



Utah Supreme Court Rules of Criminal Procedure Committee

Meeting Agenda

Doug Thompspon, Chair

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

Date: July 18, 2023

Time: 12:00 p.m. – 2:00 p.m. MST

Action: Welcome and approve May 16, 2023 Minutes	Tab 1	Doug Thompson
Discussion: Welcome new members Karin Fojtik and Adam Crayk		Doug Thompson
Discussion: Update on Rule 21 – Inconsistent Verdicts from Supreme Court		Doug Thompson
Discussion: Proposed Amendment to Rule 17.5	Tab 2	David Ferguson
Discussion: Proposal for new Rule 18.5	Tab 3	David Ferguson
Discussion: Update from Probation Consolidation Sub-committee		Ryan Peters
Discussion: Modifications to URCrP Rules 6, 7, and 9 from Legislative Session		Bryson King
Discussion: Upcoming Rules	N/A	N/A

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

Meeting Schedule:

September 19, 2023

November 21, 2023

Rule Status:

Rule 8 - pending subcommittee report

Tab 1

Present	Not Present
Douglas Thompson	
Bryson King	Prof. Matthew Tokson
Meredith Mannebach	Ryan Peters
Craig Johnson	Hon. Elizabeth Hruby-Mills
David Ferguson	
Janet Reese	
William Carlson	
Hon. Kelly Schaefer – Bullock	
Hon. Denise Porter	
Ryan Stack	
Lori Seppi	
Jacqueline Carlton	
Amber Stargell	

Action: David Ferguson moves to adopt March meeting minutes and Craig Johnson seconds David’s motion. Lori Seppi asks to correct the name of the **Manatau case**. Ryan Stack asks clarification in the minutes to reflect which Ryan is being referenced. David and Craig renew their motions.

Rule 21.

William Carlson leads discussion on Rule 21. It is not clear if a prosecutor can appeal under Rule 21. The legislator can make the decision to extend the right of appeal via statute. William Carlson explains that Rule 21(h) is where the subcommittee made substantial changes to the rule. David Ferguson moves to submit Rule 21 to the Utah Supreme Court for review. Ryan Stack seconds David’s motion.

Rule 8.

Douglas Thompson leads discussion on Rule 8. Doug states that the Utah Supreme Court suggests stylistic changes. No need to make any changes based on the public comments.

Doug discusses email received from Judge Brendan McCullagh. The group discusses whether we can move forward with the current edits to UCrRP 8 or add Judge McCullagh’s recommendations. Doug shares Judge McCullagh’s recommendations with the committee. Group discusses Rule 8(a)(2). The current language of Rule 8 suggests that a person charged with a misdemeanor or felony has the right to court-appointed counsel. Judge McCullagh proposes the following edit to Rule 8(a)(2): *when a [] penalty of conviction includes **physical detention**...* William Carlson suggests the committee to consider what to do if a defendant is indigent and waives their right to counsel.

Judge Schaeffer-Bullock requests a subcommittee to review Judge McCullagh's substantive edits. Doug and the committee discuss Judge McCullagh's suggestions to Rule 8 § (c)(1)(iii). In response to Judge McCullagh's edits, David Ferguson suggests changing the language to *laws of the relevant jurisdictions*. Doug suggests that a subcommittee should review this section further. Committee agrees to send Judge McCullagh's suggestions to a subcommittee. Judge Denise Porter is willing to help with the Rule 8 subcommittee.

Judge Shaeffer-Bullock leaves meeting. Will, Ryan Stack and Amber Stargell leaves at 1 p.m.

Rules 6, 7, and 9

The committee will address changes to Rules 6, 7, and 9 from the legislative session in our next committee meeting.

Reasonable Opportunity

Doug turns to "reasonable opportunity" email from Michael Drechsel and discusses the bill from the legislative session. Judge Porter suggests that the language suggested by the bill would fit well within Rule 7 of the Civil Procedure Rules. David Ferguson suggests we place the language in Rule 12 of the Criminal Procedure Rules instead. Doug will put together language for Rule 12 that incorporates Mike Drechsel's proposal and will email it out to the committee.

Doug then notifies the committee that several committee members will be ending their second term this summer: Judge Hruby-Mills, Ryan Stack, and Craig Johnson. He expresses his gratitude to the members for their excellent work.

The meeting is adjourned at 1:08p.m.

Tab 2

Draft Rule 17.5

Questions presented by the Judicial Council on a rule of criminal procedure for virtual court:

1. Should there be a rule of procedure that allows participants to request their hearing be held opposite the decision of the judicial officer?
2. Should there be a rule of procedure that provides a presumption regarding certain hearing types? (Example: non-evidentiary, status hearings, etc.)
3. Should there be a rule of procedure that provides an appeal process for challenging the decision of a judicial officer as it relates to remote vs. in-person hearings, and if so, who should consider the appeal? (Example: presiding judge)

The questions raised by the Judicial Council raise several competing concerns, particularly between the benefits of virtual court and the rights of the accused to appear in-person.

Virtual court presents tremendous improvements in access to justice. When comparing rates of in-person appearance to virtual appearance, Colorado has found that failures to appear dropped from 46% to 9%. Other jurisdictions found similar results. North Dakota saw appearances go up from 80% to nearly 100% for criminal warrant hearings. New Jersey saw failures to appear drop from 20% to 0.3% when its criminal courts went virtual.¹ Virtual appearances allow attorneys to keep costs down, it improves the diversity and quality of representation, and it allows more competition for public defender contracts in rural areas.

By the same token, courts cannot mandate that a defendant appear virtually without a waiver of in-person attendance. Art. I § 12 of the Utah Constitution specifically identifies the right of defendants in “criminal prosecutions” to “appear and defend in person[.]” This goes beyond the right of confrontation, which is identified elsewhere in that provision. The right of confrontation has specifically been recognized as requiring in-person appearance except in rare situations allowing a witness to testify outside of the presence of the accused.²

¹ Colorado Access to Justice Commission, *Remote Court Proceedings: Opportunities and Challenges in Colorado* 1, 14-15 (Dec. 2022), available at https://www.coloradoaccesstojustice.org/files/ugd/c659b2_a6f97bc9edc84f9294a6d415cf3aec3a.pdf?index=true

² *Cf. Coy v. Iowa*, 487 U.S. 1012 (1988) and *Maryland v. Craig*, 497 U.S. 836 (1990).

Moreover, waivers of fundamental rights cannot be presumed from “inaction,”³ but waivers can be made by conduct that indicate knowing and voluntary relinquishment.⁴ In conjunction with this proposal, Rules 7 and 7A should be modified to include a condition that courts notify a defendant of the right to appear in-person for court and allow the defendant to waive the right to appear in summary proceedings.

Summary

This amendment to rule 17.5 creates uniformity on when virtual access to courts is appropriate. It designates presumptions of in-person appearance for evidentiary hearings and flexible appearance in most other settings. It describes what factors a court must consider before deviating from the presumption and, when objected to, describes a review process to the presiding judge. It creates uniformity on public access to courts through virtual means and a process to continue matters through email by stipulation of the parties in lieu of written motion.

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

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

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

~~(c) For good cause and with appropriate safeguards the court may permit testimony in open court by contemporaneous transmission from a different location if the party not calling the witness waives the right to confront the witness in person.~~

(a) Definitions.

(1) In-Person Proceeding. A court hearing at which all parties, counsel, and other participants are physically present in the courtroom.

(2) Flexible Proceeding. A court hearing where parties, counsel, and other participants may elect to appear in person in the courtroom or appear virtually without seeking prior authorization from the court.

³ *Barker v. Wingo*, 407 U.S. 514, 526 (1972) (“Such an approach, by presuming waiver of a fundamental right from inaction, is inconsistent with this Court’s pronouncements on waiver of constitutional rights. The Court has defined waiver as an intentional relinquishment or abandonment of a known right or privilege. Courts should indulge every reasonable presumption against waiver, and they should not presume acquiescence in the loss of fundamental rights.”).

⁴ See e.g., *State v. Wanositik*, 2003 UT 46.

(3) **Virtual Appearance.** An appearance at a court hearing by computer or electronic device that includes simultaneous video and audio transmission. Virtual appearances may include appearing by telephone without video transmission if authorized by the court.

(b) Presumptively In-Person Proceedings. All criminal proceedings must be presumptively held in-person. A defendant may waive the right to an in-person appearance or proceeding.

(1) The court will accept the waiver and allow a proceeding to be conducted by virtual appearance except under the following circumstances in which the court may accept the waiver:

(A) Trial in which the highest-level offense is a class B misdemeanor or lower;

(B) Detention hearing;

(C) Sentencing;

(D) Any hearing in which evidence is taken through testimony of a live witness;

(E) An evidentiary hearing to determine revocation, modification, or extension of probation;

(F) When good cause requires that the proceeding be held in-person.

(2) The defendant may not waive an in-person appearance in a trial in which the highest-level offense is a class A misdemeanor or higher.

(3) The court will not accept a waiver if a victim as described in article I section 28 of the Utah Constitution indicates a desire to be heard in-person at an important criminal justice hearing.

(4) The court will not issue a warrant for a defendant who appears virtually to an in-person proceeding unless the court determines that the defendant has willfully used the virtual appearance to evade a required in-person appearance.

(d) Virtual Access to Courts. A link to a virtual transmission allowing parties, counsel, other participants to participate, and the public to attend court must be prominently displayed on the court's website. The link must be accompanied by instructions that:

(1) a member of the public who records or streams any proceedings without prior authorization may be held in contempt.

(2) any individual who is a witness to a case or has personal knowledge related to a case may be required to terminate virtual attendance to protect the integrity of the proceedings and may be held in contempt if the person fails to abide by an order from the court to do so.

(3) a participant who is disruptive may be required to terminate virtual attendance and may be subject to contempt.

(5) not all proceedings are open to virtual access.

(6) by opening the link to attend court virtually, a defendant who is scheduled for court that day is waiving the right to appear in-person for that proceeding.

(e) Proceedings That Are Not Subject to This Rule. Appearances at proceedings conducted by a Problem Solving Court are governed by the discretion of the court and an agreement by the defendant to participate in that court.

(f) Decision to Require an In-Person Appearance over the Defendant's Waiver. Before the court may require a defendant to appear in-person over the defendant's waiver, and upon objection or request, the court must identify what factors it has considered in its reason to reject the waiver and must allow parties to address those factors.

(g) Challenge of a Court's Decision to Require an In-Person Appearance over the Defendant's Waiver. A party who contests the court's decision to deviate from a presumption in this rule must file a motion for review within seven days of the decision being made or within seven days of receipt of an audio recording of the hearing if the request is filed within seven days of the court's decision.

(1) The motion must include:

(A) the factors that the court identified in its consideration;

(B) an indication of whether any other party expressed an argument or opinion to the court as to what decision the court should take;

(C) the next court date on which the defendant is scheduled;

(D) whether the motion can be reviewed *ex parte*;

(E) a certification that the motion is not taken solely to delay proceedings.

(2) Upon receipt of the motion the court must enter an order granting the motion or must certify the motion to the presiding judge of the district in which the court is located.

(3) A motion can be reviewed *ex parte*.

(4) The presiding judge must consider whether the court's decision to deviate constitutes a burden to a party or individual that is not necessary to move the case towards a fair resolution or prejudices the rights of a party.

(5) The proceedings are stayed until the motion is decided.

(h) Factors to determine whether good cause requires an in-person proceeding.

(1) The following non-exhaustive list of factors may be used to determine whether good cause requires a defendant to appear in-person over the defendant's waiver.

(A) The likelihood of a resolution if the proceeding is conducted in-person;

(B) The ability for parties to efficiently conduct the hearing virtually (*e.g.*, introduce evidence, make objections, and examine witnesses virtually);

(C) Technological barriers that impede movement in the case such as the speed and quality of an internet connection;

(D) The impact a virtual appearance would have on the availability for language interpretation or communication with individuals with disabilities;

(2) The court must also consider the following if raised by a party:

(A) The agreement by the parties to hold the hearing virtually including, if applicable, an express waiver by the defendant to the right of confrontation;

(B) The cost and time savings to any party or participant including the lack of reasonably available childcare;

(C) Transportation limitations of any party or participant;

(D) Weather and safe travel;

(E) The disability of a party including any illness;

(F) The difficulty for counsel to travel to the court's jurisdiction for the proceeding;

(G) Impact on employment of a party or participant;

(H) Unavoidable scheduling conflicts of the parties or participants preventing the matter from moving forward in a timelier way;

(I) The anticipated length of the proceeding;

(i) **Continuances and scheduling by email.** For any non-evidentiary matter in which the parties stipulate to a continuance or request a sooner date, the parties may inform the court of the stipulation by email no later than 24 hours before a proceeding is set to take place in lieu of written motion. The computation of time for this part excludes weekends and holidays identified in Rule 2.

(1) Each prosecutor who is assigned to a matter must provide a personally monitored email address on the website of the entity or agency to which the prosecutor is employed.

(2) An email address for which the court may accept stipulations provided in this rule must be displayed on the court's website.

(j) **Denial of virtual attendance to the public.** The court may prohibit virtual attendance by the public for any in-person or flexible proceeding by applying similar considerations to those given in the Utah Code of Judicial Administration 4-401.01(2)(b). The court may also prohibit virtual attendance for proceedings in a Problem Solving Court, or in an evidentiary hearing in which exclusion is invoked through Utah Rule of Evidence 615 and the court determines that an admonishment to virtual attendants consistent with part (b)(2) would not adequately ensure that the order of exclusion would be followed.

(dk) Nothing in this rule precludes or affects the procedures in rule [15.5](#).

Tab 3

18.5 Objection to the Use of a Peremptory Challenge

Summary: The following proposal is made at the direction of the Supreme Court to investigate the appropriateness of a rule to replace the *Batson* standard. *State v. Aziakanou* 2021 UT 57, ¶ 69 n. 12. In directing the committee to investigate a rule change, the Court cited a recently created rule by Washington State, as well as the efforts of both Connecticut and New Jersey in exploring rule changes. *Id.*

Since *Aziakanou* was published, Connecticut has developed its own rule modeled off of Washington's. *Cf.* Connecticut's rule: Sec. 5-12, Objection to the Use of a Peremptory Challenge,¹ and Washington's: Wash. Gen. R. 37, Jury Selection.²

New Jersey is currently exploring a rule change modeled off of both Washington's and Connecticut's as well as several other reforms, including the implementation of a pilot program to permit attorney-conducted voir dire in the state as a tool to decrease discrimination and bias in jury selection (New Jersey, like Utah, is one of only a few states where judges typically control most aspects of voir dire; Washington and Connecticut both already permit attorney-conducted voir dire).³

The following rule is closely modeled from Connecticut's except where explained in comments.

(a) Objection. A party may object to the use of a peremptory challenge to raise a claim of improper bias. The court has an obligation to raise this objection on its own when observed. The objection will be made by simple citation to this rule, and any further discussion will be conducted outside the presence of the prospective juror.

(b) Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge must articulate the reason that the peremptory challenge has been exercised.

(c) Determination. The court will evaluate the reason given for the challenge from the perspective of an objective observer, as defined in part (d), in light of the totality of the circumstances. If the court determines that the use of the challenge against the prospective juror, as reasonably viewed by an objective observer, legitimately raises the appearance

¹ https://www.jud.ct.gov/lawjournal/Docs/Misc/2022/29/pblj_8402.pdf.

² https://www.courts.wa.gov/court_rules/pdf/GR/GA_GR_37_00_00.pdf.

³ <https://www.njcourts.gov/sites/default/files/courts/supreme/part4of4-orderauthorizingacvd-pilotprogram-07-12-22.pdf>.

that the prospective juror's race or ethnicity was a factor in the challenge, then the challenge will be disallowed and the prospective juror will be seated. If the court determines that the use of the challenge does not raise such an appearance, then the challenge will be permitted and the prospective juror will be excused. The court need not find purposeful discrimination to disallow the peremptory challenge. The court must explain its ruling on the record. A party whose peremptory challenge has been disallowed pursuant to this rule will not be prohibited from attempting to challenge peremptorily the prospective juror for any other reason or from conducting further voir dire of the prospective juror.

(d) Nature of Observer. For the purpose of this rule, an objective observer:

(1) is aware that purposeful discrimination, and implicit, institutional, and unconscious biases, have historically resulted in the unfair exclusion of potential jurors on the basis of their race, or ethnicity; and

(2) is deemed to be aware of and to have given due consideration to the circumstances set forth in part (e).

(e) Circumstances considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following:

(1) the number and types of questions posed to the prospective juror including consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the questions asked about it;

(2) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the prospective juror, unrelated to his testimony, than were asked of other prospective jurors;

(3) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

(4) whether a reason might be disproportionately associated with a race or ethnicity;

(5) if the party has used peremptory challenges disproportionately against a given race or ethnicity in the present case, or has been found by a court to have done so in a previous case;

(6) whether issues concerning race or ethnicity play a part in the facts of the case to be tried;

(7) whether the reason given by the party exercising the peremptory challenge was contrary to or unsupported by the record.

(f) Reasons Presumptively Invalid. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection or may be influenced by implicit or explicit bias, the following are presumptively invalid reasons for a peremptory challenge:

(1) having prior contact with law enforcement officers;

(2) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;

(3) having a close relationship with people who have been stopped, arrested, or convicted of a crime;

(4) living in a high crime neighborhood;

(5) having a child outside of marriage;

(6) receiving state benefits;

(7) not being a native English speaker; and

(8) having been a victim of a crime.

A party may overcome the presumption of invalidity if the party demonstrates to the court's satisfaction that the reason, viewed reasonably and objectively, is unrelated to the prospective juror's race or ethnicity and legitimately bears on the prospective juror's ability to be fair and impartial in light of particular facts and circumstances at issue in the case.

(g) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection: allegations that the prospective juror was inattentive, failing to make eye contact or exhibited a problematic attitude, body language, grooming, or demeanor. If any party intends to offer one of these reasons or a similar reason as a justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A party who intends to exercise a peremptory challenge for reasons relating to those listed above in subsection (f) will, as soon as practicable, notify

the court and the other party in order to determine whether such conduct was observed by the court or that party. If the alleged conduct is not corroborated by observations of the court or the objecting party, then a presumption of invalidity will apply **but** may be overcome as set forth in subsection (f).

(h) Balancing of interests. If the prosecution uses a peremptory challenge for a race neutral purpose on the last or only prospective juror from a racial or ethnic minority, the court will weigh the prosecutor's interest in eliminating the juror against the defendant's interest in a jury composed of a fair cross section of the community.

