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

Agenda

November 16, 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)		Judge Shaeffer-Bullock
Rule 42 and 17.5 update • Memos Presented to Supreme Court 21-09-07		Doug Thompson
Rules from the pretrial subcommittee update • (6, 7, 7A, 7.5, 9)	Tab 2	David Ferguson
Rule 8 (Appointment of Counsel) update	Tab 3	Doug Thompson
Rule 22 update		Doug Thompson
Rule 11 Update • Rule is back from Public Comment	Tab 4	Gage DM Hansen
Rule 14		Doug Thompson
Issues being Tabled for now: • Probation consolidation • Rule 22		

Next meeting: January 18, 2022, 12 pm (noon) – 2 pm
March 21, 2022, 12 pm (noon) – 2 pm
May 16, 2022, 12 pm (noon) – 2 pm

Tab 1

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

MEETING MINUTES

WebEx Video Conferencing
September 21, 2021 – 12 p.m. to 2 p.m.

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

GUESTS:

Jacqueline Carlton

STAFF:

Gage Hansen

1. Welcome ad approval of minutes:

Doug Thompson welcomed the committee members to the meeting. Doug introduced Judge Denise Porter a new member of the committee. The Committee considered the July 20, 2021 minutes. There being no changes to the minutes, Doug moved to approve the minutes. Ryan Stack seconded the motion. An objection was not received on the motion. The motion was unanimously approved.

2. Expungement Sub-Committee Update:

Doug explained to the committee the basics of the discussion he had with the Supreme Court about the rules. Doug gave a loose framework of the sub-committee's progress so far. Judge Schaeffer-Bullock spoke on the subcommittee for expungement discussions about the timing issues. Judge Porter raised the issue of the pardon rule's reliance on expungement procedures. The subcommittee's next meeting is scheduled for September 28, 2021. Mr. Thompson will follow-up with Judge Schaeffer-Bullock and Ms. Sargent prior to the next committee meeting.

3. Forensic Toxicologist (Rule 17.5) update:

Doug updated the committee on the Supreme Court's denial of Rule 17.5 amendment to authorize the court to accept remote testimony from forensic toxicologists. David Ferguson asked the committee to discuss alternatives. David Ferguson will talk to Tyson Skeen.

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

David Ferguson updated the committee on the sub-committee's progress. The sub-committee asked for a judge to join the sub-committee. Judge Porter offered to join the sub-committee. Judge Porter brought up an issue with the differing resources of the various judicial districts. The sub-committee will schedule a new meeting via email.

5. 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. Doug explained that he will likely have a draft for feedback about a draft of the rule for the next meeting. This item will likely be reviewed at the meeting.

6. Rule 14 update:

Doug gave a brief description of the issues of appealing decisions of in camera review. David Ferguson asked about the different kinds of in camera review, and whether the differences of could be contributing to the confusion with the rule. Doug doesn't have a current proposal, and will keep this issue on the back burner.

8. Sentencing (rule 22) 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.

9. Proposed Changes to Pleas (rule 11) :

Will Carlson introduced an issue with rule 11 where a disparity between the parties that restricted the prosecution's ability to withdraw from negotiated plea agreements. Doug raised questions about whether current case law would permit the prosecutor to withdraw. Judge Porter commented about the equity of the contract, and that the Judge is the one breaking the agreement, not the prosecutor. David Ferguson commented about Defendants possibly still getting the benefit of the negotiation, and supported the change.

Will moved to adopt the proposal with language changes made during the discussion. The Motion passed unanimously. The Rule will go out for public comment.

10. Probation consolidation update - tentative:

Doug provided a brief update to the probation consolidation rule to minimize multiple jurisdictions when a defendant has several cases in multiple jurisdictions. Mr. Thompson asked if any members of the committee would like to act on this rule. Judge Porter asked the committee to make sure that the rule cannot affect parole. Will Carlson asked if a prosecutor from one Jurisdiction would have any authority to proceed on cases arising out of a different jurisdiction. Doug acknowledged that there are many practical and legal issues that probation consolidation, including complying with 17-18A-401, but will continue with the language. David Ferguson volunteered to look at the rule.

11. Adjourn:

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

Tab 2

An amendment proposed to the criminal rules by Judge Matthew Bates would remove the requirement for judges to do a Rule 7(e)(1) preliminary hearing waiver on the record before taking a guilty plea. The 2014 case of State v. Smith held that it was error not to do so, and from that point on, most judges have gone through a tedious practice of taking a prelim waiver before receiving a guilty plea.

The proposed change adds a sentence to the end of subsection (e)(1) that allows for waiver to be made by written statement (i.e. the plea affidavit) at the time the plea is taken. State v. Smith and State v. Black have been shared to provide background on the change.

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

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

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

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

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

(a)(4) of rights concerning pretrial release; and

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

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

(c) **Release conditions.**

(c)(1) Except as provided in paragraph (c), the court must issue a pretrial status order pursuant to Utah Code section 77-20-1. Parties should be prepared to address this issue, including notice requirements under Utah Code section 77-37-3 and Utah Code section 77-38-3.

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

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

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

(d) **Continuances.** 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) **Right to preliminary examination.**

(e)(1) The court must inform the defendant of the right to a preliminary examination and the times for holding the hearing. If the defendant waives the right to a preliminary examination, and the prosecuting attorney consents, the court must order the defendant bound over for trial. If the defendant waives the right to a preliminary hearing at the time of entering a guilty plea, the waiver may be made in a written statement and the prosecuting attorney's consent is not needed.

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

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

355 P.3d 981
Supreme Court of Utah.

STATE of Utah, Appellee,
v.
Terry BLACK, Appellant.

No. 20130758.
|
July 17, 2015.

Synopsis

Background: Defendant was charged with aggravated murder, child kidnapping, and rape of child. The Third District Court, West Jordan Department, Royal I. Hansen, J., denied defendant's motion to disqualify district court judge who had acted as magistrate in his case from adjudicating his competency to stand trial. Defendant's petition for interlocutory appeal was granted.

Holdings: The Supreme Court, Durham, J., held that:

[1] judge's reassignment to different docket while petition to determine defendant's competency to stand trial was pending rendered moot defendant's claim on interlocutory appeal that judge was disqualified to adjudicate his competency;

[2] defendant's claim was not capable of repetition yet evading review, as grounds for appellate review of moot issue; and

[3] district court judge had authority to act as both magistrate and judge within same case.

Affirmed; remanded.

West Headnotes (7)

[1] Criminal Law Mootness

Trial court judge's reassignment to different docket while petition to determine defendant's competency to stand trial was pending rendered moot defendant's claim on interlocutory appeal that judge was disqualified to adjudicate his competency because judge had sat as magistrate in defendant's case.

[2] Action Moot, hypothetical or abstract questions

Courts generally will not resolve an issue that becomes moot.

4 Cases that cite this headnote

[3] Criminal Law Mootness

An issue becomes "moot" if, during the pendency of the appeal, circumstances change so that the controversy is eliminated, thereby rendering the relief requested impossible or of no legal effect.

4 Cases that cite this headnote

[4] Criminal Law Mootness

Defendant's claim that judge who had sat as magistrate in his case was disqualified to adjudicate his competency to stand trial, which was rendered moot by judge's reassignment to different docket, was not capable of repetition yet evading review, as justification for appellate consideration of claim, where there was no evidence that district court judges were transferred with such frequency that claim effectively evaded review by regularly becoming moot before appellate court had opportunity to rule on issue.

[5] Action Moot, hypothetical or abstract questions

A court may resolve a moot issue if it (1) presents an issue that affects the public interest, (2) is likely to recur, and (3) because of the brief time that any one litigant is affected, evades review.

2 Cases that cite this headnote

[6] Judges Judicial powers and functions in general

District court judge had authority to act as both magistrate and judge within same case.

1 Cases that cite this headnote

[7] **Criminal Law** Review De Novo

Whether a district court judge has authority to adjudicate a matter is a question of law subject to de novo review, with no deference to the lower court's legal conclusions regarding the authority of the district court judge.

Attorneys and Law Firms

***981** Sean D. Reyes, Att'y Gen., Ryan D. Tenney, Asst. Att'y Gen., Salt Lake City, for appellee.

Joan C. Watt, McCaye Christianson, Patrick W. Corum, Jason M. Poppleton, ***982** Wojciech S. Nitecki, Salt Lake City, for appellant.

Justice DURHAM authored the opinion of the Court, in which Chief Justice DURRANT, Associate Chief Justice LEE, Justice PARRISH, and Judge ORME joined. Due to his retirement, Justice NEHRING does not participate herein; Court Of Appeals Judge GREGORY K. ORME sat. Justice DENO G. HIMONAS became a member of the Court on February 13, 2015, after oral argument in this matter, and accordingly did not participate.

Justice DURHAM, opinion of the Court:

INTRODUCTION

¶ 1 This case presents two questions: (1) whether a district court judge created an appearance of bias requiring his disqualification from the case and (2) whether a district court judge may act as both a magistrate and a judge in the same criminal case. The first question became moot when the judge was transferred to a different court docket, causing this case to be reassigned during the pendency of this appeal. We therefore do not resolve it. As to the second question, we hold that a district court judge retains the authority to act as a judge after sitting as a magistrate in a case.

BACKGROUND

¶ 2 The State charged Terry Black with aggravated murder, child kidnapping, and rape of a child. The case was assigned to Judge Kouris.

¶ 3 Judge Kouris scheduled a preliminary hearing for a date more than six months away in order to give the State time to produce requested discovery. Mr. Black later filed a motion to continue the preliminary hearing in order to obtain additional discovery. The court denied this request.

¶ 4 Mr. Black filed a renewed motion to continue the preliminary hearing seventeen days prior to its scheduled date. Defense counsel then filed a petition to evaluate Mr. Black's competency to stand trial three days later. In response, the State requested a hearing to determine the sufficiency of Mr. Black's competency petition.

¶ 5 At the hearing to determine the sufficiency of the competency petition, the district court asked some pointed questions about why defense counsel had waited until two weeks before the preliminary hearing to raise the issue of competency. Defense counsel maintained they had initial concerns about Mr. Black's competency to stand trial but these concerns became more pronounced as the preliminary hearing approached. Ultimately, the court granted defense counsel's request for a competency evaluation and stayed all other proceedings. Judge Kouris was scheduled to preside over Mr. Black's competency evaluation.

¶ 6 After this hearing, Mr. Black filed a motion to transfer adjudication of the competency petition to another judge. He argued that his competency evaluation must be adjudicated by a different district court judge because Judge Kouris had sat as magistrate in the case. The presiding judge of the Third District Court denied Mr. Black's motion to transfer. He concluded that Judge Kouris, as a district court judge, was authorized to hear and adjudicate all proceedings of a criminal case.

¶ 7 Mr. Black then filed a motion to disqualify Judge Kouris. In that motion, Mr. Black alleged that statements made by the judge during the hearing to determine the sufficiency of the competency petition created an appearance of bias. The associate presiding judge of the Third District Court concluded that the judge's tone and comments during

the hearing did not approach the level necessary for disqualification and denied Mr. Black's motion.

¶ 8 This court granted Mr. Black's petition for interlocutory review of the orders denying these two motions.

ANALYSIS

I. THE DISQUALIFICATION ISSUE IS MOOT

[1] ¶ 9 Mr. Black argues that the associate presiding judge of the Third District Court erred when he declined to disqualify ***983** Judge Kouris. After oral argument was held in this appeal, however, the State notified this court that Judge Kouris had been transferred from the court location in which Mr. Black is being prosecuted and was reassigned to a different docket. The State asserts that because a new judge will be assigned to Mr. Black's case, the disqualification issue is moot. We agree.

[2] **[3]** ¶ 10 Courts generally will not resolve an issue that becomes moot. *Utah Transit Auth. v. Local 382 of the Amalgamated Transit Union,* 2012 UT 75, ¶¶ 14, 32, 289 P.3d 582; *Navajo Nation v. State (In re Adoption of L.O.),* 2012 UT 23, ¶ 8, 282 P.3d 977. An issue becomes moot "if during the pendency of the appeal circumstances change so that the controversy is eliminated, thereby rendering the relief requested impossible or of no legal effect." *Utah Transit Auth.,* 2012 UT 75, ¶ 14, 289 P.3d 582 (internal quotation marks omitted).

[4] ¶ 11 In this case, Judge Kouris's reassignment to a different court docket eliminates the controversy over his disqualification since he will no longer preside over Mr. Black's criminal case. The disqualification issue is moot because the relief Mr. Black requests—the disqualification of Judge Kouris from his case—is now meaningless and will have no effect on future proceedings. *See id.* ¶ 24 ("The defining feature of a moot controversy is the lack of capacity for the court to order a remedy that will have a meaningful impact on the practical positions of the parties.").

[5] ¶ 12 Mr. Black contends that we should nevertheless resolve this issue because it falls within a recognized exception to the mootness doctrine. A court may resolve a moot issue if it "(1) presents an issue that affects the public interest, (2) is likely to recur, and (3) because of the brief time that any one litigant is affected, evades review." *Id.* ¶ 32. This exception does not apply here because the third element has not been met. [1] Mr. Black has not produced any evidence that district court judges are transferred with such frequency that a claim that a judge should be disqualified effectively evades review by regularly becoming moot before an appellate court has an opportunity to rule on the issue. *See id.* ¶ 37 ("The types of issues likely to evade review are those that are inherently short in duration so that by the time the issue is appealed, a court is no longer in a position to provide a remedy." (internal quotation marks omitted)).

¶ 13 Because the disqualification issue has become moot and the exception to the mootness doctrine does not apply, we do not address it.

II. A DISTRICT COURT JUDGE MAY ACT AS BOTH A MAGISTRATE AND A JUDGE WITHIN THE SAME CASE

[6] ¶ 14 Within the Utah state court system, a magistrate is a justice, judge, or commissioner who performs one of several functions described by statute. UTAH CODE §§ 77–1–3(4), 78A–2–220. One of the enumerated functions of a judicial official acting as a magistrate is to "conduct a preliminary examination to determine probable cause." *Id.* § 78A–2–220(1)(f).

¶ 15 Mr. Black contends that by presiding over proceedings leading up to his preliminary hearing, the district court judge stepped into the role of a magistrate. Mr. Black further argues that in doing so, the judge irretrievably surrendered the authority inherent to his position as a district court judge and that he could no longer perform duties reserved for the district court, such as adjudicating a competency petition. *See id.* § 77–15–5(1)(b) ("The district court ... shall review the allegations of incompetency ....").

[7] ¶ 16 Both the State and Mr. Black agree that this issue was not mooted by Judge Kouris's transfer because the question remains whether a replacement district court judge may act as both magistrate and judge in this case when it is remanded. We therefore review the presiding judge's ruling that a district court judge may resolve a competency ***984** petition after acting as a magistrate in a case. We review this ruling de novo, ceding no deference to the lower court's legal conclusions regarding the authority of a district court judge.

Cf. State v. Norris, 2007 UT 6, ¶ 10, 152 P.3d 293 ("Whether the district court has jurisdiction is a question of law that we review for correctness, giving no deference to the lower court.").

¶ 17 Mr. Black bases his argument that the district court judge was locked in his role as a magistrate on language taken from *Van Dam v. Morris,* 571 P.2d 1325 (Utah 1977) and *State v. Humphrey,* 823 P.2d 464 (Utah 1991). In *Van Dam,* we held that "[w]hen a judge acts in the capacity of a magistrate, he does not do so as a judge, but rather as one who derives his powers" from the statutes defining the authority of a magistrate. 571 P.2d at 1327. We later affirmed this holding in *Humphrey* when we stated that

> our statutory provisions make an unmistakable distinction between the functions and powers of a judicial officer acting as magistrate and one acting as judge of a court.... [Judicial officials] when sitting as magistrates hav[e] the jurisdiction and powers conferred by law upon magistrates and not those that pertain to their respective judicial offices.

823 P.2d at 467 (third alteration in original) (internal quotation marks omitted).

¶ 18 *Van Dam* and *Humphrey,* however, do nothing to advance Mr. Black's argument. In those cases we held that a judge sitting as a magistrate performs a unique statutory function that is separate from his or her judicial office. We did not say that a judge who sits as a magistrate may no longer act as a judge in subsequent proceedings in the case.

¶ 19 In fact, we have recognized that a judge may switch between a magistrate role and a judicial role in the same case. In *State v. Jaeger* we observed that the judge in that case "took off his judicial hat and put on his magistrate's hat to conduct the preliminary hearing," and then "removed that hat and put his judicial hat back on just prior to entering his judgment of dismissal and discharge." 886 P.2d 53, 54 n. 2 (Utah 1994). We later affirmed this language from *Jaeger* and held that the fact that a district court judge may switch between the roles of a magistrate and a judge "does not mean that the district court loses jurisdiction when it moves between these different capacities." *State v. Smith,* 2014 UT 33, ¶ 24, 344 P.3d 573.

¶ 20 Accordingly, we uphold the presiding judge's conclusion that a district court judge may act as both a magistrate and a judge in the same criminal case. We remand for further proceedings consistent with this opinion.

All Citations

355 P.3d 981, 791 Utah Adv. Rep. 8, 2015 UT 54

Footnotes

1 Because it is unnecessary to the resolution of this issue, we draw no conclusions about the first or second elements.

End of Document

344 P.3d 573
Supreme Court of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Shawn Michael SMITH, Defendant and Appellant.

No. 20130583.
|
Aug. 26, 2014.

Synopsis

Background: Defendant was convicted pursuant to guilty plea in the Fifth District Court, Cedar City, John Walton, J., of felony possession or use of a controlled substance in a drug-free zone. The District Court, G. Michael Westfall, J., sentenced defendant to serve one to 15 years in prison. On defendant's appeal, the Court of Appeals, 2013 UT App 52, 306 P.3d 810, Davis, J., reversed and remanded on grounds of jurisdictional defect. State petitioned for writ of certiorari, which the Supreme Court granted.

Holdings: The Supreme Court, Durrant, C.J., held that:

[1] subject-matter jurisdiction over a criminal case vests with the district court upon the filing of an information;

[2] district court's failure to hold preliminary hearing, obtain defendant's express waiver of preliminary hearing, or issue bindover order did not implicate its jurisdiction to accept defendant's plea; and

[3] defendant forfeited any error in district court's acceptance of plea without first holding preliminary hearing, obtaining express waiver, or issuing bindover order.

Reversed.

West Headnotes (11)

[1] Criminal Law Decisions of Intermediate Courts

On certiorari, the Supreme Court reviews the decision of the Court of Appeals for correctness, without deference to its conclusions of law.

2 Cases that cite this headnote

[2] Criminal Law Jurisdiction and venue

Challenges to subject-matter jurisdiction present questions of law, which the Supreme Court reviews for correctness.

3 Cases that cite this headnote

[3] Criminal Law Waiver of objections

Jurisdictional challenges may be raised at any time.

[4] Criminal Law Mode of acquiring jurisdiction

A district court's exercise of jurisdiction does not hinge on whether it held a preliminary hearing, obtained an express waiver of the right to a preliminary hearing, or issued a bindover order. West's U.C.A. Const. Art. 1, § 13; Rules Crim.Proc., Rule 7(h)(1).

1 Cases that cite this headnote

[5] Indictments and Charging Instruments Necessity to confer jurisdiction

Following statutory merger of the circuit courts into the district courts, an information is always filed directly with the district court, such that jurisdiction vests originally with the district court. West's U.C.A. § 78A–1–105(1, 2); Rules Crim.Proc., Rule 5(a).

[6] Courts Jurisdiction of Cause of Action

"Subject-matter jurisdiction" concerns a court's power to hear a case.

1 Cases that cite this headnote

[7] **Courts** Jurisdiction of Cause of Action

A court has "subject-matter jurisdiction" over a case if the case is one of the types of cases that the court has been empowered to entertain by the constitution or statute from which the court derives its authority.

1 Cases that cite this headnote

[8] **Courts** Utah

Jurisdictional statutes grant the district courts broad subject-matter jurisdiction over the full range of cases that would have been heard premerger by either a circuit court or a district court. West's U.C.A. §§ 78A–1–105(1, 2), 78A–5–102(1, 4).

[9] **Indictments and Charging Instruments** Necessity to confer jurisdiction

Subject-matter jurisdiction over a criminal case vests with the district court upon the filing of an information. Rules Crim.Proc., Rule 5(a).

2 Cases that cite this headnote

[10] **Criminal Law** Mode of acquiring jurisdiction

Indictments and Charging Instruments Necessity to confer jurisdiction

Even assuming that district court erred by accepting defendant's guilty plea to felony possession or use of a controlled substance in a drug-free zone without first holding preliminary hearing, obtaining defendant's express waiver of preliminary hearing, or issuing bindover order, such error did not implicate district court's subject-matter jurisdiction to accept plea, since jurisdiction vested with district court upon the filing of the information. West's U.C.A. Const. Art. 1, § 13; West's U.C.A. §§ 78A–1–105(1, 2), 78A–5–102(1, 4); Rules Crim.Proc., Rule 7(h)(1).

1 Cases that cite this headnote

[11] **Criminal Law** Waiver of Rights, Defenses, and Objections

Defendant forfeited any error in district court's acceptance of his guilty plea to felony possession or use of a controlled substance in a drug-free zone without first holding preliminary hearing, obtaining defendant's express waiver of preliminary hearing, or issuing bindover order, where defendant neither raised error before entering plea nor sought to withdraw plea before sentencing. West's U.C.A. Const. Art. 1, § 13; West's U.C.A. § 77–13–6(2)(b); Rules Crim.Proc., Rule 7(h)(1).

Attorneys and Law Firms

***574** Sean D. Reyes, Att'y Gen., Laura B. Dupaix, Asst. Att'y Gen., Salt Lake City, for appellee.

Herschel Bullen, Salt Lake City, for appellant.

Chief Justice DURRANT authored the opinion of the Court, in which Associate Chief Justice NEHRING, Justice DURHAM, Justice PARRISH, and Justice LEE joined.

On Certiorari to the Utah Court of Appeals.

Chief Justice DURRANT, opinion of the Court:

Introduction

¶ 1 The question presented in this case is whether a district court lacks subject matter jurisdiction to accept a defendant's guilty plea where the defendant was not bound over following either a preliminary hearing or an express waiver of the right to a preliminary hearing.[1] The court of appeals held that "a district court cannot exercise its jurisdiction to accept a guilty plea until a defendant has been bound over following either a preliminary hearing or the defendant's waiver of a preliminary hearing."[2]

¶ 2 We reverse the court of appeals' decision and conclude that while it is error for a district court to accept a guilty plea without holding a preliminary hearing or obtaining an express waiver from the defendant of the right to a preliminary hearing, such an error does not deprive the court of subject matter jurisdiction. Utah's current statutory scheme grants district courts broad subject matter jurisdiction over criminal cases. And nothing in the Utah Constitution or Utah Code makes holding a preliminary hearing, obtaining an express waiver of the right to a preliminary hearing, or issuing a bindover order a prerequisite to a district court's exercise of subject matter jurisdiction.

Background

¶ 3 On July 20, 2010, Adult Probation and Parole agents found methamphetamine in Shawn Michael Smith's bedroom. Mr. Smith and his wife admitted they smoked methamphetamine earlier that same day and both tested positive for methamphetamine.

¶ 4 Two days later, the State filed an information charging Mr. Smith with one count of ***575** possession or use of a controlled substance. Mrs. Smith was similarly charged. In addition to facing charges, the Smiths lost custody of their two children. In an apparent attempt to regain custody of the children, the Smiths quickly reached a joint plea agreement with the State. Under that agreement, Mr. Smith agreed to plead guilty to a second-degree felony and Mrs. Smith agreed to plead guilty to a class A misdemeanor. The two hoped that this arrangement would keep Mrs. Smith out of jail so she could attempt to regain custody of the children.

¶ 5 The Smiths appeared in court on August 4, 2010, for their joint preliminary hearing before Judge John Walton. What occurred, however, was not a preliminary hearing. Rather, discussions between Judge Walton and counsel immediately turned to the issue of Mr. Smith's guilty plea. Judge Walton never expressly asked Mr. Smith whether he waived his right to a preliminary hearing. Additionally, Mr. Smith's written plea statement did not refer to his right to a preliminary hearing. Eventually, he pled guilty to second-degree felony possession or use of a controlled substance in a drug-free zone.

¶ 6 Less than a month after entering his plea, Mr. Smith requested new counsel because he was concerned that his counsel could not adequately provide effective representation to both him and his wife. The court allowed Mr. Smith's counsel to withdraw and appointed new counsel to represent him. Mr. Smith then filed a motion seeking to withdraw his guilty plea. He alleged that his previous attorney's joint representation of him and his wife improperly influenced him to enter the plea, which resulted in his plea being unknowing and involuntary. He also alleged that at the time of the hearing he was not taking necessary medications, so he was confused and unable to remember the hearing.

¶ 7 On March 1, 2011, Mr. Smith appeared for a hearing on his motion to withdraw his guilty plea. The judge presiding at this hearing, Judge G. Michael Westfall, was not the same judge who had accepted Mr. Smith's guilty plea nearly seven months earlier. At the hearing, Mr. Smith changed course by withdrawing his motion to withdraw. He then asked to be immediately sentenced. Before sentencing Mr. Smith, Judge Westfall advised him of his right to a preliminary hearing in the following colloquy:

> THE COURT: All right. Now, Mr. Smith, before I announce my sentence, is there anything else you want to bring to my attention?
>
> MR. SMITH: No.
>
> THE COURT: Okay. Mr. Shawn Michael Smith, pursuant to your—okay. Well, let me just check one more thing here.
>
> Your plea, when you pled guilty, it was entered in—to Judge—before Judge Walton. I don't know if Judge Walton has the practice of making sure that in a felony case, you have waived your right to a preliminary hearing, but I want to make sure we address that at this point.
>
> There is a body of law that would suggest that if you plead guilty, you've waived any prior errors in the case but I want to make sure that you understand that you have the right to a preliminary hearing. I don't know if you waived your right to a preliminary hearing or not before you entered your plea. But if I proceed to sentencing today, that means you will never have a preliminary hearing. Do you understand that?
>
> MR. SMITH: I don't know what happened with my—that's fine, I—I guess.
>
> THE COURT: All right. You understand that and you're in agreement with that?
>
> MR. SMITH: Yeah.

> THE COURT: All right. And the defendant appears to understand the ramifications of that and so I'm going to proceed.

Judge Westfall then sentenced Mr. Smith to serve one to fifteen years in prison.

¶ 8 Mr. Smith appealed to the Utah Court of Appeals, where he argued "that because he was never formally bound over, the district court never obtained subject matter jurisdiction over the case." [3] The court of appeals agreed and held "that a failure to bind over a defendant following either a preliminary ***576** hearing or the waiver of the right to a preliminary hearing is a jurisdictional defect that renders his guilty plea void." [4] The State petitioned for writ of certiorari, which we granted. We have jurisdiction pursuant to Utah Code Section 78A–3–102(5).

Standard of Review

[1] **[2]** ¶ 9 This case is before us on writ of certiorari. "On certiorari, we review the decision of the court of appeals for correctness, without deference to its conclusions of law." [5] The question presented here is whether the district court had subject matter jurisdiction to enter the guilty pleas. "Challenges to subject matter jurisdiction present questions of law, which we ... review for correctness." [6]

Analysis

[3] ¶ 10 The outcome of this case turns on whether a district court's failure to bind a defendant over following a preliminary hearing, or an express waiver by the defendant of the right to a preliminary hearing, is jurisdictional. [7] If the error is not jurisdictional, Mr. Smith cannot now attack the validity of his plea or pre-plea proceedings because such a challenge would be untimely under Utah law. [8] On the other hand, if the district court's error is jurisdictional, Mr. Smith can challenge his plea as void because jurisdictional challenges may be raised at any time. [9] Mr. Smith argues that the district court's failure to hold a preliminary hearing or obtain an express waiver from him of his right to a preliminary hearing is a jurisdictional defect and renders his guilty plea void. In contrast, the State argues that the error is not jurisdictional and further contends that the error was forfeited by Mr. Smith when he pled guilty and failed to timely challenge his pleas.

¶ 11 The court of appeals agreed with Mr. Smith. To begin, it noted that "[c]laims relating to the validity of the [preliminary hearing] waiver itself are waivable" and further recognized that "even a constitutional defective waiver of a defendant's right to a preliminary hearing could invest the district court with *jurisdiction* if it resulted in a bindover." [10] But it distinguished Mr. Smith's case because "no wavier—valid or otherwise—was effected prior to the time the district court accepted and entered Smith's guilty plea, and thus Smith was never bound over at all." [11] Because the district court did not hold a preliminary hearing, and did not obtain an express waiver of the right to a preliminary hearing from Mr. Smith, the court of appeals reasoned that a district ***577** court never acquired the jurisdiction necessary to accept his guilty plea. [12]

[4] ¶ 12 We reverse the court of appeals' decision and conclude that a district court's exercise of jurisdiction does not hinge on whether it held a preliminary hearing, obtained an express waiver of the right to a preliminary hearing, or issued a bindover order. Two important points support this conclusion. First, during the last two decades the Legislature has merged the functions of district courts and the former circuit courts, thereby rendering obsolete the jurisdictional framework we discussed in *State v. Humphrey.* [13] And second, the jurisdictional statutes relevant here grant district courts broad subject matter jurisdiction over criminal matters, and nothing in either the Utah Constitution or Utah Code makes the exercise of that jurisdiction dependent on a defendant's right to preliminary hearing or the issuance of a bindover order. Because we reverse on this basis, we do not reach the State's alternative argument concerning a claimed express waiver by Mr. Smith.

I. Intervening Developments Between Our Decision in *State v. Humphrey* and This Case Render *Humphrey* Inapplicable Here

¶ 13 Mr. Smith's primary argument is that our decision in *State v. Humphrey* makes the issuance of a bindover order, after holding a preliminary hearing, a jurisdictional prerequisite to a district court's exercise of subject matter jurisdiction. We disagree. *Humphrey* was decided under a prior jurisdictional framework, and intervening large-scale structural changes

to Utah's district court system make *Humphrey*'s holding inapplicable to the present case.

¶ 14 Formerly, Utah's trial court system, outside of the juvenile court context, consisted of two tiers: circuit courts and district courts. In a criminal case, the prosecution typically filed an information in the circuit court. [14] Acting as a magistrate, the circuit court then held a preliminary hearing. [15] If the circuit court found that the government had met its burden, it would issue a bindover order and transfer the case to a district court. [16] The district court did not obtain jurisdiction until it received the information and other records transferred by the circuit court magistrate. [17]

¶ 15 In *Humphrey* we faced the issue of whether, following the creation of the Utah Court of Appeals, district courts still had jurisdiction to quash bindover orders. [18] We held that district courts did have such jurisdiction because they had "the obligation to determine whether [their] original jurisdiction ***578** [had] been properly invoked." [19] Because circuit courts have now been eliminated, *infra* ¶¶ 23–24, the central holding of *Humphrey* no longer applies. But Mr. Smith nonetheless argues for its application, relying heavily on a footnote from the opinion:

> Historically, a district court did not acquire jurisdiction until an information was filed with it, and this could not occur until after the magistrate's preliminary hearing and bindover. Although under the current statutory scheme a felony information (rather than a complaint) is first filed before a magistrate ... it is still true that the district court does not acquire jurisdiction until after a bindover order issues and the information and all other records are transferred to the district court. [20]

Mr. Smith argues that this footnote establishes the rule that a bindover order, issued after a preliminary hearing, is an essential prerequisite for a district court to exercise subject matter jurisdiction. Thus, he contends, even if a district court has subject matter jurisdiction to adjudicate a charge, that power never vests in the court until it holds a preliminary hearing and issues a bindover order.

¶ 16 The court of appeals agreed that a bindover order, following either a preliminary hearing or its waiver, is a procedural prerequisite and reasoned that "even where a court has subject matter jurisdiction over a particular type of case, it may be unable to exercise that jurisdiction where certain procedural prerequisites have not been met to invoke it." [21] The court likened the bindover order that follows a preliminary hearing to two procedural prerequisites required for appellate jurisdiction: (1) the final order doctrine, and (2) the notice of appeal requirement.

[5] ¶ 17 This reasoning is misplaced, however, because of intervening developments since our decision in *Humphrey.* Following our decision in that case the Legislature merged the circuit court into the district court. [22] The merger statute gives the district court jurisdiction over all matters previously filed in the circuit court. Specifically, the statute states that "[t]he district court shall have jurisdiction as provided by law for the district court and shall have jurisdiction over all matters filed in the court formerly denominated the circuit court." [23] In criminal cases, an information is now always filed directly with the district court. Because jurisdiction in criminal cases now vests originally with district courts, and because circuit courts have been abolished, our conclusion in *Humphrey* no longer applies. Accordingly, we reject Mr. Smith's argument that *Humphrey* applies to our current statutory scheme.

II. District Courts Have Broad Subject Matter Jurisdiction Over Criminal Cases and Neither the Utah Constitution nor the Utah Code Makes That Jurisdiction Contingent Upon a Preliminary Hearing, Its Waiver, or a Bindover Order

[6] **[7]** ¶ 18 Subject matter jurisdiction concerns a court's power to hear a case. "A court has subject matter jurisdiction if the case is one of the type of cases the court has been empowered to entertain by the constitution or statute from which the court derives its authority." [24] And neither the Utah Constitution nor the Utah Code makes a preliminary hearing, its waiver, or a bindover order an essential part of a district court's exercise of subject matter jurisdiction. Instead, a district court acquires subject matter jurisdiction over a case upon the filing of an information in the court.

***579** ¶ 19 Article I, section 13 of the Utah Constitution provides criminal defendants with the right to a preliminary hearing:

> Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after

> examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. [25]

But nothing in the section suggests that a district court does not have jurisdiction to hear a criminal case simply because a defendant's right to a preliminary hearing is violated.

[8] ¶ 20 Section 78A–5–102(1) of the Utah Code grants district courts broad subject matter jurisdiction over criminal cases. Specifically, the statute provides that district courts have "original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law." [26] In addition, section 78A–5–102(4) grants district courts "jurisdiction over all matters properly filed in the circuit court prior to July 1, 1996." These statutes grant district courts power to exercise subject matter jurisdiction over the full range of cases that would have been heard premerger by either a circuit court or district court. Additionally, nothing in these statutes suggests that district court jurisdiction is contingent upon a preliminary hearing, its waiver, or a bindover order.

¶ 21 Indeed, as the State points out, we impliedly recognized in *State v. Hernandez* that neither a preliminary hearing nor a bindover order is a jurisdictional prerequisite. [27] In *Hernandez,* we interpreted Article I, section 13 of the Utah Constitution to provide defendants charged with a class A misdemeanor the right to a preliminary hearing. [28] We limited our holding, however, by giving it only prospective application. [29] In doing so, we implicitly recognized that neither the lack of a preliminary hearing nor a failure to issue a bindover order can deprive a district court of subject matter jurisdiction because it is not within our power to overlook defects in subject matter jurisdiction. If the lack of a preliminary hearing and bindover order affected a district court's subject matter jurisdiction, then class A misdemeanor defendants who entered a guilty plea or were convicted before our decision in *Hernandez* could have properly challenged their convictions as void. Our decision in *Hernandez* therefore supports our conclusion that a district court's subject matter jurisdiction is not linked to whether a defendant's preliminary hearing right has been violated or whether a court has issued a bindover order.

¶ 22 Even though neither the Utah Constitution nor the Utah Code makes district court jurisdiction contingent on either a preliminary hearing or bindover order, Mr. Smith nonetheless argues that a preliminary hearing and bindover order are necessary because of the distinction between magisterial and judicial functions. But as discussed below, that distinction is irrelevant for purposes of jurisdiction. Instead, the event that vests a district court with subject matter jurisdiction is the filing of an information.

¶ 23 Before the circuit court and district court merged, circuit court judges acted as magistrates in conducting preliminary hearings. They were restricted in their activities and, in felony cases, could perform only magisterial duties. [30] After the circuit court issued a bindover order and transferred the case to the district court, the district court had jurisdiction to hold a trial.

[9] ¶ 24 At the time, district court judges could also perform magisterial functions similar ***580** to a circuit court judge. [31] But today, there are no circuit court judges. Only district court judges perform magisterial functions. [32] As we stated in *State v. Jaeger,* a district court judge may "[take] off his judicial hat and put on his magistrate's hat" depending on the function involved. [33] But that separation between functions does not mean that the district court loses jurisdiction when it moves between these different capacities. [34] Rather, subject matter jurisdiction vests with the district court upon the filing of an information. [35] Indeed, as we noted above, even before the Legislature merged the circuit and district courts, it was the filing of an information that triggered jurisdiction. But in the premerger regime district courts did not have jurisdiction "until after a bindover order issue[d] and the information and all other records [were] transferred to the district court." [36] Because an information is now always filed directly with the district court, the fact that a district court judge exercises both magisterial and district judge functions is irrelevant for purposes of subject matter jurisdiction.

[10] **[11]** ¶ 25 Here, even assuming the district court erred by neither holding a preliminary hearing nor issuing a bindover order, that error does not implicate subject matter jurisdiction because the court obtained subject matter jurisdiction upon the filing of the information. Mr. Smith

could have raised the error before entering his plea or sought to withdraw his plea before sentencing. By doing neither he forfeited those challenges. [37]

Conclusion

¶ 26 We conclude that the district court's failure to issue a bindover order following either a preliminary hearing or express waiver by Mr. Smith of his right to a preliminary hearing did not divest the court of subject matter jurisdiction. Following the merger of the circuit courts and district courts, district courts have the full scope of subject matter jurisdiction once an information is filed in a criminal case. We therefore reverse the court of appeals and affirm the district court's order entering Mr. Smith's guilty plea and sentence.

All Citations

344 P.3d 573, 768 Utah Adv. Rep. 8, 2014 UT 33

Footnotes

1 Today we have also issued an opinion in a companion case that raises this same issue. *See State v. Young,* 2014 UT 34.

2 *State v. Smith,* 2013 UT App 52, ¶ 11, 306 P.3d 810.

3 *State v. Smith,* 2013 UT App 52, ¶ 7, 306 P.3d 810.

4 *Id.*

5 *Manning v. State,* 2005 UT 61, ¶ 10, 122 P.3d 628.

6 *Westgate Resorts, Ltd. v. Consumer Prot. Grp., LLC,* 2012 UT 56, ¶ 9, 289 P.3d 420 (internal quotation marks omitted).

7 While throughout this opinion we refer to a criminal defendant's right to a preliminary hearing, UTAH R. CRIM. P. 7(h)(1), we recognize that a defendant may choose to waive that right. *Id.* Any reference we make in this opinion to the defendant's right to a preliminary hearing includes the defendant's ability to waive that right.

8 UTAH CODE § 77–13–6(2)(b) ("A request to withdraw a plea of guilty or no contest, except for a plea held in abeyance, shall be made by motion *before sentence is announced.*" (emphasis added)); *State v. Ott,* 2010 UT 1, ¶ 18, 247 P.3d 344 ("We have previously held that failure to withdraw a guilty plea within the time frame dictated by section 77–13–6 deprives the trial court and appellate courts of jurisdiction to review the validity of the plea."); *State v. Rhinehart,* 2007 UT 61, ¶ 17, 167 P.3d 1046 (explaining that a defendant "cannot achieve through a challenge to the bindover what [the defendant] was foreclosed from doing by section 77–13–6–assail the lawfulness of [the defendant's] plea").

9 *See, e.g., Brown v. Div. of Water Rights of Dep't of Natural Res.,* 2010 UT 14, ¶ 13, 228 P.3d 747 ("Jurisdictional challenges ... raise fundamental questions regarding a court's basic authority over the dispute. And a challenge to the subject matter jurisdiction of the court is unique among jurisdictional challenges in that it ... can be raised at any time, including for the first time on appeal."); *Rhinehart,* 2007 UT 61, ¶ 15, 167 P.3d 1046 ("Except in those instances in which errors affect the court's jurisdiction or where claims of error are expressly preserved for appeal, a conviction or guilty plea acts as a waiver of earlier procedural flaws.").

10 *State v. Smith,* 2013 UT App 52, ¶ 10 n. 3, 306 P.3d 810.

11 *Id.*

12 *Id.* ¶ 11.

13 823 P.2d 464 (Utah 1991).

14 *See State v. Schreuder,* 712 P.2d 264, 268 (Utah 1985) (noting that "while the statute [governing proceedings before magistrates] implies that magistrates will ordinarily sit in courts other than the district

court, it does not contain any jurisdictional limitations" and "circuit court judges do not have exclusive jurisdiction to conduct preliminary examinations"); *see also* *Humphrey,* 823 P.2d 464, 466 n. 5 (Utah 1991) (characterizing the facts of *Schreuder* as "[a]typical [ ]" because the defendant's preliminary hearing was conducted by a district court judge).

15 UTAH CODE § 78–4–5(1)(a) (Supp.1991) ("The judge of the circuit court has the authority and jurisdiction of a magistrate including the conducting of proceedings for the preliminary examination ... of persons charged with criminal offenses.").

16 *See* *Humphrey* 823 P.2d at 465 ("A magistrate issues a bindover order after a preliminary hearing upon finding that there is probable cause to believe the defendant has committed the crime charged in the information. By the bindover order, the magistrate requires the defendant to answer [the information] in the district court. The information is then transferred to the district court, permitting that court to take original jurisdiction of the matter." (alteration in original) (internal quotation marks omitted)).

17 *Id.* at 465 n. 2; *see also* *State v. Ortega,* 751 P.2d 1138, 1139 (Utah 1988) ("[W]e have consistently held that a criminal defendant cannot lawfully be tried for and convicted of a crime for which he or she was not given, or for which he or she did not waive, a preliminary hearing."); *State v. Jensen,* 103 Utah 478, 136 P.2d 949, 955 (1943) (reversing a defendant's conviction where she "was not given a preliminary hearing for the offense of which she was convicted").

18 *Humphrey* 823 P.2d at 465.

19 *Id.* at 466.

20 *Id.* at 465 n. 2 (citations omitted).

21 *State v. Smith,* 2013 UT App 52, ¶ 9, 306 P.3d 810.

22 UTAH CODE § 78A–1–105(1) ("Effective July 1, 1996, the circuit court shall be merged into the district court."); *id.* § 78A–1–105(2) ("The district court shall continue the judicial offices, judges, staff, cases, authority, duties, and all other attributes of the court formerly denominated the circuit court.").

23 *Id.* § 78A–1–105(1).

24 *Myers v. State,* 2004 UT 31, ¶ 16, 94 P.3d 211 (internal quotation marks omitted).

25 UTAH CONST. art. I, § 13.

26 UTAH CODE § 78A–5–102(1).

27 2011 UT 70, 268 P.3d 822.

28 *Id.* ¶ 29.

29 *Id.* ¶ 29 n. 3.

30 *See* UTAH CODE § 78–4–5(1)(a) (Supp.1991) (limiting circuit court jurisdiction to "impose ... punishments" to "all classes of misdemeanors and infractions involving persons 18 years of age and older," but also providing that "[t]he judge of the circuit court has the authority and jurisdiction of a magistrate including the conducting of proceedings for the preliminary examination ... of persons charged with criminal offenses").

31 *See* *State v. Schreuder,* 712 P.2d 264, 268 (Utah 1985) (noting that "while the statute [governing proceedings before magistrates] implies that magistrates will ordinarily sit in courts other than the district court, it does not contain any jurisdictional limitations" and "circuit court judges do not have exclusive jurisdiction to conduct preliminary examinations").

32 We note, however, that in some circumstances justice court judges function as magistrates. *See* UTAH CODE § 78A–2–220(2).

33 886 P.2d 53, 54 n. 2 (Utah 1994).

34 A majority of the states that allow for prosecution by information similarly hold that a court's failure to conduct a preliminary hearing and issue a bindover order is not a jurisdictional defect. *See* E.W.H. Annotation,

Defendant's Plea to Indictment or Information as Waiver of Lack of Preliminary Examination, 116 A.L.R. 550 (1938) ("It has also been held that by pleading guilty a defendant waives his right to a preliminary examination, thereby precluding his making a subsequent claim that he had no such examination."); 21 AM.JUR.2D*Criminal Law* § 527 (2008) ("An accused can waive defects in a preliminary examination proceeding, as well as the holding of the proceeding at all."); 22 C.J.S. *Criminal Law* § 456 (2006) ("Failure to accord the accused a preliminary examination, as provided by law, only goes to the regularity of the proceedings, and it does not vitiate subsequent proceedings such as the indictment, the trial, or conviction." (footnotes omitted)). *But see* WAYNE R. LAFAVE ET AL., 4 CRIM. PROC. § 14.2(g) (3d ed.2007) ("[S]ome states hold that the preliminary hearing is a jurisdictional prerequisite. In these states, a conviction will be overturned, without regard to any showing of trial prejudice, if the appellate court determines that the right to a hearing was denied.").

35 UTAH R.CRIM. P. 5(a) ("Unless otherwise provided, all criminal prosecutions whether for felony, misdemeanor or infraction shall be commenced by the filing of an information or the return of an indictment. Prosecution by information shall be commenced before a magistrate having jurisdiction of the offense alleged to have been committed unless otherwise provided by law.").

36 *State v. Humphrey,* 823 P.2d 464, 465 n. 2 (Utah 1991).

37 UTAH CODE § 77–13–6(2)(b) ("A request to withdraw a plea of guilty or no contest, except for a plea held in abeyance, shall be made by motion before sentence is announced.").

Tab 3

Rule 8. Appointment of counsel.

(a) **Right to counsel.**

(1) A defendant charged with a ~~public~~ criminal offense has the right to counsel when a possible penalty of conviction includes physical detention. ~~self-representation the penalty for which includes the possibility of incarceration, regardless of whether actually imposed, has the right to counsel, and if~~

(2) An indigent~~,~~ defendant charged with a criminal offense has the right to court-appointed counsel when a possible penalty of conviction includes physical detention ~~if the defendant faces any possibility of the deprivation of liberty~~.

(b) **Waiver of counsel.** A defendant has the right to self-representation if the right to counsel is ~~properly~~ waived.

(1) Prior to accepting a waiver of the right to counsel, the court ~~must: (1) E~~ will engage in a colloquy with the defendant to ensure that such waiver is knowing, intelligent, and voluntary. ~~During t~~The colloquy~~, the court~~ must:

(A) ~~make~~ inform the defendant ~~aware~~ of the dangers, disadvantages, and consequences of self-representation, including the applicability of legal defenses which may be available; ~~. The court must also~~

(B) discuss the defendant's specific understanding:

(i) of the nature of charges and the range of potential penalties; and

(ii) that the case is subject to the Rules of Criminal Procedure, and the Rules of Evidence.

(C) ~~D~~determine whether the defendant is indigent ~~under~~pursuant to Utah Code section 78B-22-202.

(i) If the defendant is determined to be indigent, the court:

1. will ~~shall~~ offer the defendant the opportunity for appointed counsel. ~~and~~
2. may appoint counsel for the limited purpose of advising and consulting with the defendant regarding the waiver of counsel.

(2) ~~Additionally, t~~The court may enquire as to the defendant's literacy, educational background, and legal training to assess the defendant's understanding of the consequences of waiver.

(~~b~~c) **Capital case qualifications.** In all cases in which counsel is appointed to represent an indigent defendant who is charged with an offense for which the punishment may be death, the court will~~shall~~ appoint two or more attorneys to represent such defendant and ~~shall~~ make a finding on the record based on the requirements set forth below that appointed counsel is competent in the trial of capital cases. In making its determination, the court will~~shall~~ ensure that the experience of counsel who are under consideration for appointment have met the following minimum requirements:

(~~b~~c)(1) at least one of the appointed attorneys must have tried to verdict six felony cases within the past four years or twenty-five felony cases total;

Commented [GH1]: I suggest using physical detention instead of incarceration because it is more descriptive of the critical liberty being deprived that results in the right. In other words, should home detention and other forms of physical restrictions on the right to free movement trigger the right to counsel? If so, is "physical detention" or "incarceration" a better choice, or is there an even more descriptive term that should be used?

Commented [GH2]: This edit makes the rule more definitive. It also creates a foundation for providing additional direction on the right to court-appointed counsel, should the need arise, without needing to alter the basic right to counsel.

Commented [GH3]: "properly" isn't necessary because waiver doesn't occur unless the procedure is done properly. It is better to define the procedure necessary to accomplish waiver then to include a non-determinative term like properly or effectively.

Commented [RP4]: I know this language follows verbatim the *Frampton* opinion, but I can foresee some grappling and argument that the defendant wasn't "made aware" despite the court informing him/her of the dangers of self-representation. I think changing it to "inform" makes it clear exactly what the court must do.

Commented [RP5]: Should this be "inquire" or "enquire"?

Commented [RP6]: What is the purpose of this inquiry? Can the judge deny the Defendant's right to self-representation if they are not literate or educated?

(~~b~~c)(2) at least one of the appointed attorneys must have appeared as counsel or co-counsel in a capital or a felony homicide case which was tried to a jury and which went to final verdict;

(~~b~~c)(3) at least one of the appointed attorneys must have completed or taught within the past five years an approved continuing legal education course or courses at least eight hours of which deal, in substantial part, with the trial of death penalty cases; and

(~~b~~c)(4) the experience of one of the appointed attorneys must total not less than five years in the active practice of law.

(~~c~~d) **Capital case appointment considerations.** In making its selection of attorneys for a appointment in a capital case, the court should also consider at least the following factors:

(~~c~~d)(1) whether one or more of the attorneys under consideration have previously appeared as counsel or co-counsel in a capital case;

(~~c~~d)(2) the extent to which the attorneys under consideration have sufficient time and support and can dedicate those resources to the representation of the defendant in the capital case now pending before the court with undivided loyalty to the defendant;

(~~c~~d)(3) the extent to which the attorneys under consideration have engaged in the active practice of criminal law in the past five years;

(~~c~~d)(4) the diligence, competency, the total workload, and ability of the attorneys being considered; and

(~~c~~d)(5) any other factor which may be relevant to a determination that counsel to be appointed will fairly, efficiently and effectively provide representation to the defendant.

(~~d~~c) **Capital case appeals.** In all cases where an indigent defendant is sentenced to death, the court will~~shall~~ appoint one or more attorneys to represent such defendant on appeal and ~~shall~~ make a finding that counsel is competent in the appeal of capital cases. To be found competent to represent on appeal persons sentenced to death, the combined experience of the appointed attorneys must meet the following requirements:

(~~d~~c)(1) at least one attorney must have served as counsel in at least three felony appeals; and

(~~d~~c)(2) at least one attorney must have attended and completed within the past five years an approved continuing legal education course which deals, in substantial part, with the trial or appeal of death penalty cases.

(~~e~~f) **Post-conviction cases.** In all cases in which counsel is appointed to represent an indigent petitioner pursuant to Utah Code § 78B-9-202(2)(a), the court will~~shall~~ appoint one or more attorneys to represent such petitioner at post-conviction trial and on post-conviction appeal and

~~shall~~ make a finding that counsel is qualified to represent persons sentenced to death in post-conviction cases. To be found qualified, the combined experience of the appointed attorneys must meet the following requirements:

(~~e~~f)(1) at least one of the appointed attorneys must have served as counsel in at least three felony or post-conviction appeals;

(~~e~~f)(2) at least one of the appointed attorneys must have appeared as counsel or co-counsel in a post-conviction case at the evidentiary hearing, on appeal, or otherwise demonstrated proficiency in the area of post-conviction litigation;

(~~e~~f)(3) at least one of the appointed attorneys must have attended and completed or taught within the past five years an approved continuing legal education course which dealt, in substantial part, with the trial and appeal of death penalty cases or with the prosecution or defense of post-conviction proceedings in death penalty cases;

(~~e~~f)(4) at least one of the appointed attorneys must have tried to judgment or verdict three civil jury or felony cases within the past four years or ten cases total; and

(~~e~~f)(5) the experience of at least one of the appointed attorneys must total not less than five years in the active practice of law.

(~~f~~g) **Appointing from appellate roster.** When appointing counsel for an indigent defendant on appeal from a court of record, the court must select an attorney from the appellate roster maintained by the Board of Appellate Judges under rule 11-401 of the Utah Rules of Judicial Administration, subject to any exemptions established by that rule.

(~~g~~h) **Noncompliance.** Mere noncompliance with this rule or failure to follow the guidelines set forth in this rule ~~shall~~is not of itself be grounds for establishing that appointed counsel ineffectively represented the defendant at trial or on appeal.

(~~h~~i)(1) Cost and attorneys' fees for appointed counsel ~~shall~~will be paid as described in Chapter 22 of Title 78B.

(~~h~~i)(2) Costs and attorneys fees for post-conviction counsel ~~shall~~will be paid pursuant to Utah Code § 78B-9-202(2)(a).

Tab 4

Public Comments on proposed URCrP 11 changes

1. This is a much needed and beneficial change. My comment is simply to express my full support for this proposal. - **Niel H Lund**
2. I agree wholeheartedly with this proposed change. While our judges rarely deviate from a stipulated resolution, both parties should have the right to withdraw from an agreement when that agreement is not being accepted in full by the Court. Especially when dealing with misdemeanor offenses, which lack any equivalence to a presentence investigation, a judge will typically not have the information known to the parties for what resolution is in the best interests of the parties, the victim, and even society generally. If the judge deviates from the stated terms of the agreement, both parties should have the ability to weigh the benefits/disadvantages of accepting the altered resolution or rejecting it. - **Randall McUne**
3. I support this change. It's hard to negotiate a plea deal that all parties, including victims, can live with, only to have the judge deviate from the intended outcome. While judges' discretion is an important part of this process, when judges deviate from carefully negotiated plea deals, often times it is the victims of crimes that come out worse for it. Prosecutors should be able to withdraw from a plea agreement when the judge decides that the final disposition will not conform to the plea agreement to which the Court had previously approved. This is a needed change to the rule. - **Ivy Telles**
4. I support this change. It is important that both parties be afforded the same opportunity to withdraw if the Judge intends not to follow the negotiated settlement. The State is generally best positioned to know the victim's wishes, and also must weigh considerations of justice and community safety before making an offer. If the court intends to give the defense a "better deal" so to speak, then the State should absolutely be allowed to withdraw from the bargain and present the entirety of its case to the Court. It does not make sense to treat the parties differently in this respect. - **Jenica Maxwell**

5. I support this change. While our Judges almost always execute the agreed upon terms, there have been times when a Judge has deviated from the agreement and I am left wondering what exactly the deviation is based on, especially in misdemeanor cases, as touched on in Randall McUne's comment. I have also had Judges say, "I am not onboard with this agreement" and an in chambers conversation ensued where the Judge expressed their concerns and counsel explained the basis for the proposed agreement. The latter requires a Judge who understands, while they have the power to execute any sentence within the law, sometimes justice demands they understand the specifics of the case. This change provides a mechanism which could compel that thoughtful exchange, which should lead to a better outcome. - **Robert Cosson**
6. Negotiated plea resolutions involve the agreement of both parties, however the current rule provides a loophole which places defendants in a superior position if the court does not accept that negotiated resolution. This is a restoration of fairness and transparency in plea bargaining. - **Joshua Brotherton**