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

Agenda

September 21, 2021
12:00 to 2:00 p.m.

Via Webex

Welcome and approval of minutes	Tab 1	Doug Thompson, Chair
Expungement subcommittee update • (Criminal Rule 3, Civil Rule 5) • Rule 42 and 17.5 update • Memos Presented to Supreme Court 21-09-07	Tab 2	Judge Shaeffer-Bullock and Doug Thompson
Rules from the pretrial subcommittee update • (6, 7, 7A, 7.5, 9)	Tab 3	David Ferguson
Rule 8 (Appointment of Counsel) update		Doug Thompson
Rule 14		Doug Thompson
Rule 22 update		Doug Thompson
Rule 11 Introduction	Tab 4	Will Carlson
Probation consolidation update		Doug Thompson

Next meeting: October 4, 2021, 12 pm (noon), Webex video conferencing

Tab 1

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

MEETING MINUTES

WebEx Video Conferencing
July 20, 2021 – 12 p.m. to 2 p.m.

MEMBERS:	**PRESENT**	**EXCUSED**
Douglas Thompson, *Chair*	•	
William Carlson	•	
David Ferguson	•	
Judge Elizabeth Hruby-Mills		•
Craig Johnson		•
Ryan Peters	•	
Keri Sargent	•	
Judge Kelly Schaeffer-Bullock	•	
Ryan Stack		•
Matthew Tokson	•	

GUESTS:

Brady Eames
Tyson Skeen
Jacqueline Carlton
Brady Eames
Michael Dreschel

STAFF:

Gage Hansen
Keisa Williams
Minhvan Brimhall

1. Welcome ad approval of minutes:

Doug Thompson welcomed the committee members to the meeting. William Carlson, David Ferguson, and Ryan Peters were introduced as new members of the committee. The Committee considered the May 18, 2021 minutes. There being no changes to the minutes, Judge Schaeffer-Bullock moved to approve the minutes. Keri Sargent seconded the motion. An objection was not received on the motion. The motion was unanimously approved.

2. Mr. Brady Eames Petition/Rule 22:

The committee discussed and reviewed Brady Eames' petition to amend rule 22(e)(2) as it pertains to death sentence cases. The committee did not vote on Mr. Eames's petition at the last meeting. Mr. Eames joins this meeting to further discuss his requests for the amendments to rule 22(e).

Mr. Eames spoke about the case that inspired his petition. Mr. Eames spoke about his opposition to 22(e)(2) and his allegation that the rule was passed unlawfully. Mr. Thompson asked Mr. Eames to clarify his claims, but explained that the Committee's duty was limited to recommendations on the petition and was not the place to raise those specific concerns.

Following further discussions, Mr. Thompson moved to approve amendments to rule 22(e)(2) as proposed by Mr. Eames. The committee voted with one vote in favor, Three votes against, and one abstained. The motion did not pass. (In addition to the three votes against, Professor Tokson also voted against, but that vote could not be counted. Prof. Tokson's term as a replacement for Professor Anderson expired on 7/1 and Prof. Tokson was not appointed to the Committee in his own right until 7/22.)

Mr. Thompson will draft a memorandum to the Supreme Court with a recommendation not to approve Mr. Eames' proposal to rule 22. Mr. Thompson will contact Mr. Eames prior to submitting the memorandum to the Supreme Court. Mr. Thompson will provide an update at a future committee meeting.

3. Expungement discussion (Criminal Rule 3, Civil Rule 5):

Judge Schaeffer-Bullock and Keri Sargent are on the subcommittee for expungement discussions. Ms. Sargent provided an update. The subcommittee met with the Salt Lake County expungement navigator but things are on hold for the time being as a new AOC staff is process of being identified to staff the Civil Rules Committee. The subcommittee's next meeting is scheduled for September 2021. Mr. Thompson will follow-up with Judge Schaeffer-Bullock and Ms. Sargent prior to the next committee meeting.

4. Rule 42 update:

The committee discussed proposed amendments to rule 42 at May 18 meeting and voted in favor of adopting the proposals as drafted by Brent Johnson. Mr. Johnson prepared a memorandum that will go to the Supreme Court for discussion at their next conference. Mr. Thompson will provide the committee an update at a future meeting. No further action is needed at this time.

5. Rule 17.5 update:

Rule 17.5 was amended to authorize the court to accept remote testimony from forensic toxicologists. The committee discussed proposed language during the May 18 meeting and voted to approve the amendments. Mr. Thompson will draft a memorandum to go to the Supreme Court with the committee's recommendations and send the memo to Mr. Hansen for consideration. Mr. Thompson will provide the committee an update at a future meeting.

6. Rule 12 update:

Rule 12 amendments, which include joint resolutions to HB 206, is completed and went into effect May 1, 2021. No other action is needed at this time.

7. Rules from the pretrial subcommittee (6, 7, 7A, 7.5, 9) update:

Rule 9 and 7.5 draft amended update provided by Michael Dreschel.

Mr. Dreschel explained the pre-trial events occurring in the legislature focusing on rule 9. Legislatures had a concern that "least restrictive reasonably available conditions" was removed from statute, and asked why it hadn't been changed. Mr. Dreschel explained that it is partially a waiting game to see if the legislature changes it again, and presented a proposed a possible bill that could release that language in the statute next legislative session. Mr. Dreschel also explained that the courts do not see the language as inconsistent with the amended statute or the existing caselaw.

Mr. Thompson asked if the committee should expect legislative changes. Mr. Dreschel confirmed that the taskforce is certain there will be.

Mr. Dreschel raised the issue of (c)(4) asserting substantive policy by releasing people on recognizance. There are no answers regarding (c)(4), but Mr. Dreschel wanted to make sure the committee is aware of these issues. Mr. Dreschel asked whether the committee needed to address the shelf-life of pre-trial conditions if charges are never filed. Mr. Dreschel explained that legislature is currently out of session and will be for another month, and recommended that providing movement on the rule may show the legislature that the courts are addressing these issues and any other the legislature might think about bringing up.

Mr. Thompson called for people who would want to participate in the rapid response team. Mr. Ferguson and Mr. Carlson will join the subcommittee. Mr. Dreschel asked that a judge be included on the team. Mr. Thompson said there are Judges and is certain someone will pitch in, but will email them about interest in the team.

Mr. Dreschel raised the possibility of rule 7.5 to dovetail rules committee activity with the legislature. Mr. Ferguson spoke about the possibility of reinstating a bail schedule. Mr. Dreschel said that he believed that would be a Judicial Counsel issue, and discussed what sort of objective tool jails could use to establish bail and what other ways that issues is being addressed.

Ms. Williams explained that there is dispute among the courts about whether there is a constitutional issue on ability to pay reviews. The Committee agreed to wait for an update.

8. Rule 8 update:

Mr. Thompson called rule 8, but noted that Joana Landau had been running point on the rule but was not present and is no longer on the Committee. This item will be reviewed at another meeting.

9. Rule 14:

The committee discussed proposed language to amend rule 14 a few years back, however, has not been able to return to complete the work. Due to more recent statutory changes, the proposed languages are no longer appropriate for rule 14. Mr. Thompson will look at the current statutory language and incorporate any changes to a new draft proposal of rule 14. Mr. Thompson will provide the committee an update at the next meeting.

11. Restitution rule update - tentative:

There is no update to the restitution rule at this time as no work is currently in progress. If any members of the committee would like to take action on this rule, please contact Mr. Thompson.

12. Probation consolidation update - tentative:

There is no update to the restitution rule at this time as no work is currently in progress. When last discussed, the committee was in favor of a rule to minimize multiple jurisdictions when a defendant has several cases in multiple jurisdictions. Mr. Dreschel noted that the Department of Corrections continues to express interest in the rule. Mr. Thompson asked if any members of the committee would like to take action on this rule to please him.

13. Adjourn:

With no other business, the meeting adjourned without a motion. The meeting adjourned at 1:40 pm. Next meeting is September 21, 2021 at 12 p.m. via Webex.

Tab 2

Rule 42. Expungement

(a) Definitions

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

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

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

(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.

(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

(1) *Cases eligible for automatic expungement*

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

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

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

(iii) a clean slate eligible case.

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

(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).

(2) *Notice to prosecuting entities*

(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) 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) 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).

(3) *Objection by prosecuting entities*

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

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

(4) *Expungement orders*

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

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

(c) Expungement by petition

(1) **How commenced.** 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 from BCI [or

the "Bureau"]. 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.

(2) **Service on the prosecutor.** 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, these documents ~~the petition~~ must be delivered to the county attorney's office? (per statute) in the jurisdiction where the arrest occurred or citation was issued.

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

(4) **Role of the prosecutor**.

(A) Within 21 days after receipt of a petition for expungement of a conviction or a charge dismissed in accordance with a plea in abeyance, the prosecuting attorney must make a reasonable effort to provide notice under Rule 5 of the Utah Rules of Civil Procedure to any "victim" as that term is defined in Section 77-37-2.

(B) The prosecutor must use the Judicial Council-approved expungement notice form and include a Judicial Council-approved form victim objection, a copy of the petition, certificate of eligibility, and copies of statutes and rules applicable to the petition.

(C) The prosecutor must file with the court a certificate verifying that notice was served and the date it was served within 7 days after service of the notice. If there was no victim, the prosecutor need not file a certificate.

(5) **Role of the victim**.

Commented [NS1]: **Originally proposed for Rule 5. (4) 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).

Commented [NS2]: Delivered vs. service: fix.

Commented [NS3]: There appears to be an incongruence here: service vs. delivery. This needs to be resolved.

Commented [NS4]: Victim issues-not a party to the case. Should we keep this formal or informal?
Practically speaking, a letter objecting is okay, sometimes victim works through prosecutor. But sometimes that objection is not served on the petitioner. Prosecutor sometimes files waiver/consent before even getting communication from victim. Victims sometimes feel adrift because prosecutor has abandoned them. Victim needs a victim advocate to help them.
Has code addressed victims?
The only instructions the prosecutors are giving to victims is that they can do it (file objection).

Commented [NS5]: Refer to Rule 5 here?

(A) Within 21 days after receipt of the prosecutor's notice under paragraph (c)(4), the victim may file with the court an objection to the expungement petition using the Judicial Council-approved form victim objection.

(B) The victim must serve the objection on the prosecutor and the petitioner under Rule 5 of the Utah Rules of Civil Procedure. If the victim requests that the victim's contact information be safeguarded, the court must serve the objection on the prosecutor and the respondent.

(C) A victim may appear at any expungement hearing and make a statement regarding the expungement.

(6) **Objection by prosecutor.**

(A) The prosecutor has 35 days from the date the prosecutor received the petition, or 21 days after the prosecutor served notice on the victim, whichever is later, to file an objection to the petition.

(B) If the prosecutor files an objection with the court within the time frame in paragraph (c)(6)(B), the court must schedule a hearing.

(C) The petitioner, prosecutor, victim, or any other person with relevant information may testify at the hearing.

…

(7) **Objection not filed.** If an objection is not filed with the court within 60 days after the petition is delivered to the prosecutor, the petitioner may file a request to submit for decision and the expungement may be granted without a hearing.

(8) **Expungement order.** 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.

Commented [NS6]: Idea: If the victim receives untimely notice from the prosecutor, this extends the time for filing an objection by 21 days, even if the 60 days has run---but what about the impact on the petitioner?

Commented [NS7]: What about the victim who doesn't receive notice until after the fact?

Commented [NS8]: Sort out timing issues?
https://le.utah.gov/xcode/Title77/Chapter40/77-40-S107.html?v=C77-40-S107_2021050520210505

What do you do with an objection received on Day 59?

(7) If no objection is received within 60 days from the date the petition for expungement is filed with the court, the expungement may be granted without a hearing. …

Commented [NS9]: Idea discussed by subcommittee: Prosecutor sends petition to victim. Must have proof (email—certificate of service); certify that it was mailed to last known physical address.

Victim has 35 days to respond/object. If they don't do that, then the time has run. Defendant files request to submit and court can act on petition.

If the victim files the objection within 35 days, then court then must schedule a hearing.

Refer to Rule 6 and service made exclusively by mail.

In practice, no one files a request to submit. Expungement clerks in 3rd District just wait 60 days to give it to the judge.

Justice court—clerk brings petition to judge within 60 days if no objection is filed. Clerk puts a flag on calendar. Has anything else been received?

(9) **Timing.** All timeframes must be read consistently with Rule 6 of the Utah Rules of Civil Procedure.

Effective _____

TIMELINE:

- Defendant files petition for expungement.
- Defendant has _____ time to deliver the petition to the prosecutor (open-ended). Time for potential granting of petition runs from this delivery (60 days).
- Prosecutor has 21 days to serve notice of petition on victim
- Prosecutor has 7 days after service of notice on victim to file the certificate of service with the court.
- Victim has 21 days to file an objection with the court after service of expungement petition notice by prosecutor.
- Prosecutor has 35 days after receipt of petition to file an objection OR 21 days after serving notice on victim to file an objection (this gets us to 56 days at most).
- If an objection is filed within 56 days, the court must schedule a hearing, which means the expungement granting may go past the 60 days. But the statute says this is okay (using the term "may grant").
- We have a slight incongruence in that the statute allows an objection to be made within 60 days, and right now we are working with a 56 day deadline. So paragraphs (6) and (7) should be resolved together somehow (maybe say something about if for reasons beyond control of prosecutor or victim, timing goes to 60 days…. Or something like that).

Rule 25. Dismissal without trial.

(a) **Dismissing an information.** In its discretion, for substantial cause and in furtherance of justice, the court may, either on its own initiative or upon application of either party, order an information or indictment dismissed.

(b) **Mandatory dismissal.** The court shall dismiss the information or indictment when:

(b)(1) There is unreasonable or unconstitutional delay in bringing defendant to trial;

(b)(2) The allegations of the information or indictment, together with any bill of particulars furnished in support thereof, do not constitute the offense intended to be charged in the pleading so filed;

(b)(3) It appears that there was a substantial and prejudicial defect in the impaneling or in the proceedings relating to the grand jury;

(b)(4) The court is without jurisdiction; or

(b)(5) The prosecution is barred by the statute of limitations.

~~(c) **Record of dismissal.** The reasons for any such dismissal shall be set forth in an order and entered in the minutes.~~

(c~~d~~) **Effects of dismissal.** If the dismissal is based upon the grounds that there was unreasonable delay, or the court is without jurisdiction, or the offense was not properly alleged in the information or indictment, or there was a defect in the impaneling or of the proceedings relating to the grand jury, further prosecution for the offense shall not be barred and the court may make such orders with respect to the custody of the defendant pending the filing of new charges as the interest of justice may require. Otherwise the defendant shall be discharged and bail exonerated.

An order of dismissal based upon unconstitutional delay in bringing the defendant to trial or based upon the statute of limitations, shall be a bar to any other prosecution for the offense charged.

(d~~e~~) **Dismissal by compromise.** In misdemeanor cases, upon motion of the prosecutor, the court may dismiss the case if it is compromised by the defendant and the injured party. The injured party shall first acknowledge the compromise before the court or in writing. The reasons for the order shall be set forth therein and entered in the minutes. The order shall be a bar to another prosecution for the same offense; provided however, that dismissal by compromise shall not be granted when the misdemeanor is committed by or upon a peace officer while in the performance of duties, or riotously, or with an intent to commit a felony.

(e~~e~~) **Record of dismissal.** The reasons for ~~any such~~ dismissal shall be set forth in an order and entered in the minutes. ~~If the order bars prosecution for the same offense, the dismissal shall be with prejudice.~~

Effective ~~January 1~~May/November 1, ~~1989~~20__

Tab 3

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 ~~§~~section 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~~ prefile release and the conditions thereof.

(a)(3) If available, the magistrate should also be presented the results of a validated pretrial risk assessment tool and any other information that may aid its determination in (a)(4).

(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~~ to justify the arrest and whether the defendant is eligible for release pending further proceedings~~. 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~~ through release on recognizance or a condition or a combination of conditions of release. The magistrate will impose ~~the least restrictive reasonably available conditions of release~~ only the condition or conditions 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) If the magistrate finds the statement does not support probable cause to detain the defendant on the submitted charges ~~support the charges filed~~, the magistrate may determine what if any charges are supported, and proceed under paragraph (a)(4).

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

Commented [DF1]: We need to discuss this language. The rule requires that the person be presented. But the rest of this rule is just a paper review.

Commented [DF2]: Language to keep?

Commented [DF3]: Elsewhere in this rule, "charge" is connected to the PC affidavit. In this context, it relates to the Information. Changing "precharge" to something else gives more consistency to the term.

Commented [DF4]: The magistrate determination here is Utah's way of complying with *County of Riverside v. McLaughlin*, 500 US 44 (1991), which is a case about the reasonableness of arrests without a warrant, and the magistrate's duty under the Fourth Amendment to justify the arrest within 48 hours.

Following Pugh v, Gerstein, a case that McLaughlin is based on, New Mexico rule NMRA, Rule 5-301 noted:

"…the sole purpose of a probable cause for detention determination is to decide 'whether there is probable cause for detaining the arrested person pending further proceedings.' Gerstein, 420 U.S. at 120 (emphasis added)."

So what the magistrate is meant to do here is different than the probable cause determination that occurs at a preliminary hearing.

Commented [DF5]: The legislature is going to use this word in the new law, but I think the idea of "reasonably necessary" is silly. I would vote to eliminate the word. Only lawyers would qualify "necessary" with "reasonably" and it doesn't make a lot of sense to me.

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

(b) **Circumstances in which a financial condition of release is appropriate.** If the magistrate determines that a financial condition of release is necessary under (a)(4), the magistrate must consider the person's ability to pay when setting a financial condition, drawing reasonable inferences from the information presented. If the person was given a financial condition pursuant to [statute] and has not secured release on that condition by the time of the magistrate's review, the magistrate must consider whether the amount of the condition is too high before imposing a financial condition.

(c) **Circumstances in which the suspect may be denied release.** If the offense or offenses brought before the magistrate are ones for which release may be denied pursuant to Utah Const. article I, section 8 and Utah Code section 77-20-1, the magistrate may deny release after conducting its analysis in (a)(4). The magistrate's order will remain in effect until either the filing deadlines in subsection (e)(4) are passed or a superseding order is made pursuant to Rule 6, whichever is sooner.

(~~b~~d) **Magistrate availability.**

(~~b~~d)(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~~d)(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.

(~~e~~e) **Time for review.**

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

(~~e~~e)(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.

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

~~e~~e)(4)~~(A)~~ If no information has been filed by 3:00pm on the fourth calendar day for a suspect who remains in custody on a financial condition or any other unattained condition of release, the unattained condition must be eliminated to ensure the person's release. ~~after the defendant~~ suspect ~~was booked, the release conditions set under subsection (a)(4)(shall revert to recognizance release.~~

(~~e~~e)(4)(~~B~~A) The four day period in this subsection may be extended for periods of three more days, for good cause shown. Any prosecutor request beyond an initial three day extension must identify the number of previous extensions received.

(~~e~~e)(4)(~~C~~B) If the time periods in this subsection (~~e~~e)(4)~~(A)~~ and (~~e~~e)(4)~~(B)~~(A) expire on a weekend or legal holiday, the period expires at 3:00pm on the next business day.

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

Commented [DF6]: Drechsel: If suspect remains in custody ___ hours/days after conditions of release have been set, shouldn't there be a procedural mechanism to require a hearing to determine what condition is preventing the individual's release?

David: When we did a pretrial subcommittee last year, Josh Graves suggested that any offense that isn't a violent felony must get released after 48 hours.

After ODonnell v. Harris, Harris County, Texas requires that all misdemeanors (with a few carve outs) must be released on a $100 appearance bond as soon as practicable, and that everyone else gets an in person bail review within 48 hours of arrest with assigned counsel. Also, after Walker v. Calhoun (one of the other major bail cases), all misdemeanors in the City of Calhoun get automatically released at 48 hours.

We could do something a little different, such as having a second magistrate review in 24-48 hours of the first one, provided that no Information has been filed, where the second review simply reviews the conditions and decides whether they should be adjusted.

Commented [DF7]: This has been reworked after our subcommittee discussion. The point isn't to necessarily cause the person to get OR'd, just to make sure that they aren't held in jail on unaffordable bail.

I added a bit to make sure that this encompasses more than just a situation where someone is held on unaffordable bail. For example, it's within the realm of possibility that some future judge orders that the person only be released to a treatment bed, but with no mechanism in place to help that person get into residential treatment then the person would remain in custody. So I added a bit to avoid anything like that down the road.

Tab 4

Rule 11. Pleas.

(a) **Right to Counsel.** Upon arraignment, except for an infraction, a defendant shall be represented by counsel, unless the defendant waives counsel in open court. The defendant shall not be required to plead until the defendant has had a reasonable time to confer with counsel.

(b) **Types of pleas.** A defendant may plead not guilty, guilty, no contest, not guilty by reason of insanity, or guilty and mentally ill. A defendant may plead in the alternative not guilty or not guilty by reason of insanity. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(c) **No contest plea.** A defendant may plead no contest only with the consent of the court.

(d) **Not guilty plea.** When a defendant enters a plea of not guilty, the case shall forthwith be set for trial. A defendant unable to make bail shall be given a preference for an early trial. In cases other than felonies the court shall advise the defendant, or counsel, of the requirements for making a written demand for a jury trial.

(e) **Guilty plea.** The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:

(e)(1) if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel;

(e)(2) the plea is voluntarily made;

(e)(3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived;

(e)(4)(A) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements;

(e)(4)(B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;

(e)(5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;

(e)(6) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached;

(e)(7) the defendant has been advised of the time limits for filing any motion to withdraw the plea; and

(e)(8) the defendant has been advised that the right of appeal is limited.

These findings may be based on questioning of the defendant on the record or, if used, a written statement reciting these factors after the court has established that the defendant has read, understood, and acknowledged the contents of the statement. If the defendant cannot understand the English language, it will be sufficient that the statement has been read or translated to the defendant. Unless specifically required by statute or rule, a court is not required to inquire into or advise concerning any collateral consequences of a plea.

(f) **Motion to withdraw plea.** Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty, no contest or guilty and mentally ill is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under Utah Code § 77-13-6.

(g) **Plea in domestic violence offense.** If the defendant pleads guilty, no contest, or guilty and mentally ill to a misdemeanor crime of domestic violence, as defined in Utah Code § 77-36-1, the court shall 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.

(h)(1) **Plea recommendations.** If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the agreement shall be approved or rejected by the court.

(h)(2) If sentencing recommendations are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

(i)(1) **Plea agreements.** The judge shall not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney.

(i)(2) When a tentative plea agreement has been reached, the judge, upon request of the parties, may permit the disclosure of the tentative agreement and the reasons for it, in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved.

(i)(3) If the judge then decides that final disposition should not be in conformity with the plea agreement, the judge shall advise the ~~defendant~~ **parties of the nature of the divergence from the plea agreement** and then call upon the ~~defendant~~ **parties** to either affirm or withdraw **from** the **negotiated** plea.

(j) **Conditional plea.** With approval of the court and the consent of the prosecution, a defendant may enter a conditional plea of guilty, guilty and mentally ill, or no contest, reserving in the record the right, on appeal from the judgment, to a review of the adverse determination of any specified pre-trial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(k) **Guilty and mentally ill.** When a defendant tenders a plea of guilty and mentally ill, in addition to the other requirements of this rule, the court shall hold a hearing within a reasonable time to determine if the defendant is mentally ill in accordance with Utah Code § 77-16a-103.

(l) **Strict compliance not necessary.** Compliance with this rule shall be determined by examining the record as a whole. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded. Failure to comply with this rule is not, by itself, sufficient grounds for a collateral attack on a guilty plea