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

Webex video conferencing
May 18, 2021
12:00 p.m. - 2:00 p.m.

AGENDA

1.	Welcome and approval of minutes	-	Doug Thompson
2.	Expungement discussion (Criminal Rule 3, Civil rule 5)	-	Brent Johnson/Nancy Sylvester
3.	Rule 42 update - comment period closed March 14, 2021 Five comments received	-	Doug Thompson
4.	Rule 17.5 update – comment period closed March 26, 2021 Nine comments received	-	Doug Thompson
5.	Rule 12 updated – comment period will close May 15, 2021	-	Doug Thompson
6.	Rules from the pretrial subcommittee (*6, 7, 7A, 7.5, 9) * rule 6 comment period closed April 26, 2021, no comments received	-	Doug Thompson
7.	Rule 8 update	-	Joanna Landau
8.	Rule 14	-	Doug Thompson
9.	Rule 22 update	-	Brent Johnson
10.	Restitution rule update	-	Brent Johnson
11.	Probation consolidation update	-	Brent Johnson
11.	Petition received by Mr. Brady Eames	-	Brent Johnson

Next meeting: July 20, 2021, 12 pm (noon), Webex video conferencing

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

MEETING MINUTES

WebEx Video Conferencing
March 16, 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:

Keisa Williams
Brady Eames

STAFF:

Brent Johnson
Minhvan Brimhall

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

Doug Thompson welcomed committee members to the meeting. The Committee considered the January 19, 2021 minutes. There being no changes to the minutes, Cara Tangaro moved to approve the minutes. Ryan Stack seconded the motion. An objection was not received on the motion. The motion was unanimously approved.

2. Rule 12:

The legislature passed joint resolution 7 that included amendments to rule 12. The resolution creates a timing requirement for motions that are filed on self-defense claims or other justification defense spresented to the court. The motion is to be filed 28 days prior to a trial date unless good cause is determined. The court's rapid response team presented the solution

that the legislature adopted. The rapid response team will review the resolution and make any changes to rule 12 that may be necessary. No action is needed by the committee at this time.

3. Rule 16 update:

The public comment period for rule 16 closed on March 6, 2021. The rule received five comments. Some of the concerns expressed in the comments have already been addressed by the committee in previous discussions, and taken into consideration in the drafting of the proposed rule. A comment was received by Mr. David Ferguson suggesting expansion of the discovery rule in addressing "expert disclosures, particularly related to the documents that the expert relies on for the basis of their testimony, and restitution." The committee discussed that if a prosecutor feels that defense counsel has not complied with the rules of discovery it would be up to the judge to decide whether the discovery should be accepted. The committee determined that Mr. Ferguson's comments, and other comments of similar nature, warrant further discussion at a future meeting for possible amendments to the discovery rule. The committee expressed confidence in the resolution in rule 16 as currently proposed and recommends the rule be forwarded to the Supreme Court for final approval.

With no further discussion, Jeff Gray moved to approve rule 16 as amended to send the Supreme Court for final approval. Mr. Stack seconded the motion. Judge Corum stated that the rule is not great and may still need work, but is better than what has been presented in the past. The committee moved to approve the motion by majority vote, with Judge Corum objecting to the motion. The motion passed. Rule 16 will be forwarded to the Supreme Court for final consideration.

4. *State v. Billings subcommittee update*:

In *State v. Billings*, Mr. Billings was charged with 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 the case required 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 the judgment by placing a lien on the home of Mr. Billing's ex-wife. The defendant filed an interlocutory appeal, which was denied by the Supreme Court. The Court asked the committee to see if a rule is the best way to address the denial, either as a civil rule or a criminal rule.

A subcommittee was formed and charged with the task of addressing the request from the Supreme Court. In the interim, the subcommittee was informed that the legislature had taken up a bill to change restitution. HB 260 passed both House and Senate and is awaiting the governor's signature. The bill removes the distinction between court ordered restitution and complete restitution, and when restitution is entered in a criminal case, the restitution is considered to be an account receivable in conjunction with a restitution order. The judge can then order monthly payments as a condition of probation or set a payment schedule for the defendant while the case remains open. The Board of Pardons and Parole will work with the

Office of Debt Collection to monitor the defendant's account to ensure proper payment. The criminal account receivable is in place and active while the defendant is in jail or on probation or on parole. The account will close when the case is closed and the remaining restitution amount will transfer to OSDC as a civil judgment.

Due to the passing of HB 260, the committee will recommend to the Supreme Court that a rule is not needed as the statute addresses the issue of restitution. The subcommittee will continue to look at a broader restitution rule to address the need for a fair determination of the ruling in the *Billings case*, but no further action is taken at this time. No vote was taken on this matter. Mr. Thompson will report the committee's determination to the Supreme Court.

5. *Pleasant Grove v. Terry* jury instruction update:

Pleasant Grove v. Terry is a case where the jury came out with two different verdicts. The defendant was acquitted on the charge of domestic violence, but was found guilty on the charge of domestic violence in the presence of a child. The Supreme Court invited committees to consider other inconsistent verdicts and decide if other actions would be appropriate.

Mr. Thompson met with several attorneys and gathered feedback on how the inconsistent verdicts affect the defendant's ability to receive a fair trial. Mr. Thompson drafted proposed language to rule 12 that provides for simpler and straightforward instructions to the jury. Mr. Thompson proposed adding subparagraph (h) to read as "Legally impossible verdict. A verdict is legally impossible if a defendant is acquitted on a predicate offense but convicted on the compound offense. If a verdict is legally impossible, the court must, upon its own motion or the motion of a party, enter an acquittal on the compound offense." Mr. Gray noted that Mr. Thompson's language may be better suited in rule 23 by making the existing paragraph as paragraph (A) and Mr. Thompson's language in a new paragraph (B). Mr. Thompson's language would provide jury instruction under this rule. The committee discussed concerns with the word "acquittal" in rule 23 as it may confuse the jury in understanding the context of the rule, and their role.

Following further discussion, the committee agreed that Mr. Thompson's language is appropriate but could not agree if it should be placed in rule 12 or rule 23. The committee also considered the possibility of asking the MUJI Committee to look at Mr. Thompson's proposed language and whether it belongs in rule 12 or rule 23. Mr. Thompson will review rule 23 to see if another option is more appropriate and will return to the committee with another draft proposal.

6. Rules 7 and 7A:

House 220 passed the legislature this year. The bill was changed from last year's bill and repeals certain aspects of pretrial proceedings. The Pretrial and Release Committee has drafted amendments to rules 7 and 7A and the Utah Supreme Court has approved the changes to the code. A court is required to consider a person's ability to pay under case law, and the Pretrial

Committee has no plans to return to the previous bail schedule. The Pretrial Committee has proposed amendments that clear up the language from the code into rules 7 and 7a. The proposals are ready for the committee's consideration.

Mr. Thompson noted that HB 220 is not very clear on the required changes and recommends the subcommittee meet to discuss the new language and ensure that language in the rule is clear and concise. Ms. Williams, Mr. Stack, Ms. Tangaro, and Judge Corum will participate in the subcommittee along with Mr. Thompson. The subcommittee will meet and report back the committee at another meeting.

Judge Corum shared proposed amended language to rule 7 regarding a defendant's right to preliminary examination. The proposal comes from Judge Bates. The proposed language informs the defendant if they decide to waive their rights to a preliminary hearing at the time a guilty plea is entered, they must do so in writing and the prosecutor's consent is not needed. Judge Corum noted that the proposed language makes it clearer to a defendant that a written waiver is required. The committee did not express any concerns with the proposed language. The subcommittee will address Judge Bates' proposed language during their meeting.

7. Rule 9:

This item is tabled for another meeting.

8. Rule 8:

This item is tabled and will be first on the agenda at the next meeting.

9. Other business:

* Restitution rule reminder – this item will be discussed at a future meeting.

* URCrP 22 –

There are concerns surrounding statutory changes on the time frame for judges to impose sentencing. The concerns were raised by Judge Trease. Many years ago, the statute allowed 30 days for the court to impose sentence when a plea or verdict of guilty or plea of no contest is entered. The statute was later changed to 45 days, but now the specific time frame in statute has been eliminated. The language in the new statute says a judge can set a reasonable time frame for preparation of the PSI before sentencing.

The committee discussed concerns of not having a hard and fast deadline for AP&P to file their sentencing recommendations. The committee also noted that defendants rely on the specific time frame as a reference for when their case will be heard. Ms. Tangaro noted that most public defenders would appreciate a longer time frame to prepare before the sentencing hearing but also noted that most defendants would prefer to have their cases decided sooner than later. The committee discussed several options as to how a time frame could be met by AP&P to allow judges time to meet the sentencing

requirements. Due to the lack of quorum, Mr. Thompson recommended holding this item over to the next meeting for discussion by the full quorum. No motion was taken on this item.

* Remarks by Brady Eames, guest:
Mr. Eames was invited to speak to the committee and his statement is attached to the minutes.

10. Adjourn:

With no other business, the meeting adjourned without a motion. The meeting adjourned at 1:15 pm. Next meeting is May 18, 2021 at 12 p.m. via Webex.

STATEMENT OF BRADY EAMES
before the
UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CRIMINAL PROCEDURE
Date: Tuesday-March 16, 2021

I respect that the elected lawmakers of the State of Utah still consider the death penalty to be constitutional and legal in cases of especially heinous and exceptionally depraved capital murder.

18 years ago yesterday, the Governor approved a Utah Senate Bill #8 that supports the United States Supreme Court landmark death penalty decision known as Atkins v. Virginia. Such bill was unanimously passed by elected representatives of the people of the State of Utah after being recommended by the Utah Sentencing Commission and was ultimately codified as Title 77-Chapter 15a. It specifically limits the determination of intellectual disability to before a person is tried for capital murder.

Almost 2 years ago, the Advisory Committee on Rules of Criminal Procedure adopted a new rule 22(e)(2) that supports Atkins v. Virginia by allowing a death row inmate of the Utah State Prison to motion a court at any time that he can prove she/her is intellectually disabled and should have his death sentence "corrected". I understand that none of the members of the committee who voted for such rule are elected representatives who represent the will of the people of the State of Utah. Before the adoption of such rule, the attorney general manifested serious concern regarding its constitutionality.

Back on August 20, 2020, the Utah Supreme Court opined that albeit no post conviction law of the State of Utah allows the inmate on the death row of the Utah State Prison named Michael Anthony Archuleta to motion to any court that he should have his death sentence overruled because he is intellectually disabled, Rule 22(e)(2) is the legal authority that allows him to do so.

On November 19, 2020, Archuleta motioned the Utah 4th judicial district court for Millard County that since before he was 22 and when he committed the especially heinous and exceptionally depraved capital murder of Gordon Ray Church he has been intellectually disabled and should have his death sentence abrogated albeit a jury unanimously rendered such death sentence back on December 20, 1989. No law of the State of Utah representing the will of the people has legalized what Archuleta is doing in such court yet the attorney general and the federal public defender are litigating and Judge Howell is adjudicating his intellectually disability.

I'm here to express my valid concern that it appears the USC and this Committee believe Rule 22(e)(2) shall be recognized as a statute that has been passed by elected legislatures who represent the will of the people and has been approved by the chief executive of the State of Utah. In other words, such Rule shall be considered another law under the Utah Code of Criminal Procedure.

I feel it appropriate to also remind this Committee that the elected lawmakers in the State of Utah have not yet felt it necessary to amend Title 77-Chapter 15a to allow any death row inmate to motion for a correction of her/his death sentence ever after Archuleta did so before this last session of the Utah House and Senate in 2021.

Respectfully,

Brady Eames

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

May 11, 2021

Hon. Mary T. Noonan
Interim State Court Administrator
Cathy Dupont
Deputy Court Administrator

MEMORANDUM

TO: **Criminal Procedure Advisory Committee**

FROM: **Brent M. Johnson**

RE: **Expungement**

The committee has received a request from the Advisory Committee on the Rules of Civil Procedures to add a provision in the rules on service or delivery of petitions for expungement. Several years ago, the criminal procedure committee discussed the possibility of creating an expungement rule, but the idea was shelved because there were plenty of other things to do. In light of the fact that the committee adopted a rule on automatic expungement, and in light of the request from the civil rules of procedure committee, it may be time for the committee to once again consider an expungement rule. Attached to this memorandum is a revised version of rule 42, which would contain a separate section on petitions for expungement. The rule deviates a bit from the procedure proposed by the civil rules of procedure committee. But I am proposing amendments to initiate discusions. I quickly put this rule together and have undoubtedly not adequately considered every eventuality. I look forward to our discussions at the meeting.

Rule 3. Service and filing of papers.

(a) **Filing and service of documents.** All written motions, notices, and pleadings ~~shall~~ must be filed with the court and served on all other parties.

(b) **Service upon attorney or party.** Whenever service is required or permitted to be made upon a party represented by an attorney, the service ~~shall~~ must be made upon the attorney, unless service upon the party is ordered by the court. Service upon the attorney or upon a party ~~shall~~ must be made in the manner provided in civil actions.

(c) **Service by party preparing an order.** The party preparing an order ~~shall~~must, upon execution by the court, mail to each party a copy thereof and certify to the court such mailing.

Alternative 1:

(d) Service of Petition for Expungement. 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 or citation occurred. Once 60 days has passed after service on the prosecutorial office, the petitioner may file a request to submit for decision as provided in Rule 7(g).

Alternative 2:

(d) Service of Petition for Expungement. Service of a Petition for Expungement is as provided in Rule 5 of the Utah Rules of Civil Procedure.

Comment [NS1]: Certificate of service will need to contain something re good faith effort to find the prosecuting office.

There is an attorney at the AG's office that coordinates the County Attorneys Association—contact Joni Jones. Let them know before this goes out for comment about the work around we are attempting.

Rule 42. 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) Automatic expungement

(b)(1) *Cases eligible for automatic expungement*

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

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

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

(b)(1)(A)(iii) a clean slate eligible case.

(b)(1)(B) A case that is dismissed after completion of a plea in abeyance agreement is not eligible for automatic expungement.

(b)(1)(C) Once a month the AOC must identify for each court the cases that are eligible for automatic expungement under (b)(1)(A) and (B). The AOC must separately identify the cases that are clean slate eligible under (b)(1)(C).

(b)(2) *Notice to prosecuting entities*

(b)(2)(A) 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.

(b)(2)(B) 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.

(b)(2)(C) 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).

(b)(3) *Objection by prosecuting entities*

(b)(3)(A) 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.

(b)(3)(B) Failure to properly e-file an objection will result in the objection being rejected.

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

(b)(4) *Expungement orders*

(b)(4)(A) Upon receiving a list of cases eligible for automatic expungement, the court must issue an expungement order for each eligible case.

(b)(4)(B) The AOC must provide copies of the expungement orders to the bureau and the prosecuting entity.

(c) Expungement by petition

(c)(1) An expungement case is commenced upon the filing of a petition for expungement in the court where the criminal case was filed or if charges were never filed, in the district court of the county in which the arrest occurred or citation was issued. The petition must include a certificate of eligibility. A certificate of eligibility is not required if the petitioner is proceeding under Utah Code Section 77-40-103(5). The petitioner must also file a proposed order.

(c)(2) The petition for expungement, certificate of eligibility, and proposed order must be delivered to the prosecutor's office that prosecuted the case. If a case was never filed or the court no longer exists, the petition must be delivered to the county attorney in the jurisdiction where the arrest occurred or citation was issued.

(c)(3) The petitioner must file with the court a certificate of delivery or acceptance of delivery. The certificate of delivery must include the manner of delivery, the name and address of the prosecutor's office, and the date of delivery.

(c)(4) Upon receipt of the petition, the prosecutor must send to the victim by first class mail notice of the petition for expungement, a copy of the petition, certificate of eligibility, and copies of statutes and rules applicable to the petition. The notice must state that the victim has a right to file an objection, how to file an objection, and the time within which an objection must be filed. The prosecutor must file with the court a certificate verifying that notice was sent and the date it was sent. If there was no victim, the prosecutor need not file a certificate.

(c)(5) If an objection is filed by the prosecutor within 35 days from the date the prosecutor received the petition or within 35 days after notice was sent to the victim, the court must schedule a hearing. The petitioner, prosecutor, victim, or any other person with relevant information may testify at the hearing.

(c)(6) If an objection is not filed within 60 days after the petition is delivered to the prosecutor, the petitioner may file a request to submit for decision.

(c)(7) If the court issues an expungement order, the court must provide to the petitioner certified copies of the order in the number requested by the petitioner. The petitioner is responsible for delivering copies of the order to all affected criminal justice agencies.

Effective _____

Rule 42. 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.

(b)(3) Once a month the AOC must identify for each court the cases that are eligible for automatic expungement under (b)(1)(A) and (B). The AOC must separately identify the cases that are clean slate eligible under (b)(1)(C).

(c) Notice to prosecuting entities

(c)(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.

(c)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.

(c)(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).

(d) Objection by prosecuting entities

(d)(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.

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

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

(e) Expungement orders

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

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

Effective _____

URCrP 42 – comment period closed March 14, 2021

George A. Hunt
January 28, 2021

Is expungement the answer? I have clients who have been arrested, charged and then acquitted (or the case voluntarily dismissed for lack of evidence) and the the file is expunged. The problem is that the record of the arrest lives on in cyberspace and there no longer exists an Order of dismissal with Prejudice that can be used to clear the record. This is a real problem that I have encountered several times in my practice, and clients are left in limbo with a big question mark on their record – at least in the eyes of many.

Mike Branum
January 28, 2021

I would propose:

(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;
[STRIKE "and"]
[ADD] (b)(1)(C) except as provided in paragraph (b)(2), a case that is dismissed without prejudice and the statute of limitations on the underlying alleged offense has run; and
[RENUMBER] (b)(1)(D) a clean slate eligible case.

Kim Ostler
January 28, 2021

Is there a cost for the defendant in this process? Shouldn't the AOC send a copy of the Order of Expungement to all agencies as defendant is required to?

Erin E. Byington
January 29, 2021

Like the others, I am concerned about the full record being expunged. Within the Rule, the Expungement order needs to be sent to all agencies involved and include the arrest record in the expungement order. Additionally, a copy of the order should not only go to the prosecutor, but the defense attorney on record as well, or to the Defendant. I don't see why the expungement order couldn't be pushed out to everyone in the case to ensure there isn't a problem post expungement with getting another copy of the order.

Laura
January 29, 2021

I don't think the language is clear regarding how a class B conviction for DUI would be handled. It does include language that this is not a "traffic violation," but can a DUI be eligible for the automatic expungement? Also, I think this proposed amendment is very good, and can help people who have something negative like these included charges on their criminal history.

Herschel Bullen
January 30, 2021

Proposed criminal rule 42 is inconsistent. "42(b)(2) A case that is dismissed after completion of a plea in abeyance agreement is not eligible for automatic expungement." This is inconsistent with (b)(1)(A) a case that resulted in an acquittal on all charges;13 (b)(1)(B) except as provided in paragraph (b)(2), a case that is dismissed with prejudice; and 14 (b)(1)(C) a clean slate eligible case.

A PIA results in a "complete dismissal" and with prejudice in many cases and may even be "clean slate" eligible at the end of the abeyance period. So the exclusion of the PIA from automatic expungement doesn't seem to make logical sense.

Rule 17.5. Hearings with contemporaneous transmission from a different location.

(a) The court, in its discretion, may conduct the arraignment, bail hearing, and/or initial appearance with a defendant attending by contemporaneous transmission from a different location without the agreement of the parties or waiver of the defendant's attendance in person.

(b) For any other type of hearing, the court may conduct the hearing with a defendant attending by contemporaneous transmission from a different location only if the parties agree and the defendant knowingly and voluntarily waives attendance in person.

(c) Subject to subsection (d), ~~F~~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.

(d) In misdemeanor cases, a forensic toxicologist may provide testimony by contemporaneous transmission in open court from a different location subject to the safeguards set forth in Rule 43(b) of the Utah Rules of Civil Procedure. The court may order a forensic toxicologist to appear in person on a showing of good cause by either party.

~~(d)~~ (e) Nothing in this rule precludes or affects the procedures in rule 15.5.

URCrP 17.5 – comment period closed March 26, 2021:

Alan Buividas

I think the courts are going down a slippery slope. This will lead to other exceptions. Eventually, we will not recognize trials. There will be exceptions for other expert witnesses. It could lead to remote testimony of other witnesses such as victims for various reasons such as protecting victims from the emotional trauma of testifying in open court or because they moved out of State. This can apply to nonvictim witnesses. I understand the virus situation, but this is temporary.

Jessica Peterson

This rule tramples a defendant's right to force the government to prove their case by having their witnesses available in court and also violates a defendant's right to cross examination in person. There is ample case law that says a defendant has a right to confront against witnesses physically present in court – "Writing for the Court, Justice Scalia recognized that it is the defendant's right to a face-to-face encounter with an adversary witness that is at the "core" of a defendant's confrontation rights." Coy v. Iowa, 487 U.S. 1012, 108 S. Ct. 2798 (1988).
I strongly urge this change is not adopted and concur with concerns this is a slippery slope. Video testimony is simply not an adequate substitute for the constitutionally-required right to confront witnesses.

Mike

The reasoning for this particular carveout is not clear. Why toxicologists, what's so unique about them? If toxicologists are testifying about impairment, how would a defendant NOT have good cause to confront this witness in person before a jury? And if that's the case then making a rule seems like a waste of resources – like me having to comment on this lame rule. Just leave it to the parties. If toxicology isn't a point of contention in the case, the parties will likely stipulate to something like this. Otherwise, it seems like the only purpose of this rule is to make it more "convenient" for toxicologists to testify remotely. And 99/100 times that'll be the State's witness.

William Melton

I appreciate the committee attempting to bring technology more into the court. I would certainly agree that technology can help us. However, I have multiple concerns with this rule change. I'm sure many people will be addressing the Constitutional concerns. For me, that is my first concern. This is another stone chipped away at a defendant's constitutional rights. I think it is a clear violation of the confrontation clause. Even if it were to be found constitutional I would still argue it is a bad policy. It is extremely difficult to conduct an adequate direct or cross-

examination on a witness over video. Regardless of which side is conducting the questioning. Video has delays, connection issues, and most importantly it is impossible for a jury to judge the credibility of witnesses who are not physically present.

Mike Branum

To quote the late Antonin Scalia: "The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause – like those other constitutional provisions – is binding, and we may not disregard it at our convenience."

Unless we intend to rewrite the Constitutions of the United States and the State of Utah, it is difficult to imagine this rule change surviving a constitutional challenge. Lest we return to a system of subservience to "the Crown," I hope the protections provided by the drafters of those documents will continue to be held sacred.

Greg

The role of the Govt in a criminal case is to seek justice. Its not about getting the "win" and doing it in the manner of least inconvenience. The confrontation clause guarantees a defendant's right to confront his/her accuser. The remote hearings we've been doing over the past several months have shown us that it is not the same as in court, face to face direct and cross examination. This rule will lead us down the proverbial slippery slope. The convenience aspect has already been addressed in several rulings from the Supreme Court which held that this type of exception violates a defendant's due process rights. And to limit this to just misdemeanor cases is just a method of sticking the camel's nose under the tent. Then we'll see the rule expanded to district courts and felony matters because…"its been proven in the misdemeanor courts." Do not make an exception to a defendant's rights and facilitate the Govt's ease in taking away someone's liberties.

Stephen Howard

1 – The rights of confrontation and cross-examination were never intended to make prosecution more convenient or to make conviction easier for the government. These constitutional principles are intended to protect the individual.
2 – The presumption of innocence requires that a prosecutor present evidence to prove each element of any criminal charge, even in misdemeanor cases.
3 – Negligent homicide and driving under the influence are just two examples of misdemeanors that can involve testimonial evidence of toxicological analysis. Although they are misdemeanors, a conviction on either of these charges will carry serious consequences from both the court case itself and from the collateral consequences that persist long after a trial has concluded.
4 – A forensic toxicologist will likely be employed by the same government that is prosecuting the case. Issues of bias and truthfulness can arise with any witness, even a prosecution witness

employed by the government.
5 – On a more practical note, “contemporaneous transmission” is a phrase that has been used in other contexts (e.g. Civil Rule 43) to include telephonic transmission. The proposed Rule 17.5 does not specifically require that the remote testimony include any video component. Quite literally, the proposed rule could allow government witnesses to “phone it in.”

David Ferguson

The desire to increase efficiency in the courtroom is laudable. The rule, as currently stands, has a number of significant problems.

1) There’s a lot of problems with the term “forensic toxicologist.” Those folks at the state lab aren’t toxicologists, forensic or otherwise. They’re criminalists (forensic science is criminalistics, and criminalist is the common term nationally for the role that the technicians at the state toxicology lab fill). So that’s a problem. The rule doesn’t identify them correctly. This is more than a pedantic issue. The term “forensic toxicologist” carries significant meaning in the scientific community about an individual’s background and education. The rule would be enshrining an inappropriate level of authority by giving criminalists an incorrect designation.

2) Because “forensic toxicologist” is actually a niche role in an already narrow field, this rule doesn’t apply equally to defense and prosecution. As written prosecution get to use a remote expert under the incorrect understanding that criminalists are forensic toxicologists. But what kind of expert can a defense bring in remotely? Is defense limited to a forensic toxicologist? That’s unduly restrictive since I can use any number of experts to challenge the lab’s chromatograms: a chemist, a clinical physician, a microbiologist, a chemical engineer, etc. There are lots and lots of people who are competent to testify that the State’s machine (GC-FID) can’t actually tell the difference between ethanol and ethyl chloride. I worry about hiring a chemical engineer who isn’t a “forensic toxicologist” and then not being able to use that expert because of the strict reading of the rule.

3) I’m also concerned about the meaning of “good cause.” It’s a little nebulous. Setting aside the concern about this eroding the confrontation clause, all I really want from the criminalist is to be able to impeach them with documentary evidence such as the chromatogram, their SOP manual, and learned treatises. And that can be super hard to do if I’m in the courtroom with the jury and the criminalist is remote. Courts have differing technological capacities. In SLC Justice Court, I have to actually stand at the clerk’s desk awkwardly to use their technology (which is at the back of the room between the judge and jury with a small TV on the opposite end of the room). This is messy. And maybe my situation constitutes “good cause” for face-to-face testimony but I don’t know if a judge will agree. And then if I’m forced to try and make it work, it’s going to potentially greatly lengthen trial as I switch back and forth between “screen sharing” impeaching material with the criminalist’s face for the jury to see how they react to it (what do I do when I want to impeach with a book? Having some scanned pages is not the same thing as using the book). And in SLC Justice Court those TV screens on the opposite end of the room really are quite small (as I imagine they are in many other justice courts). Jurors will get distracted and bored by the endless switching back and forth along with accompanied delays in the system. The

judge will get annoyed at the inefficiency. I'll get annoyed. And maybe the judge will regret ruling against me, but by that point it's too late.

The term "good cause" here isn't tailored to acknowledge this kind of scenario or to guide courts that this scenario falls under the umbrella of good cause (which is otherwise almost entirely a discretionary decision), and this doesn't seem like an appropriate thing to force the defense to have to articulate each time we want live testimony. Again, setting aside confrontation issues for a moment (more on that below), the rule should make it clear that a criminalist must physically appear if the defense may use documentary evidence to impeach the witness. Which, for at least some of us, is going to be in most of the DUIs and DwMCS cases that we take to trial.

4) The notice issue is unresolved. I don't know if the prosecutor files a motion to permit remote testimony or I file a motion demanding in-person testimony. How does this work with pro se defendants?

5) Here's the big one: this rule violates the confrontation clause. As a preliminary point, two of the seminal confrontation cases are about forensic drug analysis that's highly similar to what criminalists do in Utah: Melendez-Diaz and Bullcoming. The quote that Michael Branum cited in his comment about the Confrontation Clause not bending to convenience comes from the majority opinion in Melendez-Diaz. To be fair, Melendez-Diaz and Bullcoming are about something quite different than remote transmissions, but it's worth underscoring that some of the biggest battles over the confrontation clause are on forensic experts.

Crawford clearly equates the confrontation clause with face-to-face confrontation. The whole point is so that the witness and the defendant can see each other so that the witness understands who it is that they are giving testimony against. Physical presence is virtually axiomatic to face-to-face confrontation.

Notably, there is caselaw on the confrontation that allows for contemporaneous transmission from another place. Maryland v. Craig, which creates a presumption of face-to-face confrontation without necessarily requiring it in all situations. But the holding of Craig is very narrow (the case was about a child rape victim), based on a far more compelling circumstances than 17.5's concern about governmental costs, and it predates Crawford, relying on the now overruled Ohio v. Roberts decision. That history calls the ongoing vitality of Craig into question. I strongly recommend reading a recent opinion by the Michigan Supreme Court that gives a more thorough review of how Craig fits in with the modern confrontation clause. Interestingly the opinion decides whether a forensic evaluator's remote transmission testimony violates the confrontation clause. People v. Jemison, 505 Mich. 352, 355, 952 N.W.2d 394, 395 (2020). As an aside, take it for what it's worth, two of the three new justices on the Supreme Court—Justices Barrett and Gorsuch—are staunch believers in the Crawford-originalist confrontation paradigm.

Just as a concluding point, I have no problem conceptually with a rule that expands the permitted uses of remote testimony. Allowing greater latitude would be revolutionary to the defense since it gives us access to experts we couldn't otherwise afford. And there are some DUI cases where I would have no problem with the criminalist remoting in such as in meth DUIs where the amount

of meth in the blood says nothing about their ability to drive or actual physical control cases where the evidence doesn't support my client's control of a vehicle. An amended rule that allows a defense's waiver would be perfectly fine. That said, I'd hope that the instructions on the waiver would be clear enough to ensure that pro se defendants don't get abused by not appreciating what they give up with a waiver (a particularly important consideration given that some justice courts aren't good about appointing counsel when they really should, forcing ignorant pro se defendants to navigate the system in bewilderment).

Nathan Phelps

The rule as currently drafted is inconsistent with the established constitutional protections of the right to confrontation. But even if the proposed rule were modified to address conflicts with present law, its viability is still threatened by the fact that it is premised on case law of dubious worth.

1. As noted by David Ferguson above, to the extent that it is still valid, Maryland v. Craig, 497 U.S. 836 (1990), provides the controlling test for the admissibility of remote testimony under the federal Confrontation Clause. See, e.g., U.S. v. Yates, 438 F.3d 1307, 1313 (11th Cir. 2006) (en banc) ("Craig supplies the proper test for admissibility of two-way video conference testimony."); accord U.S. v. Bordeaux, 400 F.3d 548, 552–55 (8th Cir. 2005); U.S. v. Carter, 907 F.3d 1199, 1206–08; State v. Rogerson, 855 N.W.2d 495, 502–03 (Iowa 2014) (collecting similar cases).

Under Craig, a "court generally must: (1) hold an evidentiary hearing and (2) find: (a) that the denial of physical, face-to-face confrontation at trial is necessary to further an important public policy and (b) that the reliability of the testimony is otherwise assured." Yates, 438 F.3d at 1315 (citing Craig, 497 U.S. at 850, 855).

As written, proposed Rule 17.5(d) contradicts the Craig test. For starters, there is no apparent requirement that a court hold an evidentiary hearing.

Next, proposed Rule 17.5(d) does require a showing of necessity that Craig demands. Craig demands strict necessity, not mere convenience to prosecution interests. See, e.g., Yates, 438 F.3d at 1316. Instead, the proposed rule presumes that remote testimony by "forensic toxicologists" will be allowed unless a party in the case objects and provides good cause for why the expert should appear in person. In other words, the proposed rule requires the opposite of what Craig demands.

Finally, proposed Rule 17.5(d) as currently written doesn't appear to meet Craig's requirement that the testimony be reliable. Perhaps that is because it mistakenly refers to URCP 43(b), and not some other provision. Regardless, as written, it is insufficient.

2. Of course, the above analysis assumes that Craig is still good law. However, numerous courts and others have doubted its vitality in light of the Supreme Court's subsequent decision in Crawford v. Washington. One of the best is the concurrence in U.S. v. Cox, 871 F.3d 479 (6th

2017). In it, Judge Sutton recognized that "junior courts may not overrule the handiwork of their superiors" and so it concurred in the use of the Craig standard. Id. at 492. But Judge Sutton then went on to explain at length the contradictions between the reasoning in Craig and the reasoning in Crawford, highlighting five different points.

This is significant for two reasons. First, and most obviously, this conflict portends a future Supreme Court ruling that completely undermines the proposed rule. While the proposed rule fails to even meet the requirements of Craig, it is very well possible that Craig's more permissive test for allowing remote testimony will be overruled, further endangering the rule's viability.

But beyond that, the proposed rule's apparent reliance on a pre-Crawford understanding of the confrontation rights also raises questions about the proposed rule's compatibility with the Utah constitution. Although materials are limited, the available evidence indicates that original understanding of Utah's Confrontation Clause is more in line with Crawford than Craig, too. See State v. Mannion, 57 P. 542 (Utah 1899). Years ago, the Utah Supreme Court ignored that original meaning in favor of the confrontation test announced in Ohio v. Roberts, 448 U.S. 56 (1980). See State v. Brooks, 638 P.2d 537, 539 (1981), abrogated on other grounds by State v. Goins, 2017 UT 61. Since Crawford has overruled Roberts, it is difficult to believe that the Utah Supreme Court would continue to adhere to the Roberts standard, which has no basis in the Utah constitution. Instead, if the question were raised, it seems more like that the Utah Supreme Court would return to the original meaning. Thus, even if the U.S. Supreme Court continues to stand by Craig, the proposed rule could still be found unconstitutional under the state constitution.

In light of these flaws, the propose rule should be rejected.

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 § 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.

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

(c)(3)(A) in writing; and

(c)(3)(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.

(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) 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 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) 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.

(h) 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.

Rule 6. Warrant of arrest or summons.

(a) Upon the filing of an indictment, or upon the acceptance of an information by a judge, the court must set the case for an initial appearance or arraignment, as appropriate. The court must then issue a summons directing the defendant to appear for that hearing, except as described in subsection (c).

(b) The summons must inform the defendant of the date, time and courthouse location for the initial appearance or arraignment. The summons may be mailed to the defendant's last known address, or served by anyone authorized to serve a summons in a civil action.

(c) If the defendant is not a corporation, a judge may issue a warrant of arrest instead of a summons if the court finds from the information and any supporting statements or affidavits that:

(c)(1) The defendant's address is unknown or the defendant will not otherwise appear on a summons; or

(c)(2) there is substantial danger of a breach of the peace, injury to persons or property, or danger to the community.

(d) A judge may issue a warrant of arrest in cases where the defendant has failed to appear in response to a summons.

(e) Prior to issuing a warrant the judge must review the information for sufficiency. If the judge determines from the information, or from any supporting statements or affidavits, that there is probable cause to believe the offenses have been committed and that the accused committed them, the judge may issue the warrant. If the judge determines there is not probable cause the judge must notify the prosecutor. If the prosecutor does not file a sufficient information within 28 days, the judge must dismiss the case.

(e)(1) When a warrant of arrest is issued, the judge must state on the warrant:

(e)(1)(A) Whether the defendant is denied pretrial release ~~under the authority of Utah Code § 77-20-1,~~ and the alleged supporting facts ~~supporting~~.

(e)(1)(B) The conditions of pretrial release the court requires of the defendant ~~in accordance with Utah Code section 77-20-1~~.

~~(e)(1)(C) As required by Utah Code section 77-20-1, if the court determines monetary bail is necessary, the judge must consider the individual's ability to pay and set the lowest amount reasonably calculated to ensure the defendant's appearance at court.~~

(e)(1)(D) ~~The court must state w~~Whether the defendant's personal appearance is required or whether the defendant may remit monetary bail to satisfy any obligation to the court pursuant to Utah Code § 77-7-21.

(e)(1)(E) The geographic area from which the issuing court will guarantee transport pursuant to Utah Code § 77-7-5.

(e)(2) The court must impose the least restrictive conditions of release necessary to reasonably:

(e)(2)(A) ensure the appearance of the accused;

(e)(2)(B) ensure the integrity of the court process;

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

(e)(2)(D) ensure the safety of the public.

(e)(3) If the court determines monetary bail is necessary, the court must consider the individual's ability to pay and set the lowest amount reasonably calculated to ensure the defendant's appearance at court.

(f) The clerk of the court must enter the warrant into the court information management system.

(g) **Service, Execution and return of the warrant.**

(g)(1) The warrant must be served by a peace officer. The officer may execute the warrant at any place within the state.

(g)(2) The warrant must be executed by the arrest of the defendant. The officer need not possess the warrant at the time of the arrest. Upon request, the officer must show the warrant to the defendant as soon as practicable. If the officer does not have the warrant in possession at the time of the arrest, the officer must inform the defendant of the offense charged and of the fact that the warrant has been issued.

(g)(3) The person executing a warrant or serving a summons must make return thereof to the magistrate as soon as practicable.

(h) The court may periodically review unexecuted warrants to determine whether they should be recalled.

Effective ~~October~~ May/November 1, 20__ ~~20~~

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 of the following:

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

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

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

(a)(4) rights concerning pretrial release; 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~~d), the court ~~must issue a pretrial status order~~ must determine whether the defendant is eligible for pretrial release. ~~Parties should be prepared to address this issue, including the notice requirements under Utah Code section 77-37-3 and Utah Code section 77-38-3.~~The court must impose the least restrictive reasonably available conditions of release reasonably necessary to:

(c)(1)(A) ensure the appearance of the accused;

(c)(1)(B) ensure the integrity of the court process;

(c)(1)(C) prevent direct or indirect contact with witnesses or victims by the accused, if appropriate; and

(c)(1)(D) ensure the safety of the public.

(c)(2) In determining whether a financial condition of release is least restrictive and reasonably necessary, the court must consider the defendant's ability to pay and allow the defendant an opportunity to be heard.

(c)(3~~2~~) A motion to modify the pretrial status order issued at the 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)(43) 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)(54) 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.

(e) **Pretrial Detention Motions.** A pretrial detention motion is not required. If the prosecutor moves for pretrial detention, the first appearance court must set a pretrial detention hearing without unnecessary delay, and no later than seven days following the initial appearance. Upon application of either party and a showing of good cause, the court may allow up to a three-day continuance of the hearing. The court may allow more than three days with the consent of the defendant. A defendant has the right to be represented by counsel at the pretrial detention hearing.

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

(fe)(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.

(fe)(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.

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

Effective ~~October 1, 2020~~May/November 1, 20__

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 of the following:

(a)(1) ~~of~~ the charge(s) 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; 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 such appointment.

(c) **Release conditions.** Except as provided in paragraph (d), the court ~~must issue a pretrial status order~~ must determine whether the defendant is eligible for pretrial release~~pursuant to Utah Code § 77-20-1. Parties should be prepared to address this issue, including the notice requirements under Utah Code section 77-37-3 and Utah Code section 77-38-3.~~

(c)(1) The court must impose the least restrictive reasonably available conditions of release reasonably necessary to:

(c)(1)(A) ensure the appearance of the accused;

(c)(1)(B) ensure the integrity of the court process;

(c)(1)(C) prevent direct or indirect contact with witnesses or victims by the accused, if appropriate; and

(c)(1)(D) ensure the safety of the public.

(c)(2) In determining whether a financial condition of release is least restrictive and reasonably necessary, the court must consider the defendant's ability to pay and allow the defendant an opportunity to be heard.

(c)(3~~1~~) A motion to modify the pretrial status order issued at the 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)(42) 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)(53) 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.

(e) **Pretrial Detention Motions.** A pretrial detention motion is not required. If the prosecutor moves for pretrial detention, the first appearance court must set a pretrial detention hearing without unnecessary delay, and no later than seven days following the initial appearance. Upon application of either party and a showing of good cause, the court may allow up to a three day continuance of the hearing. The court may allow more than three days with the consent of the defendant. A defendant has the right to be represented by counsel at the pretrial detention hearing.

(~~f~~e) **Entering a plea.**

(~~f~~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.

(~~f~~e)(2) If the plea is guilty, the court must sentence the defendant as provided by law, or impose the terms of a plea in abeyance agreement as approved by the parties.

(~~f~~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.

(~~f~~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 ~~October 1, 2020~~May/November 1, 20__

Rule 7.5. Pretrial Detention Hearings

(a) Upon receipt of a motion for pretrial detention of an individual charged with one or more offenses eligible for detention, the court must hold a pretrial detention hearing no later than seven days following the initial appearance. Upon application of either party and a showing of good cause, the court may allow up to a three-day continuance of the hearing. The court may allow more than three days with the consent of the defendant.

(b) A defendant has the right to be represented by counsel at the pretrial detention hearing.

(c) Except as provided in paragraph (h), both parties have a right to subpoena witnesses to testify at a pretrial detention hearing.

(d) Prior to the detention hearing, the prosecutor must provide to the defendant or defendant's counsel all information in the prosecutor's possession upon which it intends to rely upon at the hearing.

(e) An alleged victim has the right to be heard at the pretrial detention hearing.

(f) Both parties must be afforded the opportunity to make arguments and present relevant information at the detention hearing. The hearing may proceed by proffer. However, the court has discretion to determine the manner of presentation of information at the hearing, including allowing for testimony, affidavits, or other information. The hearing may be continued for the purpose of furnishing additional information if the court finds the proffer or information presented at the hearing is insufficient to make a determination.

(g) At the conclusion of the hearing, the court may order the defendant detained pending trial if the court finds that:

(g)(1) the state has presented substantial evidence in support of its pretrial detention motion, including meeting all statutory and Constitutional evidentiary requirements; and

(g)(2) no conditions that may be imposed upon granting the individual pretrial release will reasonably:

(g)(2)(A) ensure the appearance of the accused;

(g)(2)(B) ensure the integrity of the court process;

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

(g)(2)(D) ensure the safety of the public.

(h) If a defendant seeks to subpoena an alleged victim who did not willingly testify at a pretrial detention hearing, at the conclusion of the hearing the defendant may issue a subpoena compelling the alleged victim to testify at a subsequent pretrial detention hearing only if the court finds that the testimony sought by the subpoena:

(h)(1) is material to the substantial evidence or clear and convincing evidence determinations; and

(h)(2) would not unnecessarily intrude on the rights of the victim or place an undue burden on the victim.

Effective May/November 1, 20

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

(a) **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 eligibility for pretrial release pursuant to Utah Code § 77-20-1.

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

(a)(4) 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~~ must impose the least restrictive reasonably available conditions of release reasonably necessary to:

(a)(4)(A) ensure the individual's appearance at future court proceedings;

(a)(4)(B) ensure that the individual will not obstruct or attempt to obstruct the criminal justice process;

(a)(4)(C) ensure the safety of any witnesses or victims of the offense allegedly committed by the individual; and

(a)(4)(D) ensure the safety and welfare of the public and the community.

(a)(5) In determining whether a financial condition of release is least restrictive and reasonably necessary, the court must consider the defendant's ability to pay.

(a)(~~6~~5) 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 paragraph (a)(4).

(a)(~~7~~6) If probable cause is not articulated for any charge, the magistrate must return the statement to the submitting authority indicating such.

(a)(~~8~~7) 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)(98) The arrestee need not be present at the probable cause determination.

(b) **Magistrate availability.**

(b)(1) The information required in paragraph (a) 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~~arrest, if no probable cause determination and pretrial status order 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)(4)(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.

Effective ~~October~~ May 1, 2021~~20~~

Rule 22. Sentence, judgment and commitment.

(a) **Time for sentencing**. Upon the entry of a plea or verdict of guilty or plea of no contest, the court must set a time for imposing sentence which may be not less than two nor more than 45 days after the verdict or plea, unless the court, with the concurrence of the defendant, ~~otherwise orders~~ continues the sentencing date for a reasonable period of time to allow for preparation of a presentence investigative report or to gather information from other sources. Pending sentence, the court may commit the defendant or may continue or alter bail or recognizance. Before imposing sentence the court must afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney must also be given an opportunity to present any information material to the imposition of sentence.

(b) **Defendant's absence**. On the same grounds that a defendant may be tried in defendant's absence, defendant may likewise be sentenced in defendant's absence. If a defendant fails to appear for sentence, a warrant for defendant's arrest may be issued by the court.

(c) **Sentencing advisories**.

(c)(1) Upon a verdict or plea of guilty or plea of no contest, the court must impose sentence and must enter a judgment of conviction which must include the plea or the verdict, if any, and the sentence. Following imposition of sentence, the court must advise the defendant of defendant's right to appeal, the time within which any appeal must be filed and the right to retain counsel or have counsel appointed by the court if indigent.

(c)(2) If the defendant is convicted of a misdemeanor crime of domestic violence, as defined in Utah Code § 77-36-1, the court must advise the defendant orally or in writing that, if the case meets the criteria of 18 U.S.C. § 921(a)(33) or Utah Code § 76-10-503, then pursuant to federal law or state law it is unlawful for the defendant to possess, receive or transport any firearm or ammunition. The failure to advise does not render the plea invalid or form the basis for withdrawal of the plea.

(d) **Commitment**. When a jail or prison sentence is imposed, the court must issue its commitment setting forth the sentence. The officer delivering the defendant to the jail or prison must deliver a true copy of the commitment to the jail or prison and must make the officer's return on the commitment and file it with the court.

(e) **Correcting a sentence**.

(e)(1) *Types of sentences.* The court must correct a sentence when the sentenced imposed:

(e)(1)(A) exceeds the statutorily authorized maximums;

(e)(1)(B) is less than statutorily required minimums;

(e)(1)(C) violates Double Jeopardy;

(e)(1)(D) is ambiguous as to the time and manner in which it is to be served;

(e)(1)(E) is internally contradictory; or

(e)(1)(F) omits a condition required by statute or includes a condition prohibited by statute.

(e)(2) *Post-sentence appellate decisions*. The court must correct the sentence of a defendant who can prove that the sentence is unconstitutional under a rule established or ruling issued by the United States Supreme Court, the Utah Supreme Court, or the Utah Court of Appeals after sentence was imposed, and the rule or ruling was not dictated by precedent existing at the time the defendant's conviction or sentence became final.

(e)(3) *Time for filing*. A motion under (e)(1)(C), (e)(1)(D), or (e)(1)(E) must be filed no later than one year from the date the facts supporting the claim could have been discovered through the exercise of due diligence. A motion under the other provisions may be filed at any time.

(f) **Sentencing and mentally ill offenders**. Upon a verdict or plea of guilty and mentally ill, the court must impose sentence in accordance with Title 77, Chapter 16a, Utah Code. If the court retains jurisdiction over a mentally ill offender committed to the Department of Human Services as provided by Utah Code § 77-16a-202(1)(b), the court must so specify in the sentencing order.

Effective July 1, 2019

Committee Note

A defendant may rely on subparagraph (e)(2) only when the rule or ruling is to be applied retroactively.

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

May 11, 2021

Hon. Mary T. Noonan
Interim State Court Administrator
Cathy Dupont
Deputy Court Administrator

MEMORANDUM

TO: **Criminal Procedure Advisory Committee**

FROM: **Brent M. Johnson**

RE: **Restitution**

One of the projects I was unable to finish before leaving the courts is creation of a restitution rule. Discussion on a rule was tabled a couple of times to wait for legislative action. The legislature amended the restitution statutes this year, but I don't think the amendments are significant in regards to what the committee hopes to accomplish. The new staff to the committee will resume the restitution project, but I think there is an important question the committee should answer before additional work proceeds.

Attached to this memo you will find two versions of a restitution rule. One version is a rule that was started a couple of years ago by Doug Thompson and Emily Adams. The second version is one that I started a year or so ago. The question is whether the committee should adopt a rule with more detailed discovery procedures or a rule that outlines fewer procedures but nevertheless allows for discovery permitted under the Rules of Civil Procedure.

I think it is important to place the burden on the prosecution to initially justify every penny that is requested as restitution. The prosecution would need to provide documentation that supports everything that is requested. If the defendant disagrees with the amount, a hearing could be set and discovery could occur. I have been concerned about an intensive discovery process because these are civil proceedings but they will be handled by criminal defense attorneys, many of whom do not have experience in civil cases. The process should be as fair to them as possible without overwhelming their resources.

There is also a question of what to do with a victim's participation. Victims have a right to be involved in restitution hearings and to even present the entire case if the victim chooses. If possible, the committee might also consider adding to the rule that the victim can become involved only if the victim disagrees with the amount presented by the prosecutor.

In any event, I present these versions to you so that you can provide direction on where this should go and hopefully a restitution rule can finally be created this year.

PROPOSED RESTITUTION RULE

Relevant Restitution Statutes

Utah Code § 77-38a-203

(1)(a) The department shall prepare a presentence investigation report in accordance with Subsection 77-18-1(5). The prosecutor and law enforcement agency involved shall provide all available victim information to the department upon request. The victim impact statement shall:

(i) identify all victims of the offense;

(ii) itemize any economic loss suffered by the victim as a result of the offense;

(iii) include for each identifiable victim a specific statement of the recommended amount of complete restitution as defined in Section 77-38a-302, accompanied by a recommendation from the department regarding the payment by the defendant of court-ordered restitution with interest as defined in Section 77-38a-302;

(iv) identify any physical, mental, or emotional injuries suffered by the victim as a result of the offense, and the seriousness and permanence;

(v) describe any change in the victim's personal welfare or familial relationships as a result of the offense;

(vi) identify any request for mental health services initiated by the victim or the victim's family as a result of the offense; and

(vii) contain any other information related to the impact of the offense upon the victim or the victim's family that the court requires.

(b) The crime victim shall be responsible to provide to the department upon request all invoices, bills, receipts, and other evidence of injury, loss of earnings, and out-of-pocket loss. The crime victim shall also provide upon request:

(i) all documentation and evidence of compensation or reimbursement from insurance companies or agencies of the state of Utah, any other state, or federal government received as a direct result of the crime for injury, loss, earnings, or out-of-pocket loss; and

(ii) proof of identification, including date of birth, Social Security number, drivers license number, next of kin, and home and work address and telephone numbers.

(c) The inability, failure, or refusal of the crime victim to provide all or part of the requested information shall result in the court determining restitution based on the best information available.

(2)(a) The court shall order the defendant as part of the presentence investigation to:

(i) complete a financial declaration form described in Section 77-38a-204; and

(ii) submit to the department any additional information determined necessary to be disclosed for the purpose of ascertaining the restitution.

(b) The willful failure or refusal of the defendant to provide all or part of the requisite information shall constitute a waiver of any grounds to appeal or seek future amendment or alteration of the restitution order predicated on the undisclosed information.

(c) If the defendant objects to the imposition, amount, or distribution of the restitution recommended in the presentence investigation, the court shall set a hearing date to resolve the matter.

(d) If any party fails to challenge the accuracy of the presentence investigation report at the time of sentencing, that matter shall be considered to be waived.

Utah Code § 77-38a-302(d)

(d)(i) The prosecuting agency shall submit all requests for complete restitution and court-ordered restitution to the court at the time of sentencing if feasible, otherwise within one year after sentencing.

(ii) If a defendant is placed on probation pursuant to Section 77-18-1:

(A) the court shall determine complete restitution and court-ordered restitution; and

(B) the time period for determination of complete restitution and court-ordered restitution may be extended by the court upon a finding of good cause, but may not exceed the period of the probation term served by the defendant.

(iii) If the defendant is committed to prison:

(A) any pecuniary damages that have not been determined by the court within one year after sentencing may be determined by the

Board of Pardons and Parole; and (this is a loophole; consider making sure that discovery obligations are the same with restitution decided by the Board and restitution decided by the courts)

(B) the Board of Pardons and Parole may, within one year after sentencing, refer an order of judgment and commitment back to the court for determination of restitution.

PROPOSED RESTITUTION DISCOVERY RULE (Maybe 21B?)

(a) Disclosure.

(a)(1) *Initial disclosures*. When a request for restitution is submitted either to the district court or to the Board of Pardons and Parole, that request must include the following information:

(a)(1)(A) the name of each fact witness likely to have discoverable information supporting its claim for restitution;

(a)(1)(B) a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the prosecuting agency or the persons claiming restitution; and

(a)(1)(C) a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered.

(a)(2) *Expert testimony*.

(a)(2)(A) Disclosure of expert testimony. A party must, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used in a restitution hearing to present evidence under Rule 702 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the witness's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those

opinions, and (iv) the compensation to be paid for the witness's study and testimony.

(a)(2)(B) Limits on expert discovery. Further discovery may be obtained from an expert witness either by deposition or by written report. A deposition shall not exceed four hours and the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition. A report shall be signed by the expert and shall contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not testify in a restitution hearing concerning any matter not fairly disclosed in the report. The party offering the expert shall pay the costs for the report.

(a)(2)(C) Timing for expert discovery.

(a)(2)(C)(i) The party who bears the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(2)(A) prior to the restitution hearing. Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(2)(B) and Utah Rules of Civil Procedure 30, or a written report pursuant to paragraph (a)(2)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(2)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(2)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(2)(C)(i) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(2)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(2)(B) and Rule 30, or a written report pursuant to paragraph (a)(2)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(2)(C)(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses it shall serve on the other parties the information required by paragraph (a)(2)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(2)(C)(ii) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(2)(C)(ii). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to

paragraph (a)(2)(B) and Utah Rule of Civil Procedure 30, or a written report pursuant to paragraph (a)(2)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(2)(D) Multiparty actions. In multiparty actions, all parties opposing the expert must agree on either a report or a deposition. If all parties opposing the expert do not agree, then further discovery of the expert may be obtained only by deposition pursuant to paragraph (a)(2)(B) and Utah Rule of Civil Procedure 30.

(a)(2)(E) Summary of non-retained expert testimony. If a party intends to present evidence at trial under Rule 702 of the Utah Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). A deposition of such a witness may not exceed four hours.

(a)(3) *Prehearing disclosures.*

(a)(3)(A) A party shall, without waiting for a discovery request, serve on the other parties:

(a)(3)(A)(i) the name and, if not previously provided, the address and telephone number of each witness, separately identifying witnesses the party will call and witnesses the party may call;

(a)(3)(A)(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript with the proposed testimony designated; and

(a)(3)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative exhibits, separately identifying those which the party will offer and those which the party may offer.

(a)(3)(B) Disclosure required by paragraph (a)(3) shall be served on the other parties at least 30 days before the restitution hearing. At least 14 days before the hearing, a party shall serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition and to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the

Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

(b) Methods, sequence and timing of discovery.

(b)(1) *Methods of discovery*. Parties may obtain discovery by one or more of the following methods as explained by the Utah Rules of Civil Procedure: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; requests for admission; and subpoenas other than for a court hearing or trial. [May want place limits on what methods can be used for certain claims of restitution—for example, can only use one depo if restitution claim is less than $5,000, or something like that. I'm not sure what the tier system would look like. And there will probably need to be something in here about examining/deposing victims. The Victim's Rights Act (Utah Code 77-37-3) does not prohibit a victim from being examined or deposed, but the rule needs to account for victim's statutory and constitutional protections]

(b)(2) *Sequence and timing of discovery*. Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery shall not delay any other party's discovery. A party may not seek discovery from any source before that party's initial disclosure obligations are satisfied.

(c) Requirements for disclosure or response; disclosure or response by an organization; failure to disclose; initial and supplemental disclosures and responses.

(c)(1) A party shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(c)(2) If the party providing disclosure or responding to discovery is a corporation, partnership, association, or governmental agency, the party shall act through one or more officers, directors, managing agents, or other persons, who shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(c)(3) A party is not excused from making disclosures or responses because the party has not completed investigating the case or because the party challenges the sufficiency of another party's disclosures or responses or because another party has not made disclosures or responses.

(c)(4) If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material at any restitution hearing unless the failure is harmless or the party shows good cause for the failure.

(c)(5) If a party learns that a disclosure or response is incomplete or incorrect in some material way, the party must timely serve on the other parties the additional or correct information if it has not been made known to the other parties. The supplemental disclosure or response must state why the additional or correct information was not previously provided.

(d) Restitution hearing.

(d)(1) At the restitution hearing

2018 UT App 81 Becker

¶13 The Utah Supreme Court recently established that the proximate cause test is the proper test for determining whether a defendant's criminal activity resulted in the economic injury suffered by a victim for purposes of restitution.[8] Ogden, 2018 UT 8, ¶ 48. "Proximate cause is that cause which, in a natural and continuous sequence, unbroken by any new cause, produced the injury, and without which the injury would not have occurred." Dee v. Johnson, 2012 UT App 237, ¶ 4, 286 P.3d 22 (quotation simplified); see also Raab v. Utah Ry. Co., 2009 UT 61, ¶ 22, 221 P.3d 219 ("'In its most common usage, the term 'proximate cause' is equivalent to 'legal cause' and is usually juxtaposed against the term 'cause in fact.'" (citation omitted)). "[F]oreseeability is an element of proximate cause." Steffenson v. Smith's Management Corp., 862 P.2d 1342, 1346 (Utah 1993). "Therefore, the more fundamental test is whether under the particular circumstances the defendant should have foreseen that his conduct would have exposed others to an unreasonable risk of harm." Dee, 2012 UT App 237, ¶ 5 (quoting Watters v. Querry, 588 P.2d 702, 704 (Utah 1978)) (quotation simplified).

Rule _____. Restitution.

(a) Request for restitution.

(a)(1) D*isclosures to the court and defendant*. When the prosecution requests restitution, the prosecution must submit the following information to the defendant and the court:

(a)(1)(A) a computation of the restitution claimed and copies of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered;

(a)(1)(B) the name of each fact witness likely to have discoverable information supporting the claim for restitution; and

(a)(1)(C) copies of all documents, data compilations, electronically stored information, and tangible things relevant to determining restitution that is in the possession or control of the prosecution or the person or persons requesting restitution.

(a)(2) The prosecution must submit the information to the court and the defendant at least 14 days before the hearing at which restitution will be considered.

(a)(3) If the defendant objects to the amount of restitution, the court must schedule an evidentiary hearing.

(a)(4) If the defendant does not object to the amount of restitution, the court must enter judgment for restitution in the amount supported by the materials submitted.

(a)(5) If the victim disagrees with the amount of restitution that is requested, the victim may request a restitution hearing.

(b) Discovery.

(b)(1) In anticipation of an evidentiary hearing, and subject to the conditions below, the prosecution, defense, and victim may conduct discovery in accordance with the Utah Rules of Civil Procedure. The parties will follow the criteria of tier 1 fact discovery for restitution claims of $50,000 or less, and the criteria of tier 2 fact discovery for restitution claims of $50,000 or more.

(b)(2) When the court sets the evidentiary hearing, the court must determine whether any initial disclosures are required and the time within which such disclosures must be made. The court must set a deadline by which discovery must be completed. They must also establish discovery deadlines.

(c) Restitution hearing.

(c)(1) The prosecution has the burden of proving that the defendant's criminal activities are the proximate cause of the damages requested as restitution.

(c)(2)(A) At the restitution hearing, the prosecution must present evidence in support of the charge. After the prosecution has presented its case, the court may permit the victim to present additional evidence in support of the restitution claim.

(c)(2)(B) Upon request of the prosecution and the victim, the court may permit the victim to present the case instead of the prosecution.

(c)(3) After the prosecution has presented its case, the defense may present its case.

(c)(4) Thereafter, the parties may offer only rebutting evidence unless the court, for good cause, otherwise permits.

(c)(5) The parties may stipulate to presenting their case through proffer.

(c)(6) When the evidence is concluded, the court may permit the parties to make closing arguments. The prosecution will open the argument. The victim may present argument, followed by the defense. There will be no arguments in rebuttal. The court may set limits on the time to be allowed for argument.

(d) Judgment

The court must enter a judgment for restitution in the amount that was proximately caused by the defendant's criminal activities and is supported by the evidence submitted by the parties.

PETITION
Date: Tuesday-March 16, 2021
To: ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE
Attn: Chairman Doug Thompson
re: amendment of Rule 22(e)(2)

I respect that the elected lawmakers of the State of Utah still consider the death penalty to be constitutional and legal in cases of especially heinous and exceptionally depraved capital murder.

18 years ago yesterday, the Governor approved a *Utah Senate Bill #8 (see https://le.utah.gov/~2003/bills/sbillenr/SB0008.pdf)* that supports the United States Supreme Court landmark death penalty decision known as *Atkins v. Virginia, 536 U.S. 304 (2002). (see https://tile.loc.gov/storage-services/service/ll/usrep/usrep536/usrep536304/usrep536304.pdf)* Such bill was unanimously passed by elected representatives of the people of the State of Utah after being recommended by the Utah Sentencing Commission and was ultimately codified as *Title 77-Chapter 15a*. It specifically limits the determination of intellectual disability and prohibition of a death sentence to ***before a person is tried for capital murder***. *(see https://le.utah.gov/xcode/Title77/Chapter15A/C77-15a_1800010118000101.pdf)*

Almost 2 years ago, the Advisory Committee on Rules of Criminal Procedure (Committee) adopted a new *Rule 22(e)(2)* that supports Atkins v. Virginia by allowing a death row inmate of the Utah State Prison to motion a court at any time that he can prove she/her is intellectually disabled and should have his death sentence "corrected". *(see https://www.utcourts.gov/resources/rules/urcrp/URCRP22.html)* I understand that none of the members of the committee who voted for such rule are elected representatives who represent the will of the people of the State of Utah. Before the adoption of such rule, the attorney general manifested serious concern regarding its constitutionality. *(see https://www.utcourts.gov/utc/rules-comment/2019/03/21/rules-governing-the-utah-state-bar-comment-period-closes-may-5-2019/)*

Back on August 20, 2020, the Utah Supreme Court (USC) opined that albeit no post conviction law of the State of Utah allows the inmate on the death row of the Utah State Prison named Michael Anthony Archuleta (Archuleta) to motion to any court that he should have his death sentence overruled because he is intellectually disabled, *Rule 22(e)(2)* is the legal authority that allows him to do so. *(see https://www.utcourts.gov/opinions/supopin/Archuleta%20v.%20State20200820_20160992_62.pdf)*

On November 19, 2020, Archuleta motioned the Utah 4th judicial district court for Millard County that since before he was 22 and when he committed the especially heinous and exceptionally depraved capital murder of Gordon Ray Church he was intellectually disabled and should have his death sentence abrogated albeit a jury unanimously rendered such death sentence back on December 20, 1989. No law of the State of Utah representing the will of the people has legalized what Archuleta is doing in such court yet the attorney general and the federal public defender are litigating and Judge Howell is adjudicating his intellectually disability. *(see case 881701140, Utah v. Archuleta)*

It appears that the USC and this Committee erroneously believe *Rule 22(e)(2)* shall be recognized as a statute that has been passed by elected legislatures who represent the will of the

people and has been approved by the chief executive of the State of Utah. In other words, such Rule shall be considered another law under the Utah Code of Criminal Procedure.

I feel it appropriate to remind this Committee that the elected lawmakers in the State of Utah have not yet felt it necessary to amend *Title 77-Chapter 15a* to allow any death row inmate to motion for a correction of her/his death sentence ever after Archuleta did so before this last session of the Utah House and Senate in 2021.

I hereby exercise my right under *Rule 11-102(1) (see https://www.utcourts.gov/resources/rules/ucja/ch11/11-102.htm)* by petitioning that the Committee immediately amend *Rule 22(e)(2)* to reflect that it does not apply to any death sentences which have already been unanimously rendered by a jury.

Respectfully,

Brady Eames