



Utah Supreme Court Rules of Criminal Procedure Committee

Meeting Agenda

Doug Thompspon, Chair

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

Date: November 21, 2023

Time: 12:00 p.m. – 2:00 p.m. MST

Action: Welcome and approve September 19, 2023 Minutes	Tab 1	Doug Thompson
Discussion: Rule 8 – Self representation and capital appointments	Tab 2	Doug Thompson
Discussion: Update on proposed amendment to Rule 17.5		David Ferguson
Discussion: Update on proposal for new Rule 18.5		David Ferguson
Discussion: Update from Probation Consolidation Sub-committee		Doug Thompson
Discussion: Update on proposed Justice Court Bench Warrants rule		Doug Thompson

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

Meeting Schedule for 2024:

January 16th

March 19th

May 21st

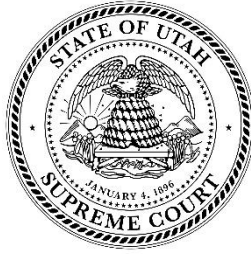
July 16th

September 17th

November 19th

Rule Status:

Tab 1



**Utah Supreme Court
Rules of Criminal Procedure Committee**

**Meeting Minutes
September 19th, 2023**

Committee members	Present	Excused	Guests/Staff Present
Douglas Thompson, Chair	X		Bryson King, Staff
Judge Elizabeth Hruby-Mills	X		Amber Stargell, Rec. Secretary
Judge Kelly Schaeffer-Bullock	X		
Matthew Tokson		X	
William Carlson	X		
David Ferguson	X		
Meredith Mannebach		X	
Ryan Peters	X		
Judge Denise Porter	X		
Janet Reese	X		
Lori Sepi	X		
Karin Fojtik	X		
Judge Kristine Johnson		X	
Adam Crayk	X		

Agenda Item #1 - Approval of Meeting Minutes (July 18, 2023)

Doug Thompson welcomes the Committee members. The meeting minutes from the July meeting are still being drafted and will be circulated to the Committee for approval later.

Agenda Item #2 - Discussion of Rule 21, Legally Impossible Verdict

The discussion then moves to amending Rule 21. William Carlson begins by discussing the Advisory Committee Note in Option #1 of Rule 21. Doug Thompson reviews the recommendations from the Supreme Court in developing language for the impossible verdicts section of the Rule in conjunction with its opinion in *Terry*. Discussion ensues on how to implement the Court's guidance in Option #1 of the Rule. The Committee then turns its attention to Option #2 and the use of plural language in the impossible verdicts section of the Rule. Discussion continues on the Advisory Committee Note of Option #2. After cleaning up language in Option #2, the Committee then votes to recommend both versions of the Rule be sent to the Supreme Court for review.

Agenda Item #3 - Rule 17.5, In-person and Virtual Hearings

David Ferguson leads the subcommittee on Rule 17.5, and requests others to join. Judge Hruby-Mills and Adam Crayk volunteer and David will coordinate with volunteers to set up a meeting.

Agenda Item #4 - Rule 18.5, Objection to Use of a Peremptory Challenge

David Ferguson continues the Committee's discussion on Rule 18.5. David reviews the language of Rule 18.5 and case law supporting that language. David invites members of the Committee to comment on his proposals. Discussion ensues primarily on the demographic and objection subsections of the proposed Rule. The Committee also discusses statutory and constitutional limitations to peremptory strikes based on demographic information. Doug suggests the Committee form a subcommittee to further develop Rule 18.5. David Ferguson will lead the subcommittee. Lori Sepi, Karin Fojtik, and William Carlson volunteer to join the subcommittee.

Agenda Item #5 - Subcommittee on Probation Consolidation Rule

Ryan Peters provides an update to the Committee on the development of the Rule. A proposal will be sent to the full Committee soon for review.

Agenda Item #6 – Justice Court Bench Warrants

Bryson King addresses a request from the Judiciary to amend the rules related to bench warrants. The amend would solve a current issue where a bench warrant is issued by one court, and remains unresolved for several weeks, preventing other courts from releasing defendants on their cases to treatment, specialty courts, employment, or for other causes. The Committee engages in preliminary discussions on how the rule might be crafted. Doug Thompson volunteers to identify which Rule would be amended to address the issue raised by the Judiciary and will prepare to discuss this at the next Committee meeting.

Agenda Item #7 – Utah Code Citation Updates in Rules 6, 7, 7A, and 9

Bryson King explains to the Committee that following the 2023 Legislative Session, the code sections cited in Rules 6, 7, 7A, and 9 need to be updated. David Ferguson offers to review the Rules and the code sections cited in the Rules to determine if there are any substantive changes to statute that need the Committee's in revising the Rules. David will propose any changes to the Committee for consideration by the next meeting. Doug directs Bryson to begin an email to the Committee to review the Rules and the citations cited to determine if any substantive changes in statute need to be reflect in the Rules.

Adjourn

The Committee meeting is adjourned. The next meeting will be November 21st, 2023.

Tab 2

1 (a) Right to counsel.

2 (1) A defendant charged with any public offense has the right to be represented
3 by counsel at all stages of the prosecution. ~~self-representation the penalty for~~
4 ~~which includes the possibility of incarceration, regardless of whether~~
5 ~~actually imposed, has the right to counsel, and if~~

6 (2) An indigent defendant charged with a misdemeanor or felony has the right
7 to court-appointed counsel if the defendant faces any possibility of the
8 deprivation of liberty.

9 (3) A defendant has the right to self-representation if the defendant waives the
10 right to counsel.

11 (b) Appointment. Except in circumstances provided in paragraphs (d), (e), (f), and (g),
12 or when the defendant waives representation as described in paragraph (c), if the
13 trial court finds the defendant is indigent pursuant to Utah Code section 78B-22-
14 202, the court will appoint an indigent defense service provider according to Utah
15 Code section 78B-22-203.

16 (c) Waiver of counsel. A defendant has the right to self-representation if the
17 defendant waives the right to counsel.

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

21 (A) inform the defendant of the dangers, disadvantages, and consequences
22 of self-representation;

23 (B) discuss the defendant's specific understanding:

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

25 (ii) that the case is subject to the Rules of Criminal Procedure and
26 the Rules of Evidence; and

27 (iii) that the elements of the charged crime(s) and the existence of
28 any legal defenses are governed by the laws and ordinances of
29 the State of Utah and its political subdivisions;

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

- 32 (i) If the court determines the defendant is indigent, the court:
- 33 1. will offer the defendant the opportunity to have counsel
- 34 appointed; and
- 35 2. may appoint counsel for the limited purpose of
- 36 consulting with the defendant regarding the waiver of
- 37 counsel.
- 38 (2) As part of its colloquy with the defendant, the court may inquire as to the
- 39 defendant’s literacy, educational background, and legal training to assess the
- 40 defendant’s understanding of the consequences of waiver.
- 41 (3) A defendant can revoke the waiver of counsel and either retain counsel or
- 42 seek the appointment of counsel. The court may set reasonable time limits on
- 43 motions to revoke the waiver of counsel if the court concludes that such
- 44 motion is made to delay or frustrate the case proceedings.

45 ~~(b)~~ **Capital case qualifications.** In all cases in which counsel is appointed to represent

46 an indigent defendant who is charged with an offense for which the punishment may

47 be death, the court ~~shall~~will appoint two or more attorneys to represent such defendant

48 and ~~shall~~will make a finding on the record based on the requirements set forth below

49 that appointed counsel is competent in the trial of capital cases. ~~In making its~~

50 ~~determination, the court shall ensure that the experience of counsel who are under~~

51 ~~consideration for appointment have met the following minimum requirements~~ To be

52 found competent to represent a defendant charged in a capital case, the combined

53 experience of the appointed attorneys must meet the following requirements:

54 ~~(b)~~(1) at least one of the appointed attorneys must have tried to verdict at least

55 six felony cases as defense counsel within the past four years or ~~twenty-five~~ 25

56 felony cases total, with at least six of the 25 felony cases as defense counsel;

57 ~~(b)~~(2) at least one of the appointed attorneys must have appeared as defense

58 counsel or defense co-counsel in a capital or a felony homicide case which was

59 tried to a jury and which went to final verdict;

60 ~~(b)~~(3) within the last five years, at least one of the appointed attorneys must have

61 completed or taught, in person, ~~within the past five years an~~ at least eight hours

62 of approved continuing legal education ~~course or courses at least eight hours of~~

63 which dealt, in substantial part, with the ~~trial~~ representation of defendants in

64 death penalty cases; and

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

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

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

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

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

78 ~~(e)~~(4) the diligence, competency, the total workload, and ability of the attorneys
79 being considered; and

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

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

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

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

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

98 represent persons sentenced to death in post-conviction cases. To be found qualified,
99 the combined experience of the appointed attorneys must meet the following
100 requirements:

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

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

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

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

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

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

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

124 (j) Litigation expenses and attorney fees.

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

127 ~~(h)~~(2) ~~Cost~~ Litigation expenses and attorneys' fees for post-conviction counsel
128 ~~shall~~ will be paid pursuant to Utah Code § section 78B-9-202(2)(a).