Utah Supreme Court
Rules of Criminal Procedure Committee

Meeting Agenda

Doug Thomspon, Chair

Location: WebEx Meeting: https://utcourts.webex.com/meet/brysonk

Date: January 17, 2023

Time: 12:00 p.m. – 2:00 p.m. MST

Action: Welcome and approve November `15th, 2022 Minutes	Tab 1	Doug Thompson
Discussion: Rule 21 – Inconsistent Verdicts	Tab 2	William Carlson
Discussion: Review of Rule 8 Public Comments	Tab 3	Doug Thompson
Discussion: Update from Probation Consolidation Sub-committee		Ryan Peters
Discussion: Rule 2 – Time	Tab 4	Doug Thompson
Discussion: Legislative Action on URCrP Rules 7B, 14, and 16	Tab 5	Doug Thompson
Discussion: Proposal for Rule 16	Tab 6	Josh Esplin
Discussion: Upcoming Rules	N/A	N/A

https://www.utcourts.gov/rules/urcrp.php

Meeting Schedule:
March 21, 2023 (potentially in person)
May `16, 2023
July 18, 2023
September 19, 2023
November 21, 2023

Rule Status:

Tab 1

Present	Not Present
Douglas Thompson	Meredith Mannebach
Bryson King	Matthew Tokson
William Carlson	Judge Kelly – Schaefer
Judge Denise Porter	Atty Craig Johnson
David Ferguson	Janet Reese
Amber Stargell	
Judge Hruby-Mills	
Lori Seppi	
Ryan Peters – logged of at 12:55	
Ryan Stack	

Action: Welcome and approval of July 19 and September 20, 2022 minutes. Will moves to approve both meeting minutes. David Ferguson seconds Will motion. No objections. Minutes are approved.

Future Meetings

In a recent poll, most committee members voted in favor of an "in-person and virtual" mix approach to meetings. David suggests that the committee holds three in-person meetings and three virtual meetings in 2023. Conversation ensues about the courthouse parking garage construction. The parking lot construction may make it difficult to for members to park. Bryson is unsure if construction will be completed by the January meeting. Doug proposes a virtual meeting in January, and in-person meeting in March. No objections.

Rule 21 – Inconsistent Verdicts

Will leads the conversation on inconsistent verdicts. Legally impossible verdicts need to be reverse. The subcommittee made technical changes on lines 11 and 13. The changes to Line 39 is specifically to the section title/label as "Acquittal." Will states that the committee agreed that this section is truly about "custody."

Will discusses why the subcommittee made the most substantive changes to section (h) of Rule 21. According to Will, the language in the proposed section is broader than the language in the Terry case. Will states that the broader language is to reach beyond "compound verdicts". Doug also adds that the principal in *Terry* is the same in the rule. However, there are several ways an impossible verdicts could arise.

Ryan Peters asks why would the judge consider jury instructions? Doug states that the elements of the crime are defined in the jury instructions and the jury is instructed to base their verdict on the language used in the jury instructions.

Ryan Stack asks if the ruling can be appealed? Doug says that an inconsistent verdict ruling is technically a verdict, but it could be subject to appeal because it is a motion from the court. Doug adds that the Supreme Court has not made a ruling on this matter. Discussion ensues. Ryan

suggests that it might be better to put this proposed language in Rule 23, with the motion to arrest judgment. Doug suggests the subcommittee discuss this matter further at the next subcommittee meeting. No objection. The committee holds the voting on Rule 21 for additional discussions.

Rule 18 – Voir Dire

David states that the new voir dire proposal is on hold. David suggests we have a joint committee with the Civil Rules of Procedure Committee. However, the Civil Rules of Procedure Committee is still in the process of forming a committee. Doug suggests placing this matter on hold until there is further movement from the Civil Rules of Procedure Committee. No objection.

Rule 14(b) and Evidence Rule 506

The Evidence Rules Committee met in October. The committee sent the proposed language to the Supreme Court in August. The Court sent notes back to the subcommittee. The Evidence Rules Committee decided to hold on the Rule 506 changes until after the Appellate Rules Committee makes additional decisions related to how the sealed records are handled on appeal. Doug suggests the Criminal Rules of Procedure Committee should hold any changes to Rule 14(b) until there is further movement on Rule 506. No objection.

Green-phase Taskforce and Rule 17.5

Bryson states that the Judicial Council has decided to give the trial level courts discretion to determine whether hearings will continue in person or virtual. Bryson states that the Judicial Council will provide a suggested template for Rule 17.5.

Rule 8

The Committee sent Rule 8 out for public comment. We received one comment from Judge Laycock. Doug proposes that Judge Laycock attends the next subcommittee meeting to address her concerns about the language regarding legal defenses. Judge Porter understands Judge Laycock concerns, but she reads the language differently. Judge Porter believes that the rule is clear regarding the instruction. Doug suggests the Rule 8 subcommittee meet on a later date to discuss this matter further. No objection.

Rule 12.5

The Committee sent Rule 12.5 for public comment. We received one public comment. It was a positive comment. Doug proposes we submit a memo to the Court stating that we received one positive comment. No objection.

Rule 42

The Committee sent Rule 42 for public comment. We received three comments from two commenters. The first commenter submitted two comments – the second comment essentially corrected their misunderstanding in the first comment. The second commenter expressed concern that the BCI does not receive the final letters of expungement. Doug does not see how we can

change the rule to specifically address the commenters concerns. Doug proposes we send a memo to the court describing the comments we received. No objections.

Update on from the Probation Consolidation Subcommittee

Ryan Peters is the head of this committee. Ryan logged off at 12:55. We will discuss this matter at the next meeting.

Rule 2 – Juneteenth and Computing Court Time

The State of Utah does not recognize Juneteenth the same way as the Federal Government. The Federal Government celebrates Juneteenth on June 19. Utah celebrates Juneteenth the preceding Monday if the holiday falls on a Tuesday through Sunday. The new proposal provides two options. One is to add a website link in Rule 2 with a list of the "legal holidays." The alternative would include listing Juneteenth within the rule with a caption that states "date as statutorily recognized to celebrate Juneteenth." We do not have a full committee to vote on any amendments on the rule today. Amber and Doug discuss concerns about website accessibility and ability to update the website. Will Carlson states that either using the same language the statute does or just referencing the "date statutorily recognized to celebrate Juneteenth" would work. Doug agrees.

David Ferguson makes the motion to adopt changes to Rule 2. The redline for Rule 2 will be submitted via email.

Tab 2

(a)~~(1)~~ **Verdict options**.

(1) ~~For crimes committed on or after May 6, 2002, t~~The verdict of the jury shall be either "guilty" or "not guilty," "not guilty by reason of insanity," "guilty and mentally ill at the time of the offense," or "not guilty of the crime charged but guilty of a lesser included offense," or "not guilty of the crime charged but guilty of a lesser included offense and mentally ill at the time of the offense," provided that when the defense of mental illness has been asserted and the defendant is acquitted on the ground that the defendant was insane at the time of the commission of the offense charged, the verdict shall be "not guilty by reason of insanity."

~~(a)~~(2) For crimes committed before May 6, 2002, the defendant may also elect to proceed under subsection (a)(1) or under (a)(3).

~~(a)~~(3) For crimes committed before May 6, 2002, unless the defendant elects to proceed under subsection (a)(1), the verdict of the jury shall be either "guilty," "not guilty," "not guilty by reason of insanity," "guilty and mentally ill," "not guilty of the crime charged but guilty of a lesser included offense," or "not guilty of the crime charged but guilty of a lesser included offense and mentally ill" provided that when the defense of mental illness has been asserted and the defendant is acquitted on the ground that the defendant was insane at the time of the commission of the offense charged, the verdict shall be "not guilty by reason of insanity."

(b) **Unanimity.** The verdict shall be unanimous. It shall be returned by the jury to the judge in open court and in the presence of the defendant and counsel. If the defendant is voluntarily absent, the verdict may be received in the defendant's absence.

(c) **Multiple defendants.** If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to any defendant as to whom it has agreed. If the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(d) **Multiple offenses.** When the defendant may be convicted of more than one offense charged, each offense of which the defendant is convicted shall be stated separately in the verdict.

(e) **Offenses included in charged offense.** The jury may return a verdict of guilty to the offense charged or to any offense necessarily included in the offense charged or an attempt to commit either the offense charged or an offense necessarily included therein.

(f) **Polling the jury.** When a verdict is returned and before it is recorded, the jury shall be polled at the request of any party or may be polled at the court's own instance. If, upon the poll, there is no unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged. If the verdict is unanimous, it shall be recorded.

(g) ~~**Acquittal.**~~ **Custody.** If judgment of acquittal is given on a verdict or the case is dismissed and the defendant is not detained for any other legal cause, the defendant shall be discharged as soon as the judgment is given. If a verdict of guilty is returned, the court

may order the defendant to be taken into custody to await judgment on the verdict or may permit the defendant to remain on bail.

(h) **Legally impossible verdicts.** The court must, sua sponte or upon the motion of any party, enter an acquittal for a legally impossible guilty verdict. Legally impossible verdicts occur when a not-guilty finding on one count necessarily negates an element required for conviction on another count. If the court determines that a defendant is acquitted of an offense that is an essential element of a guilty verdict in another count, the guilty verdict is legally impossible. The court shall consider the elements of the crimes, the verdicts, the evidence introduced, and jury instructions, if any, when making this determination.

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may order the defendant to be taken into custody to await judgment on the verdict or may permit the defendant to remain on bail.

(h) **Inconsistent verdicts.** The court must, upon its own motion or upon the motion of any party, enter an acquittal for a legally impossible guilty verdict.

(1) Legally impossible verdicts include conviction for a compound offense and acquittal for a predicate offense. A compound offense is an offense composed of one or more separate offenses. A predicate offense is a crime that is composed of some, but not all, of the elements of the compound offense and that is necessarily committed in carrying out the compound offense. After considering the elements of the crimes, the jury verdicts, and the jury instructions, if the court finds that the conviction for the compound offense is impossible in the face of an acquittal for a predicate offense the verdict is impossible and must be vacated.

Tab 3

UTAH COURT RULES – PUBLISHED FOR COMMENT

The Supreme Court and Judicial Council invite comments about amending these rules. To view the proposed amendment, click on the rule number.

To submit a comment or view the comments of others, click on "Continue Reading." To submit a comment, scroll down to the "Leave a Reply" section, and type your comment in the "Comment" field. Type your name and email address in the designated fields and click "Post Comment."

Comments cannot be acknowledged, but all will be considered. Comments are saved to a buffer for review before publication.

Posted: July 14, 2022

Utah Courts

Rules of Criminal Procedure – Comment Period Closed August 28, 2022

URCrP008. Appointment of counsel. (AMEND). The language of this rule has been amended to clarify when the right to counsel applies to defendants charged with a criminal offense. The rule also includes a new subsection to explain the right to self-representation and how a defendant may waive the right to counsel. The colloquy courts should engage with defendants seeking to waive the right is provided in this addition. Finally, the rule clarifies the prerequisite qualifications for attorneys appointed to represent defendants charged in capital cases.

This entry was posted in -Rules of Criminal Procedure, URCrP008.

« Code of Judicial Administration – Comment Period Closed September 2, 2022

Rules of Criminal Procedure – Comment Period Closed August 28, 2022 »

To view all comments submitted during a particular comment period, click on the comment deadline date. To view all comments to an amendment, click on the rule number.

CATEGORIES

- -Alternate Dispute Resolution
- -Code of Judicial Administration
- -Code of Judicial Conduct
- -Fourth District Court Local Rules
- -Licensed Paralegal Practitioners Rules of Professional Conduct
- -Rules Governing Licensed Paralegal Practitioner
- -Rules Governing the State Bar

UTAH COURTS

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One thought on "Rules of Criminal Procedure – Comment Period Closed August 28, 2022"

Claudia Laycock
July 14, 2022 at 5:30 pm

(b)(1)(A) "Prior to accepting a waiver of the right to counsel, the court will engage in a colloquy with the defendant to ensure that such waiver is knowing, intelligent, and voluntary. The colloquy must inform the defendant of the dangers, disadvantages, and consequences of self-representation, including the applicability of legal defenses which may be available."

The last phrase of this subsection is of great concern. What does "including the applicability of legal defenses which may be available" mean? Won't this require the court to give legal advice about possible defenses to a defendant? How would a judge have enough knowledge about a case to give such advice to a defendant, anyway, unless a preliminary hearing had already occurred? Even then, that takes us back to my question about legal advice. How can the court warn the defendant about the risks of self-representation–including the fact that the court cannot help the defendant with his/her case–and then immediately offer advice regarding the applicability of legal defenses which may be available? This phrase is a call for legal advice from the bench.

- -Rules of Appellate Procedure
- -Rules of Civil Procedure
- -Rules of Criminal Procedure
- -Rules of Evidence
- -Rules of Juvenile Procedure
- -Rules of Professional Conduct
- -Rules of Professional Practice
- -Rules of Small Claims Procedure
- ADR101
- ADR103
- Appendix B
- Appendix F
- CJA Appendix F
- CJA01-0201
- CJA01-0204
- CJA01-0205
- CJA01-0205
- CJA01-0302
- CJA01-0303
- CJA01-0304
- CJA01-0305
- CJA010-01-0404
- CJA010-1-020
- CJA02-0101
- CJA02-0103
- CJA02-0104
- CJA02-0106.01
- CJA02-0106.02
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Tab 4

Rule 2. Time.

(a) **Computing time.** The following rules apply in computing any time period specified in these rules, any local rule or court order, or in any statute that does not specify a method of computing time.

~~(a)~~(1) When the period is stated in days or a longer unit of time:

~~(a)(1)~~(A) exclude the day of the event that triggers the period;

~~(a)(1)~~(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

~~(a)(1)~~(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

~~(a)~~(2) When the period is stated in hours:

~~(a)(2)~~(A) begin counting immediately on the occurrence of the event that triggers the period; and

~~(a)(2)~~(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays.

~~(a)~~(3) Unless the court orders otherwise, if the clerk's office is inaccessible:

~~(a)(3)~~(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday or legal holiday; or

~~(a)(3)~~(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

~~(a)~~(4) Unless a different time is set by a statute or court order, filing on the last day means:

~~(a)(4)~~(A) for electronic filing, at midnight; and

~~(a)(4)~~(B) for filing by other means, the filing must be made before the clerk's office is scheduled to close.

~~(a)~~(5) The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

~~(a)~~(6) "Legal holiday" ~~means the day for observing:~~ is any holiday that is recognized and observed by the State of Utah, as specified here: https://www.utcourts.gov/en/about/miscellaneous/law-library/holidays.html.

~~(a)(6)(A) New Year's Day;~~

~~(a)(6)(B) Dr. Martin Luther King, Jr. Day;~~

~~(a)(6)(C) Washington and Lincoln Day;~~

~~(a)(6)(D) Memorial Day;~~

~~(a)(6)(E) Independence Day;~~

~~(a)(6)(F) Pioneer Day;~~

~~(a)(6)(G) Labor Day;~~

~~(a)(6)(H) Columbus Day;~~

~~(a)(6)(I) Veterans' Day;~~

~~(a)(6)(J) Thanksgiving Day;~~

~~(a)(6)(K) Christmas; and~~

~~(a)(6)(L) and any designated by the Governor or Legislature as a state holiday.~~

(b) **Extending time.**

~~(b)~~(1) When an act may or must be done within a specified time, the court may, for good cause, extend the time:

~~(b)(1)~~(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

~~(b)(1)~~(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

~~(b)~~(2) A court must not extend the time for taking any action under the rules applying to a judgment of acquittal, new trial, arrest of judgment and appeal, unless otherwise provided in these rules.

(c) **Additional time after service by mail.** When a party may or must act within a specified time after service and service is made by mail, three days are added after the period would otherwise expire under paragraph (a).

Tab 5

LEGISLATIVE GENERAL COUNSEL
₵ Approved for Filing: J. Carlton ₵
₵ 01-09-23 11:23 AM ₵

S.J.R. 6

JOINT RESOLUTION AMENDING RULES OF PROCEDURE AND EVIDENCE REGARDING CRIMINAL PROSECUTIONS

2023 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Todd D. Weiler

House Sponsor: _____

LONG TITLE

General Description:

This joint resolution amends court rules of procedure and evidence regarding criminal prosecutions.

Highlighted Provisions:

This joint resolution:

- amends Rule 7B of the Utah Rules of Criminal Procedure to address the use of reliable hearsay and the admission of evidence in preliminary hearings;
- amends Rule 14 of the Utah Rules of Criminal Procedure to address a defendant's right to a discovery deposition in a criminal prosecution;
- amends Rule 16 of the Utah Rules of Criminal Procedure to allow for depositions for the purpose of discovery in a criminal prosecution;
- amends Rule 22 of the Utah Rules of Juvenile Procedure to address the use of reliable hearsay in preliminary hearings;
- amends Rule 1102 of the Utah Rules of Evidence to address the admission of reliable hearsay statements in preliminary hearings; and
- makes technical and conforming changes.

Special Clauses:

This resolution provides a special effective date.

Utah Rules of Criminal Procedure Affected:

S.J.R. 6

AMENDS:

Rule 7B, Utah Rules of Criminal Procedure

Rule 14, Utah Rules of Criminal Procedure

Rule 16, Utah Rules of Criminal Procedure

Utah Rules of Juvenile Procedure Affected:

AMENDS:

Rule 22, Utah Rules of Juvenile Procedure

Utah Rules of Evidence Affected:

AMENDS:

Rule 1102, Utah Rules of Evidence

Be it resolved by the Legislature of the state of Utah, two-thirds of all members elected to each of the two houses voting in favor thereof:

As provided in Utah Constitution Article VIII, Section 4, the Legislature may amend rules of procedure and evidence adopted by the Utah Supreme Court upon a two-thirds vote of all members of both houses of the Legislature:

Section 1. **Rule 7B**, Utah Rules of Criminal Procedure is amended to read:

Rule 7B. Preliminary examinations.

(a) **Burden of proof.** At the preliminary examination, the state has the burden of proof and proceeds first with its case. At the conclusion of the state's case, the defendant may testify under oath, call witnesses, and present evidence. The defendant may also cross-examine adverse witnesses.

(b) **Probable cause determination.** If from the evidence the magistrate finds probable cause to believe that the crime charged has been committed and that the defendant has committed it, the magistrate must order that the defendant be bound over for trial. The findings of probable cause may [~~be based on hearsay, in whole or in part~~] not be based solely on hearsay evidence. Objections to evidence on the ground that it was acquired by unlawful means are not properly raised at the preliminary examination.

(c) **If no probable cause.** If the magistrate does not find probable cause to believe the crime charged has been committed or the defendant committed it, the magistrate must dismiss the information and discharge the defendant. The magistrate may enter findings of fact,

conclusions of law, and an order of dismissal. The dismissal and discharge do not preclude the state from instituting a subsequent prosecution for the same offense.

(d) **Probable cause evidence**. A prosecutor must disclose any evidence that the prosecutor intends to use at the preliminary examination to establish probable cause, and all communications described in Utah Code section 77-7a-202, to the defendant at least 48 hours before the day on which the preliminary examination is held.

[~~(d)~~] (e) **Witnesses.** At a preliminary examination, the magistrate, upon request of either party, may exclude witnesses from the courtroom and may require witnesses not to converse with each other until the preliminary examination is concluded.

[~~(e)~~] (f) **Written findings.** If the magistrate orders the defendant bound over for trial, the magistrate must execute a bind-over order and include any written findings in the case record.

[~~(f)~~] (g) **Assignment on motion to quash.** If a defendant files a motion to quash a bind-over order, the motion shall be decided by the judge assigned to the case after bind-over, regardless of whether the judge conducted the preliminary examination in the judge's role as a magistrate.

Section 2. **Rule 14**, Utah Rules of Criminal Procedure is amended to read:

Rule 14. Subpoenas.

(a) **Subpoenas requiring the attendance of a witness or interpreter and production or inspection of records, papers, or other objects.**

(a) (1) A subpoena to require the attendance of a witness or interpreter before a court, magistrate or grand jury in connection with a criminal investigation or prosecution may be issued by the magistrate with whom an information is filed, the prosecuting attorney on his or her own initiative or upon the direction of the grand jury, or the court in which an information or indictment is to be tried. The clerk of the court in which a case is pending must issue in blank to the defendant, without charge, as many signed subpoenas as the defendant may require. An attorney admitted to practice in the court in which the action is pending may also issue and sign a subpoena as an officer of the court.

(a) (2) A subpoena may command the person to whom it is directed to appear and testify or to produce in court or to allow inspection of records, papers or other objects, other than those records pertaining to a victim covered by Subsection (b). The court may quash or

modify the subpoena if compliance would be unreasonable.

(a) (3) A subpoena may be served by any person over the age of 18 years who is not a party. Service must be made by delivering a copy of the subpoena to the witness or interpreter personally and notifying the witness or interpreter of the contents. A peace officer must serve any subpoena delivered for service in the peace officer's county.

(a) (4) Written return of service of a subpoena must be made promptly to the court and to the person requesting that the subpoena be served, stating the time and place of service and by whom service was made.

(a) (5) A subpoena may compel the attendance of a witness from anywhere in the state.

(a) (6) When a person required as a witness is in custody within the state, the court may order the officer having custody of the witness to bring the witness before the court.

(a) (7) Failure to obey a subpoena without reasonable excuse may be deemed a contempt of the court responsible for its issuance.

(a) (8) If a party has reason to believe a material witness is about to leave the state, will be too ill or infirm to attend a trial or hearing, or will not appear and testify pursuant to a subpoena, the party may, upon notice to the other, apply to the court for an order that the witness be examined conditionally by deposition. The party must file an affidavit providing facts to support the party’s request. Attendance of the witness at the deposition may be compelled by subpoena. The defendant shall be present at the deposition and the court will make whatever order is necessary to effect such attendance. A deposition may be used as substantive evidence at the trial or hearing to the extent it would otherwise be admissible under the Rules of Evidence if the witness is too ill or infirm to attend, the party offering the deposition has been unable to obtain the attendance of the witness by subpoena, or the witness refuses to testify despite a court order to do so. Nothing in this paragraph (a)(8) shall be construed to prevent a defendant from deposing a witness under Rule 16.

(b) **Subpoenas for the production of records of victim.**

(b) (1) No subpoena or court order compelling the production of medical, mental health, school, or other privileged records pertaining to a victim shall be issued by or at the request of any party unless the court finds after a hearing, upon notice as provided below, that the records are material and the party is entitled to production of the records sought under applicable rules of privilege, and state and federal law.

(b) (2) The request for the subpoena or court order shall identify the records sought with particularity and be reasonably limited as to subject matter.

(b) (3) The request for the subpoena or court order shall be filed with the court as soon as practicable, but no later than 28 days before trial, or by such other time as permitted by the court. The request and notice of any hearing shall be served on counsel for the victim or victim's representative and on the opposing party. Service on an unrepresented victim must be facilitated through the prosecutor. The prosecutor must make reasonable efforts to provide a copy of the request for the subpoena to the victim or victim's representative within 14 days of receiving it.

(b) (4) If the court makes the required findings under subsection (b)(1), it must issue a subpoena or order requiring the production of the records to the court. The court will then conduct an in camera review of the records and disclose to the defense and prosecution only those portions that the requesting party has demonstrated a right to inspect.

(b) (5) Any party issuing a subpoena for non-privileged records, papers or other objects pertaining to a victim must serve a copy of the subpoena upon the victim or victim's representative. Service on an unrepresented victim must be facilitated through the prosecutor. The prosecutor must make reasonable efforts to provide a copy of the subpoena to the victim within 14 days of receiving it. The subpoena may not require compliance in less than 14 days after service on the prosecutor or victim's representative.

(b) (6) The court may, in its discretion or upon motion of either party or the victim or the victim's representative, issue any reasonable order to protect the privacy of the victim or to limit dissemination of disclosed records.

[~~(b) (7) For purposes of this rule, "victim" and "victim's representative" are used as defined in Utah Code § 77-38-2.~~]

(b) (7) For purposes of this rule:

(b) (7) (A) "victim" means the same as the term "victim of a crime" is defined in Utah Code section 77-38-2.

(b) (7) (B) "victim's representative" means the same as the term "representative of a victim" is defined in Utah Code section 77-38-2.

(b) (8) Nothing in this rule alters or supersedes other rules, privileges, statutes or caselaw pertaining to the release or admissibility of an individual's medical, psychological,

school or other records.

(c) Applicability of Rule 45, Utah Rules of Civil Procedure. The provisions of Rule 45, Utah Rules of Civil Procedure, will govern the content, issuance, objections to, and service of subpoenas to the extent those provisions are consistent with the Utah Rules of Criminal Procedure.

Section 3. **Rule 16**, Utah Rules of Criminal Procedure is amended to read:

Rule 16. Discovery.

(a) **Disclosures by prosecutor.**

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

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

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

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

(D) written or recorded statements of witnesses;

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

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

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

(3) Disclosures upon request.

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

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

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

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

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

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

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

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

(b) **Disclosures by defense.**

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

(2) Other disclosures required by statute. The defense must disclose to the prosecutor

such information as required by statute relating to alibi or insanity.

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

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

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

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

(c) **Methods of disclosure.**

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

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

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

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

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

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

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

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

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

(B) grant a continuance of the proceedings;

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

(D) order such other relief as the court deems just under the circumstances.

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

(f) **Identification evidence.**

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

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

(3) Unless relieved by court order, failure of the accused to appear or to comply with

the requirements of this paragraph without reasonable excuse shall be grounds for revocation of pre-trial release and will subject the defendant to such further consequences or sanctions as the court may deem appropriate, including allowing the prosecutor to offer as evidence at trial the defendant's failure to comply with this paragraph.

(g) **Discovery depositions for class A misdemeanors and felonies.**

(1) Generally.

(A) If a defendant is charged by information with a class A misdemeanor or a felony, the defendant may depose a witness by oral examination in accordance with Utah Code section 77-1-6.

(B) A defendant may not depose a witness under this paragraph (g) more than once.

(C) A prosecutor, or a representative from the prosecuting agency, must be present at a deposition unless the witness requests that the prosecutor or a representative not be present.

(2) Notice of deposition.

(A) A defendant must provide the witness and the prosecutor with written notice of the defendant's intent to depose the witness.

(B) The written notice must:

(i) state the name of the witness;

(ii) if the name of the witness is not known, sufficiently describe the witness with enough information that the prosecutor can identify the individual that the defendant seeks to depose;

(iii) designate any documents and tangible things to be produced by the witness; and

(iv) state the method by which the deposition will be recorded.

(3) Time, place, and location of deposition.

(A) The defendant must make a good faith effort to coordinate the date, time, and location of a deposition and to accommodate the schedule and preferred location of the witness to be deposed.

(B) A deposition may be taken by videoconference or other remote electronic means.

(C) If the defendant and the witness are unable to agree upon the location of the deposition:

(i) for a witness that is an alleged victim of the offense for which the defendant is charged, the witness may select the location at which the deposition is held or to have the

deposition taken by video conference or other remote electronic means; and

(ii) for any other witness, the deposition must be held at the courthouse location where the defendant's initial appearance was held.

(4) Presence of defendant.

(A) The defendant may not be present in person at a deposition of a witness who is an alleged victim of the offense for which the defendant is charged unless the witness and the prosecutor consent to the in-person presence of the defendant.

(B) If the defendant is in custody and the witness and the prosecutor consent to the defendant's presence in person at the deposition, the defendant may only be present in person by leave of the court.

(C) If a deposition is conducted by video conference or other remote electronic means, a defendant may not be visible to a witness who is an alleged victim of the offense for which the defendant is charged, unless the witness and the prosecutor consent to the defendant being visible to the witness.

(5) Presence of other parties.

(A) A witness may have an attorney present for a deposition.

(B) If the defendant seeks to depose a witness who is an alleged victim of the offense for which the defendant is charged, the witness may have an advocate or another individual present for a deposition but the advocate or individual may not assist the witness in answering questions.

(6) Requirements for deposition.

(A) A deposition must be conducted under oath in accordance with Utah Code sections 78B-1-142 through 78B-1-144.

(B) A prosecutor, a defendant's attorney, or a witness's attorney may administer an oath to a witness.

(C) A deposition must begin with a statement on the record that includes:

(i) the name of the individual who administers the oath to the witness;

(ii) the date, time, and place of the deposition;

(iii) the name of the witness;

(iv) the administration of the oath to the witness;

(v) an identification of all persons present at the deposition; and

(vi) if the prosecutor or a representative from the prosecuting agency is not present, whether the witness consents to the prosecutor or a representative not being present at the deposition.

(D) If the deposition is recorded other than stenographically, the individual who administers the oath to the witness shall repeat paragraphs (g)(6)(C)(i) through (iii) at the beginning of each unit of the recording.

(E) At the end of the deposition, the individual who administers the oath to the witness must state on the record that the deposition is complete and any stipulations regarding the deposition.

(F) Any questioning of a witness in a deposition may not exceed 90 minutes.

(G) A deposition must be recorded by sound, sound-and-visual, or stenographic means.

(H) The defendant must bear any cost of recording a deposition.

(I) The appearance, demeanor, or statements of the witness or attorneys at a deposition may not be distorted through recording techniques.

(7) Objections.

(A) A witness's attorney or a prosecutor may object to any question asked by the defendant's attorney.

(B) An objection must be recorded but the questioning must proceed and the testimony taken subject to the objection.

(C) Any objection must be stated concisely and in a non-argumentative and non-suggestive manner.

(D) A witness's attorney may instruct a witness to not answer a question to preserve a privilege or to enforce a limitation on evidence directed by the court.

(8) Continuance or termination of a deposition.

(A) The defendant or the defendant's attorney may not delay or continue the deposition of the victim after the date, time, and location of the deposition are established.

(B) A witness may only terminate a deposition in accordance with Utah Code section 77-6-1.

(9) Transcript or recording. A transcript or recording of a deposition taken under this paragraph (g) must be provided to all parties within 14 days, or as soon as practicable, before trial.

(10) Use of deposition at trial or other hearing. A deposition may be used at trial or a hearing by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness or as substantive evidence as permitted by the Utah Rules of Evidence.

Section 4. **Rule 22**, Utah Rules of Juvenile Procedure is amended to read:

Rule 22. Initial appearance and preliminary examinations in cases under Utah Code section 80-6-503.

(a) When a summons is issued in lieu of a warrant of arrest, the minor shall appear before the court as directed in the summons.

(b) When any peace officer or other person makes an arrest of a minor without a warrant, the minor shall be taken to a juvenile detention facility pending a detention hearing, which shall be held as provided by these rules. When any peace officer makes an arrest of a minor with a warrant, the minor shall be taken to the place designated on the warrant. If an information has not been filed, one shall be filed without delay in the court with jurisdiction over the offense.

(c) If a minor is arrested in a county other than where the offense was committed the minor shall without unnecessary delay be returned to the county where the crime was committed and shall be taken before a judge of the juvenile court.

(d) The court shall, upon the minor's first appearance, inform the minor:

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

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

(3) of the right to retain counsel or have counsel appointed by the court;

(4) of rights concerning detention, pretrial release, and bail in the event the minor is bound over to stand trial in district court; and

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

(e) The court shall, after providing the information under paragraph (d) and before proceeding further, allow the minor reasonable time and opportunity to consult counsel and shall allow the minor to contact any attorney by any reasonable means, without delay and without fee.

(f) The minor may not be called on to enter a plea. During the initial appearance, the

minor shall be advised of the right to a preliminary examination. If the minor waives the right to a preliminary examination the court shall proceed in accordance with Rule 23A to hear evidence regarding the factors contained in Utah Code section 80-6-504.

(g) If the minor does not waive a preliminary examination, the court shall schedule the preliminary examination. The time periods of this rule may be extended by the court for good cause shown. The preliminary examination shall be held within a reasonable time, but not later than ten days after the initial appearance if the minor is in custody for the offense charged and the information is filed under Utah Code section 80-6-503. The preliminary examination shall be held within a reasonable time, but not later than 30 days after the initial appearance if:

(1) the minor is in custody for the offense charged and the information is filed under Utah Code section 80-6-503; or

(2) the minor is not in custody.

(h) A preliminary examination may not be held if the minor is indicted. If the indictment is filed under Utah Code section 80-6-503, the court shall proceed in accordance with Rule 23A to hear evidence regarding the factors contained in Utah Code section 80-6-503.

(i) A preliminary examination shall be held under the rules and laws applicable to criminal cases tried before a court. The state has the burden of proof and shall proceed first with its case. At the conclusion of the state's case, the minor may testify under oath, call witnesses, and present evidence. The minor may cross-examine adverse witnesses.

(j) A prosecutor must disclose any evidence that the prosecutor intends to use at the preliminary examination to establish probable cause, and all communications described in Utah Code section 77-7a-202, to the minor at least 48 hours before the day on which the preliminary examination is held.

[~~(j)~~] (k) If from the evidence the court finds probable cause to believe that the crime charged has been committed, that the minor has committed it, and the information is filed under Utah Code section 80-6-503, the court shall proceed in accordance with Rule 23A to hear evidence regarding the factors contained in Utah Code section 80-6-504.

[~~(k)~~] (l) The finding of probable cause may [~~be based on hearsay in whole or in part~~] not be based solely on hearsay evidence. Objections to evidence on the ground that it was acquired by unlawful means are not properly raised at the preliminary examination.

[~~(l)~~] (m) If the court does not find probable cause to believe that the crime charged has

been committed or that the minor committed it, the court shall dismiss the information and discharge the minor. The court may enter findings of fact, conclusions of law, and an order of dismissal. The dismissal and discharge do not preclude the state from instituting a subsequent prosecution for the same offense.

[~~(m)~~] (n) At a preliminary examination, upon request of either party, and subject to Title 77, Chapter 38, [~~Victim Rights~~] Rights of Crime Victims Act, the court may:

(1) exclude witnesses from the courtroom;

(2) require witnesses not to converse with each other until the preliminary examination is concluded; and

(3) exclude spectators from the courtroom.

Section 5. **Rule 1102**, Utah Rules of Evidence is amended to read:

Rule 1102. Reliable Hearsay in Criminal Preliminary Examinations.

(a) Statement of the Rule. Reliable hearsay is admissible at criminal preliminary examinations.

(b) Definition of Reliable Hearsay. For purposes of criminal preliminary examinations only and except as provided in Utah Code section 77-7a-202, reliable hearsay includes:

(b) (1) hearsay evidence admissible at trial under the Utah Rules of Evidence;

(b) (2) hearsay evidence admissible at trial under Rule 804 of the Utah Rules of Evidence, regardless of the availability of the declarant at the preliminary examination;

(b) (3) evidence establishing the foundation for or the authenticity of any exhibit;

(b) (4) scientific, laboratory, or forensic reports and records;

(b) (5) medical and autopsy reports and records;

(b) (6) a statement of a non-testifying peace officer to a testifying peace officer;

(b) (7) a statement made by a child victim of physical abuse or a sexual offense which is recorded in accordance with Rule 15.5 of the Utah Rules of Criminal Procedure;

(b) (8) a statement of a declarant that is written, recorded, or transcribed verbatim which is:

(b) (8) (A) under oath or affirmation; or

(b) (8) (B) pursuant to a notification to the declarant that a false statement made therein is punishable; and

(b) (9) other hearsay evidence with similar indicia of reliability, regardless of

admissibility at trial under Rules 803 and 804 of the Utah Rules of Evidence.

(c) Continuance for Production of Additional Evidence. If hearsay evidence is proffered or admitted in the preliminary examination, a continuance of the hearing may be granted for the purpose of furnishing additional evidence if:

(c) (1) The magistrate finds that the hearsay evidence proffered or admitted is not sufficient and additional evidence is necessary for a bindover; or

(c) (2) The defense establishes that it would be so substantially and unfairly disadvantaged by the use of the hearsay evidence as to outweigh the interests of the declarant and the efficient administration of justice.

Section 6. **Effective date.**

If this resolution is approved by two-thirds vote of all members elected to each house, this resolution takes effect on May 3, 2023.

Tab 6

Doug,

I'm writing this email to you in your capacity as the Rules Committee Chair. What I propose to the committee is to consider an addition to Rule 16 related to audio/visual evidence that a prosecution team is currently required to provide to defense counsel. In my experience, being provided this type of evidence can be challenging as different agencies use various proprietary equipment and software. What this leads to is a ".exe" file along with other various codec and/or plugins to try and view/play them. Inevitably there are issues with getting these files to play and in fact they are incapable of being viewed by certain operating systems.

My proposal is that there be a requirement that the prosecution team comply with Rule 16 regarding this type of evidence by providing the evidence in a more common format. For example, a ".mp4" file is a video file that is capable of being played back on multiple platforms and operating systems with no need to install or use any other software. Granted, conversion to this format may result in potential loss of exif data attached to this type of file. Exif data generally includes things such as time and date of the file. However, this data would still be available as it would be in the possession of the prosecution - and this is really not a huge issue in the vast majority of cases.

This type of rule addition would streamline process of discovery review and ease of playback for court hearings. It would also help assure that Rule 16 is complied with by avoiding disclosures that are not viewable or require additional software/equipment to view.

Thanks.

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Regards,

Joshua S. Esplin
Chief Counsel | Trial Attorney
Utah County Public Defender Assoc.