Utah Supreme Court
Rules of Criminal Procedure Committee

Meeting Agenda

Doug Thomspon, Chair

Location: Webex Webinar: https://utcourts.webex.com/utcourts/j.php?MTID=m10b996d388b50c31667a457ac2072186

Date: January 21st, 2025

Time: 12:00 p.m. – 2:00 p.m. MST

Action: Welcome and approve November 19, 2024, meeting minutes	Tab 1	Doug Thompson
Discussion: Rule 7 and 7A – Updates on criminal protective order amendments	Tab 2	Amy Hernandez
Discussion: Rule 4 – Proposal on joint trial presumption	Tab 3	William Carlson
Discussion: Rule 11 – Proposal following *Rippey* decision	Tab 4	Doug Thompson & Bryson King
Discussion: Rule 16 – Post-*Willden* Proposal	Tab 5	Matthew Hansen

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

Meeting Schedule for 2025:
March 18th
May 20th
July 15th
September 16th
November 18th

Postponed Rule Discussions:
Rule 8 (Update from subcommittee)
Rule 3 (Use of AI)

Tab 1

Utah Supreme Court
Rules of Criminal Procedure Committee

Meeting Minutes
November 19, 2024

Committee members	Present	Excused	Guests/Staff Present
Douglas Thompson, Chair	**X**		Bryson King, Staff
Judge Kelly Schaeffer-Bullock		**X**	Amber Stargell, Rec. Secretary
Matthew Tokson		**X**	
William Carlson	**X**		
David Ferguson		**X**	
Meredith Mannebach	**X**		
Judge Denise Porter	**X**		
Janet Reese	**X**		
Lori Seppi	**X**		
Karin Fojtik	**X**		
Judge Kristine Johnson		**X**	
Adam Crayk	**X**		
Lindsey Wheeler		**X**	
Matthew Hansen		**X**	

Agenda Item 1: Introduction and Approval of Minutes

Doug Thompson welcomed the Committee members to the meeting and reviewed the meeting minutes from the September 16th, 2024, meeting. Karin Fojtik moves to adopt

the minutes. Doug holds the vote for more voting members to join the meeting. Adam joins the meeting. Unanimous vote to adopt the September minutes.

Agenda Item 2: Rule 8 Sub-Committee

No updates for today.

Agenda Item 3: Criminal Protective Orders - Rule 43

Will and Doug discuss concerns about amending the rule to reflect the exact language in the statute. Doug will send proposed amendments for Rules 7 and 7A to the committee members via email for further discussion and committee vote.

Agenda Item 4: Rule Amendments for Rule 6, Rule 7 and Rule 9.

- Will makes a motion to approve adopt the changes to Rule 6. 76-20-205. Unanimous vote to adopt Rule 6 changes.

- Rule 7: Bryson gives up date on the deletion of U.C.A. 77-38-3. The committee discovers that U.C.A. 77-38-3 was not recodified and the reference is still accurate. The committee agrees to keep U.C.A. 77-38-3 as referenced.

- Rule 7A: Will makes a motion to change in 7A paragraph (c). Unanimous vote to adopt 7A paragraph (c).

- Rule 9: Change in the nested references in Rule 9. Will moves to approve recommend changes. Unanimous vote to approve the changes in the nested references.

Tab 2

Possible Amendments to Rules 7 and 7A to account for NCIC/UCJIS Audit Recommendations

Part 1. **Rule 7** is amended as follows:

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

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

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

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

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

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

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

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

(c) **Release conditions.**

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

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

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

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

(d) **Continuances.** Upon application of either party and a showing of good cause, the court may allow up to a seven day continuance of the hearing to allow for preparation, including notification to any victims. The court may allow more than seven days with the consent of the defendant.

(e) **Right to preliminary examination.**

(e)(1) The court must inform the defendant of the right to a preliminary examination and the times for holding the hearing. If the defendant waives the right to a preliminary examination, and the prosecuting attorney consents, the court must order the defendant bound over for trial.

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

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

(f) Pretrial protective orders.

(f)(1) When a defendant is charged with an offense for which the court is statutorily required to determine the necessity of a pretrial protective order at the first appearance, the court will enter its findings and determination in writing, either issuing or denying the pretrial protective order.

(f)(1)(i) At the time of case initiation or citation for the offenses described above, the agency that initiated the case is required to provide all identifying information for the defendant and any protected person(s), including name, date of birth, sex, race, and any other available information.

(f)(2) If the court issues a pretrial protective order in other offenses, it will rely on the agency that initiated the case to provide all identifying information for the defendant and any protected person(s), including name, date of birth, sex, race, and any other available information. The court will indicate on the order if any identifying information has not been provided and is therefore unknown.

(f)(3) The court will specify the conditions of the pretrial protective order and any applicable expiration date.

(f)(4) A court will consider victim input when granting, modifying, or dismissing pretrial protective orders.

Part 2. **Rule 7A** is amended as follows:

Rule 7A. Procedures for arraignment on class B or C misdemeanors, or infractions.

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

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

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

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

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

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

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

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

(c)(1) A motion to modify the pretrial status order issued at initial appearance may be made by either party at any time upon notice to the opposing party sufficient to permit the opposing party to prepare for the hearing and to permit each alleged victim to be notified and be present.

(c)(2) Subsequent motions to modify a pretrial status order may be made only upon a showing that there has been a material change in circumstances.

(c)(3) A hearing on a motion to modify a pretrial status order may be held in conjunction with a preliminary hearing or any other pretrial hearing.

(d) **Continuances.** Upon application of either party and a showing of good cause, the court may allow up to a seven day continuance of the hearing to allow for preparation, including notification to any victims. The court may allow more than seven days with the consent of the defendant.

(e) **Entering a plea.**

(e)(1) If defendant is prepared with counsel, or if defendant waives the right to be represented by counsel, the court must call upon the defendant to enter a plea.

(e)(2) If the plea is guilty, the court must sentence the defendant as provided by law.

(e)(3) If the plea is not guilty, the court must set the matter for trial or a pretrial conference within a reasonable time. Such time should be no longer than 30 days if defendant is in custody.

(e)(4) The court may administratively enter a not guilty plea for the defendant. If the court has appointed counsel, the defendant does not desire to enter a plea, or for other good cause, the court must then schedule a pretrial conference.

(f) Pretrial protective orders.

(f)(1) When a defendant is charged with an offense for which the court is statutorily required to determine the necessity of a pretrial protective order at the first appearance, the court will enter its findings and determination in writing, either issuing or denying the pretrial protective order.

(f)(1)(i) At the time of case initiation or citation for the offenses described above, the agency that initiated the case is required to provide all identifying information for the defendant and any protected person(s), including name, date of birth, sex, race, and any other available information.

(f)(2) If the court issues a pretrial protective order in other offenses, it will rely on the agency that initiated the case to provide all identifying information for the defendant and any protected person(s), including name, date of birth, sex, race, and any other available information.

The court will indicate on the order if any identifying information has not been provided and is therefore unknown.

(f)(3) The court will specify the conditions of the pretrial protective order and any applicable expiration date.

(f)(4) A court will consider victim input when granting, modifying, or dismissing pretrial protective orders.

Tab 3

Introduction

This memorandum provides a high-level overview of how each state (and select territories) addresses the joinder of multiple defendants in criminal proceedings. Specifically, it highlights whether state rules or statutes allow multiple defendants to be charged in a single indictment or information, whether there is a presumption of or discretion for joint trial, and how severance is handled. Where no explicit rule was found, that is indicated accordingly.

Citations are included so readers may review the primary authority if needed. This analysis is particularly relevant in light of Utah Code § 77-8a-1 and the difficulty in jointly charging multiple defendants under the CORIS system.

A. States With Explicit Rules on Joinder of Multiple Defendants

1. Alabama

- **Governing Rules:** Alabama Rules of Criminal Procedure 13.3 (joinder) and 13.4 (relief from prejudicial joinder).
- **Key Points:**
    - Multiple defendants "may be charged in the same indictment" if they participated in the same act or transaction, share a common scheme/plan, or if proof is otherwise inseparable.
    - If offenses/defendants are in separate charging documents but could have been joined, the court may order consolidation.
    - Severance is available if prejudice is demonstrated.
- **Citations:** *Ala. R. Crim. P. 13.3*; *Ala. R. Crim. P. 13.4*.

2. Alaska

- **Governing Rules:** Alaska Rule of Criminal Procedure 8 (joinder) and 14 (relief from prejudicial joinder).
- **Key Points:**
    - Multiple defendants "may be charged in the same indictment or information" if they participated in the same act or transaction.
    - Severance must be granted upon a showing of prejudice.
    - Merely showing certain evidence might be inadmissible at a separate trial is not itself dispositive; prejudice must be shown.
- **Citations:** *Alaska R. Crim. P. 8*; *Alaska R. Crim. P. 14*.

3. Arizona

- **Governing Rule:** Arizona Rule of Criminal Procedure 13.3(b)–(c).
- **Key Points:**
    - Multiple defendants may be joined if each is charged with each offense or if the offenses arise from a common conspiracy, scheme, or plan.
    - The court "may" consolidate separate proceedings in the interests of justice.
- **Citation:** *Ariz. R. Crim. P. 13.3*.

4. Arkansas

- **Governing Rules:** Arkansas Rules of Criminal Procedure 21.2 (joinder) and 22.4 (severance).
- **Key Points:**
    - Two or more defendants may be joined in one information/indictment if each is accountable for each offense charged, or if the offenses form part of a common scheme or plan.
    - A defendant can move for severance if the evidence at trial is insufficient to support joint participation or if prejudice would result.
- **Citations:** *Ark. R. Crim. P. 21.2*; *Ark. R. Crim. P. 22.4*.

5. California

- **Status:** Nothing found. (No codified rule located; practice presumably governed by caselaw or other statutory provisions.)

6. Colorado

- **Governing Rules:** Colorado Rules of Criminal Procedure 8(b) (joinder) and 14 (severance).
- **Key Points:**
    - Defendants may be joined if they participated in the same criminal episode.
    - Severance is mandatory if prejudice is shown, especially regarding inadmissible evidence against one defendant that would be admitted against another.
- **Citations:** *Colo. R. Crim. P. 8(b)*; *Colo. R. Crim. P. 14*.

7. Connecticut

- **Status:** Nothing found.

8. Florida

- **Governing Rules:** Florida Rules of Criminal Procedure 3.150 (joinder) and 3.152 (severance).
- **Key Points:**

    - Defendants may be jointly charged if they share accountability for offenses, or if the offenses alleged arise from a conspiracy or a common scheme/plan.
    - Severance is required if there is a statement by a co-defendant implicating another defendant that is not admissible against the latter.
- **Citations:** *Fla. R. Crim. P. 3.150*; *Fla. R. Crim. P. 3.152*.

9. Georgia

- **Status:** Nothing found.

10. Hawaii

- **Governing Statute:** Haw. Rev. Stat. Ann. § 806-21.
- **Key Points:**
    - Accessories and receivers of stolen property may be charged together even if they participated at different times.
    - The principal defendant need not be included in the same indictment.
- **Citation:** *Haw. Rev. Stat. § 806-21*.

11. Idaho

- **Governing Statute:** Idaho Code Ann. § 19-2106.
- **Key Points:**
    - If defendants are "jointly indicted or informed against," the court may decide whether they are tried separately or jointly.
- **Citation:** *Idaho Code Ann. § 19-2106*.

12. Illinois

- **Status:** Nothing found.

13. Indiana

- **Status:** Nothing found.

14. Iowa

- **Status:** Nothing found.

15. Kansas

- **Status:** Nothing found.

16. Kentucky

- **Governing Rules:** Kentucky Rules of Criminal Procedure 6.20 and 8.31.

- **Key Points:**
    - Defendants may be jointly charged if they participated in the same act or transaction.
    - If prejudicial joinder is shown, the court must sever or provide other relief.
- **Citations:** *Ky. RCr 6.20*; *Ky. RCr 8.31*.

17. Louisiana

- **Governing Statute:** La. Code Crim. Proc. Ann. art. 704.
- **Key Points:**
    - Jointly indicted defendants "shall be tried jointly unless" the State elects otherwise or a severance is required.
    - Reflects a strong presumption of joint trial.
- **Citation:** *La. Code Crim. Proc. Ann. art. 704*.

18. Maine

- **Governing Rule:** Maine Rule of Unified Criminal Procedure 8(b).
- **Key Points:**
    - The State may file a "Notice of Joinder" when multiple defendants allegedly participated in the same act or series of acts.
    - Defense may move for relief if prejudiced by the joinder.
- **Citation:** *Me. R. U. Crim. P. 8(b)*.

19. Maryland

- **Status:** Nothing found.

20. Massachusetts

- **Governing Rules:** Massachusetts Rules of Criminal Procedure 9(b)–(d).
- **Key Points:**
    - Defendants may be joined if the charges arise out of the same criminal conduct or a single scheme/plan.
    - The trial judge may order consolidation or severance to serve the interests of justice.
- **Citation:** *Mass. R. Crim. P. 9*.

21. Michigan

- **Governing Rule:** Michigan Court Rules 6.420(B).

- **Key Points:**
    - Permits verdicts to be returned for some but not all co-defendants.
    - Addresses partial verdict and mistrial scenarios in joint trials.
- **Citation:** *Mich. Ct. R. 6.420(B)*.

22. Minnesota

- **Governing Rule:** Minnesota Rule of Criminal Procedure 17.03.
- **Key Points:**
    - Court has discretion to join or sever codefendants, considering the nature of the offense, impact on the victim, prejudice to defendants, and the interests of justice.
    - Addresses out-of-court statements by codefendants and potential severance if prejudice cannot be mitigated.
- **Citation:** *Minn. R. Crim. P. 17.03*.

23. Mississippi

- **Governing Rule:** Mississippi Rule of Criminal Procedure 14.2(b).
- **Key Points:**
    - Multiple defendants may be joined when each defendant is charged with accountability for each offense, or the offenses are part of a common scheme or plan.
    - Severance is available upon a showing of prejudice.
- **Citation:** *Miss. R. Crim. P. 14.2*.

24. Missouri

- **Governing Rules/Statutes:** Missouri Supreme Court Rules 23.06, 24.06, and Mo. Ann. Stat. § 545.880.
- **Key Points:**
    - Strong presumption of joint trial for jointly indicted defendants.
    - Court may order separate trials if there is "probability of prejudice."
- **Citations:** *Mo. Sup. Ct. R. 23.06*, *24.06*; *Mo. Ann. Stat. § 545.880*.

25. Montana

- **Governing Statutes:** Mont. Code Ann. §§ 46-11-404(4) and 46-13-211.
- **Key Points:**

    - Joinder allowed if defendants participated in the same transaction.
    - Court may order severance or separate trials if prejudice is shown.
- **Citations:** *Mont. Code Ann. § 46-11-404*, *46-13-211*.

26. Nebraska

- **Status:** Nothing found.

27. Nevada

- **Status:** Nothing found.

28. New Hampshire

- **Governing Rule:** New Hampshire Rule of Criminal Procedure 20.
- **Key Points:**
    - Court may order joinder if two or more defendants are charged with "related offenses," provided it does not violate defendants' rights or cause undue prejudice.
- **Citation:** *N.H. R. Crim. P. 20*.

29. New Jersey

- **Status:** Nothing found.

30. New Mexico

- **Governing Rule:** New Mexico Rule of Criminal Procedure 5-203(B)–(C).
- **Key Points:**
    - A separate indictment/information must be filed for each defendant, but the State may file a "statement of joinder" or a motion to join for trial.
    - Courts may consolidate upon showing the charges arise from the same plan or series of acts.
    - Severance granted if prejudice is shown.
- **Citation:** *N.M. R. Ann. 5-203*.

31. New York

- **Governing Statute:** New York Criminal Procedure Law § 200.40.
- **Key Points:**
    - Two or more defendants can be jointly charged in the same indictment if they are all charged with every offense, or if the offenses derive from the same criminal transaction or a common scheme/plan.

    - Consolidation of separate indictments is allowed if the defendants could have been joined originally.
    - Good cause (e.g., prejudice) may lead to severance.
- **Citation:** *N.Y. Crim. Proc. Law § 200.40*.

32. North Carolina

- **Status:** Nothing found.

33. Ohio

- **Governing Rules:** Ohio Rule of Criminal Procedure 8(B) and 14.
- **Key Points:**
    - Allows joint charging if defendants participated in the same act, transaction, or course of criminal conduct.
    - Severance if joinder appears to prejudice either a defendant or the State.
- **Citations:** *Ohio R. Crim. P. 8(B)*; *Ohio R. Crim. P. 14*.

34. Oklahoma

- **Status:** Nothing found.

35. Oregon

- **Status:** Nothing found.

36. Pennsylvania

- **Governing Rule:** Pennsylvania Rule of Criminal Procedure 505(A).
- **Key Points:**
    - A separate complaint must be filed for each defendant.
    - The complaints may be consolidated for hearing/trial, and costs are not duplicated.
- **Citation:** *Pa. R. Crim. P. 505*.

37. South Carolina

- **Status:** Nothing found.

38. South Dakota

- **Governing Statutes:** S.D. Codified Laws §§ 23A-11-1 and 23A-11-2.
- **Key Points:**
    - Court may order two or more indictments/informations tried together if defendants and offenses could have been joined in a single instrument.

    - Relief from prejudicial joinder is available via severance or other remedy.
- **Citations:** *S.D. Codified Laws §§ 23A-11-1*, *23A-11-2*.

39. Tennessee

- **Governing Rule:** Tennessee Rule of Criminal Procedure 8(b).
- **Key Points:**
    - Defendants may be charged jointly if each is accountable for each offense or if the offenses form a common scheme or plan.
    - Severance is governed by separate provisions, generally requiring a showing of prejudice.
- **Citation:** *Tenn. R. Crim. P. 8(b)*.

40. Texas

- **Status:** Nothing found.

41. Utah

- **Note:** Utah Code § 77-8a-1(2)(b)–(d) allows multiple defendants to be jointly charged and mandates joint trials absent prejudice, but the CORIS system effectively prohibits filing a single information for multiple defendants.

42. Vermont

- **Governing Rule:** Vermont Rule of Criminal Procedure 8(b).
- **Key Points:**
    - Permits joinder of multiple defendants in the same indictment or information if each defendant is accountable for the offenses, or if the offenses arise from a common scheme/plan.
    - Standard severance rule applies if prejudice is demonstrated.
- **Citation:** *Vt. R. Crim. P. 8(b)*.

43. Virginia

- **Status:** Nothing found.

44. Washington

- **Status:** Nothing found.

45. West Virginia

- **Governing Rules:** West Virginia Rules of Criminal Procedure 8(b) and 14(b).
- **Key Points:**

- Defendants may be joined if they participated in the same act or transaction.
- Courts may sever or provide other relief if prejudice is shown.

- **Citations:** *W. Va. R. Crim. P. 8*, *14*.

46. Wisconsin

- **Governing Statute:** Wis. Stat. Ann. § 971.12(2)–(4).
- **Key Points:**
  - Defendants may be joined if they participated in the same act or transaction.
  - The court must sever if a codefendant's statement implicates another defendant and that statement cannot be sufficiently redacted or excluded.
  - Authorizes consolidation of separate complaints/indictments if they could have been joined originally.
- **Citation:** *Wis. Stat. Ann. § 971.12*.

47. Wyoming (Grouped With Alaska, Delaware, North Dakota, Rhode Island, Virgin Islands Under "Rule 8/14 Model" in Original Outline)

- **Governing Rules:** Wyoming Rules of Criminal Procedure 8(b) and 14.
- **Key Points:**
  - Tracks language similar to Fed. R. Crim. P. 8(b) and 14.
  - Defendants "may be charged in the same indictment" if they participated in the same act or transaction.
  - Court may grant severance for prejudicial joinder.
- **Citations:** *Wyo. R. Crim. P. 8*, *Wyo. R. Crim. P. 14*.

(Note: Delaware, North Dakota, Rhode Island, and the Virgin Islands also use similarly worded versions of Rule 8/14, though the specific text was not listed in detail above.)

B. States With No Found Codified Rule

- **California, Connecticut, Georgia, Illinois, Indiana, Iowa, Kansas, Maryland, Nebraska, Nevada, New Jersey, New York (some coverage under CPL 200.40, but that is a partial rule), North Carolina, Oklahoma, Oregon, South Carolina, Texas, Virginia, Washington**: No explicit joinder-of-defendants provision was located in the primary rule sets (some of these states have partial or older statutory references and rely on caselaw).

(Note: For some of these states, partial or alternative statutory authority may exist, but no direct corollary to Fed. R. Crim. P. 8/14 was found).

Rule 4. Prosecution by information.

(a) Commencing a prosecution. A prosecution may be commenced by filing an information. The information shall be filed in a format required by rules of the Judicial Council.

(b) **Contents of information.** An information must contain:

(b)(1) If known, the defendant's name, date of birth, and current address as provided by law enforcement and corrections authorities.

(b)(1)(A) If the name of the defendant is not known, the prosecution must identify the defendant as John or Jane Doe, and must provide any known identifying information.

(b)(1)(B) Other identifying information may be provided in accordance with rules of the Judicial Council, provided the information does not include non-public records.

(b)(2) Numbered counts using the name given to the offense by statute or ordinance, or stating in concise terms the definition of the offense sufficient to give the defendant notice of the charge.

(b)(2)(A) The prosecution may allege alternate theories of the same offense in a single count or in multiple counts.

(b)(3) Unless otherwise contained in filings accompanying the Information, a booking number and a State Identification Number (SID) if the defendant was arrested and detained on charges related to the information. Any pretrial release conditions must be included, such as:
(b)(3)(A) monetary bail or other pretrial release conditions set by the magistrate when determining probable cause at arrest;

(b)(3)(B) whether the defendant was denied pretrial release;

(b)(3)(C) whether the defendant was released to a pretrial supervision agency; and

(b)(3)(D) whether the defendant is in custody.

(c) Joinder of Defendants.

(c)(1) When two or more defendants are charged in separate informations but each information identifies the other defendants and alleges the defendants participated in the same act or series of acts arising from the same criminal episode, the court will treat those defendants as though they were jointly charged in a single information.

(c)(2) If it appears that a defendant would be prejudiced by a joint trial, the court may order separate trials or provide any other relief as justice requires.

~~**(c)**~~ **(d) Felonies and class A misdemeanors.** If a felony or class A violation is alleged, and in all cases requesting a warrant, an information must:

~~(c)~~ **(d)**(1) contain or be accompanied by a statement of facts sufficient to support probable cause for the charged offense or offenses. The information need not include facts such as time, place, means, intent, manner, value, and ownership unless necessary to charge the offense. Supporting physical materials such as money, securities, written instruments, pictures, statutes, and judgments may be identified using names or by describing the documents. Neither presumptions of law nor matters of judicial notice need be stated,

~~(d)~~**(e) Amending the information.** The court may permit an information to be amended at any time before trial has commenced so long as the substantial rights of the defendant are not prejudiced. If an additional or different offense is charged, the defendant has the right to a preliminary hearing on that offense as provided under these rules and any continuance as necessary to meet the amendment. The court may permit an information to be amended after the trial has commenced but before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. After verdict, an information may be amended so as to state the offense with such particularity as to bar a subsequent prosecution for the same offense upon the same set of facts.

~~(e)~~**(f) Bill of particulars**. When facts not set out in an information are required to inform a defendant of the nature and cause of the offense charged, so as to enable the defendant to prepare a defense, the defendant may file a written motion for a bill of particulars. The motion must be filed at arraignment or within 14 days thereafter, or at such later time as the court may permit. The court may, on its own motion, direct the filing of a bill of particulars. A bill of particulars may be amended or supplemented at any time subject to such conditions as justice may require. The request for and contents of a bill of particulars must be limited to a statement of factual information needed to set forth the essential elements of the particular offense charged.

Rule 4C. Joint Trials of Separately Charged Defendants.

(a) Joint Trial Presumption. When two or more defendants are charged in separate informations or indictments, but each charging document alleges that the defendants participated in the same act or conduct in the same criminal episode, the court will presume that such defendants are "jointly charged" and will order a joint trial of all defendants, unless the court, on a party's motion or on its own, finds that severance is required to meet the interests of justice.

(b) Procedure for Consolidation.

1. **Motion or Court's Initiative.** Any party may move to consolidate separately charged defendants for a single trial. The court may also do so on its own initiative.
2. **Contents of Motion.** A motion to consolidate must allege that the defendants could have been joined in a single charging document.
3. **Order of Consolidation.** Upon a showing that the defendants participated in the same act or criminal episode, the court will order a consolidated trial, unless severance is appropriate under paragraph (c).

(c) Severance. If it appears that a defendant would be prejudiced by a joint trial, the court may order separate trials, grant a severance of defendants, or provide other relief justice requires.

(d) Effect of Joint Trial. Once the court orders a consolidated trial, proceedings shall be as if all defendants had been jointly charged in a single information.

Tab 4

This opinion is subject to revision before final publication in the Pacific Reporter

2024 UT 45

IN THE

SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Appellee,

v.

STEPHEN RIPPEY,
Appellant.

No. 20200917
Heard September 8, 2023
Filed December 27, 2024

On Direct Appeal

Third District Court, West Jordan
The Honorable L. Douglas Hogan
No. 081402174

Attorneys*:

Sean D. Reyes, Att'y Gen., William M. Hains, Asst. Solic. Gen., Salt Lake City, for appellee

Ann Marie Taliaferro, Dain Smoland, Salt Lake City, for appellant

CHIEF JUSTICE DURRANT authored the opinion of the Court, in which JUSTICE PETERSEN, JUSTICE HAGEN, JUSTICE POHLMAN, and JUDGE LUTHY joined.

Having recused himself, ASSOCIATE CHIEF JUSTICE PEARCE did not participate herein; COURT OF APPEALS JUDGE JOHN D. LUTHY sat.

* Additional attorneys: Benjamin Miller, Debra M. Nelson, Salt Lake City, for *amicus curiae* Utah Indigent Appellate Defense Division, in support of appellant; Dallas Young, Staci Visser, David Ferguson, Salt Lake City, for *amicus curiae* Utah Association of Criminal Defense Lawyers, in support of appellant.

CHIEF JUSTICE DURRANT, opinion of the Court:

INTRODUCTION

¶1 Stephen Rippey pled guilty to one count of aggravated sexual abuse of a child and one count of object rape of a child. He was sentenced to serve two prison terms of fifteen years to life, which were ordered to run concurrently. Ten years after his conviction, a district court reinstated Rippey's time to file a direct appeal. On appeal, Rippey challenges several aspects of his plea, conviction, and sentence. We recalled his appeal to address a threshold issue: whether the Plea Withdrawal Statute (PWS)[1] is constitutional.

¶2 In this opinion we reach solely that issue. We hold that subsection (2)(b)'s preservation rule and the corresponding waiver housed in subsection (2)(c) of the PWS violate the separation of powers required by the Utah Constitution. Because those provisions are unconstitutional, the PWS does not bar Rippey's challenge to his guilty plea and his appeal is now governed—as are similar challenges brought by other defendants—by our standard rules of preservation. Having resolved Rippey's constitutional challenge to the PWS, we instruct the parties to brief the merits of

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[1] The Plea Withdrawal Statute reads:

> (1) A plea of not guilty may be withdrawn at any time prior to conviction.
>
> (2)(a) A plea of guilty or no contest may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made.
>
> (b) A request to withdraw a plea of guilty or no contest, except for a plea held in abeyance, shall be made by motion before sentence is announced. Sentence may not be announced unless the motion is denied. For a plea held in abeyance, a motion to withdraw the plea shall be made within 30 days of pleading guilty or no contest.
>
> (c) Any challenge to a guilty plea not made within the time period specified in Subsection (2)(b) shall be pursued under Title 78B, Chapter 9, Postconviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure.

UTAH CODE § 77-13-6.

Rippey's challenges to his plea, conviction, or sentence under the standards articulated in this opinion.

BACKGROUND

¶3 The State charged Rippey with five first-degree felonies—three counts of aggravated sexual abuse of a child and two counts of object rape of a child—for acts that allegedly occurred between January 2005 and July 2008. Rippey pled guilty to one count of aggravated sexual abuse of a child and one count of object rape of a child. In exchange for his guilty plea, the State dismissed the other charges and amended the information to specify that the charged offenses occurred in December 2007.[2]

¶4 Before Rippey entered his plea, the court engaged in a colloquy with him. Rippey told the court that he had reviewed the plea statement with his counsel, and that he understood the rights he was giving up by pleading guilty. He also told the court that he could read and understand English, had not taken drugs or alcohol in the previous forty-eight hours, and was not aware of mental or physical impairments preventing him from understanding the ramifications of his guilty plea. Finally, Rippey told the court that he was "still willing to go forward" with the plea despite the possibility that he could spend the rest of his life in prison.

¶5 After this exchange, Rippey signed a plea form certifying that he believed he was "of sound and discerning mind"; "mentally capable of understanding the[] proceedings and the consequences of [the guilty] plea"; and "free of any mental disease, defect, or impairment that would prevent [him] from understanding what [he was] doing or from knowingly, intelligently, and voluntarily entering [his] plea." The plea form also described the requirements and limitations for withdrawing a guilty plea and explained that

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[2] The change in timeframe was relevant because the statutory penalties for the charged offenses changed between July 2005 and July 2008, when the State initially alleged that the offenses had occurred. Notably, before May 2008, object rape of a child included a presumptive sentence of fifteen years to life, which could be reduced to ten or six years to life in the interests of justice. *See id.* § 76-5-402.3(2), (3) (2007). After May 2008, the legislature eliminated the sentencing presumption for the offense so that a defendant convicted of object rape of a child would receive twenty-five years to life with no chance for an interests-of-justice reduction. *See id.* (2008).

defendants could pursue post-sentence plea challenges only under the Post-Conviction Remedies Act (PCRA) and rule 65C of the Utah Rules of Civil Procedure.

¶6 Rippey's counsel then provided the district court with a factual basis for the guilty plea. Rippey attested to its accuracy and affirmed that he was, in fact, guilty of the offenses. The court accepted Rippey's plea and told him that if he wanted to withdraw the plea, he would "need to ask [the court] in writing sometime prior to [his] sentencing date." Rippey did not move to withdraw his plea before sentencing. He was sentenced to two concurrent prison terms of fifteen years to life.

¶7 Rippey did not appeal his conviction within the permitted timeframe. About a year after his sentencing, however, he filed a pro se petition for post-conviction relief under the PCRA and rule 65C. In the petition, Rippey listed seventeen claims for relief.

¶8 At the frivolity review stage,[3] the district court dismissed eight of Rippey's seventeen claims for relief. The State then moved to dismiss the remaining claims for failure to state a claim upon which relief could be granted, arguing that Rippey could have but did not challenge the validity of his plea before sentencing, that he entered his plea knowingly and voluntarily, and that he could not show that his trial counsel was constitutionally ineffective.

¶9 At a hearing on the State's motion to dismiss, Rippey, representing himself, asserted that his mental health records would demonstrate both that he was incompetent when he entered his guilty plea and that his trial counsel was ineffective. The State responded that because Rippey did not move to withdraw his guilty plea before sentencing, all his claims except ineffective assistance of counsel had been waived. And, the State added, Rippey could not show that his trial counsel performed ineffectively.

¶10 The court granted the State's motion to dismiss. In its written dismissal order, the court reasoned that Rippey's plea challenges were procedurally barred because they could have been but were not raised in the district court or on direct appeal. And it explained that Rippey's ineffective assistance of counsel claims, though not procedurally barred, were "without merit."

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[3] *See* UTAH R. CIV. P. 65C(h)(1).

¶11 Over the course of the post-conviction proceedings, Rippey asked the court nearly ten times to appoint counsel for him. Rippey offered several reasons why he needed counsel's assistance: the legal issues were complex; without assistance of counsel, he would be deprived of meaningful access to the courts; and he lacked requisite legal resources. The State objected to Rippey's requests for counsel, contending that the legal and factual issues were "fairly straightforward and d[id] not require an evidentiary hearing," and that the counsel-appointment process would lead to needless delays.

¶12 The court denied Rippey's requests for the appointment of counsel, though it did "reserve[] the possibility that the need for counsel m[ight] become more apparent as the case proceed[ed] further." In the court's view, the appointment of counsel was not yet "necessary" under the PCRA because an evidentiary hearing would not likely be needed, and because Rippey's petition did not present "complicated issues of law or fact."[4]

¶13 Rippey appealed the post-conviction court's dismissal of his petition. At this point, the court appointed counsel to represent him. Regarding the challenges to the validity of his plea, Rippey argued to the court of appeals that because the PWS mandates that guilty plea challenges not raised in a motion to withdraw be raised under the PCRA, he had not waived his claims in post-conviction proceedings under the PCRA by failing to raise them on appeal.[5] And Rippey maintained that his ineffective assistance of counsel claims had merit.[6]

¶14 The court of appeals determined that Rippey's claims, other than ineffective assistance of counsel, were not preserved.[7] Accordingly, the court did not address the unpreserved claims on their merits.[8] And the court upheld the district court's dismissal of Rippey's ineffective assistance of counsel claims.[9] It concluded that although Rippey had made some allegations that, "if taken as true,

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[4] (Quoting UTAH CODE § 78B-9-109(1), (2) (2011))

[5] *Rippey v. State*, 2014 UT App 240, ¶ 7, 337 P.3d 1071.

[6] *Id.* ¶ 10.

[7] *Id.* ¶ 9.

[8] *Id.*

[9] *Id.* ¶ 16.

arguably state one or more claims that his counsel performed deficiently in some respects," he had not made the necessary showing that it would have been rational for him to reject the plea deal.[10] Rippey asked this court to review the court of appeals' decision, but we declined to do so.

¶15 Ten years later, Rippey—again acting pro se—moved to reinstate the time to file a direct appeal in his criminal case. He attached to the motion a letter that he purportedly wrote to his trial counsel a few days after his sentencing. In the letter, Rippey instructed his counsel, "Appeal if possible."

¶16 The district court denied Rippey's motion. Rippey appealed, and the court of appeals summarily reversed the district court ruling because Rippey was not represented by counsel in bringing the motion. On remand, this time with Rippey represented by counsel, the district court granted Rippey's motion.

¶17 Upon reinstatement of his time for appeal, Rippey timely filed a notice of appeal. In this first direct appeal, Rippey claims that the PWS is unconstitutional, his plea was not knowingly and voluntarily entered, and the district court abused its discretion at sentencing.

¶18 We instructed the parties to brief only the threshold issue of whether the PWS is constitutional.[11] We now address that issue.

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[10] *Id.* ¶¶ 13–15.

[11] Initially, we poured over Rippey's appeal and several similar cases for our court of appeals' consideration. As part of the suggestion leading to our recall of these cases, Rippey proposed that we "bifurcate the constitutionality of the Plea Withdrawal Statute from the underlying merits of each case," and we have done so. Upon resolution of that threshold issue, those other cases raising the same threshold issue are to "be poured back over to the court of appeals for consideration of the merits in each case." However, because we have held oral argument in Rippey's case, we will not pour his case back to the court of appeals but will resolve the remaining merits of his appeal after further briefing. *See* UTAH R. APP. P. 42(a) (allowing for the transfer of "cases," not discrete issues, and providing that "[a]t any time before a case is set for oral argument before the Supreme Court, the Court may transfer to the Court of Appeals any case except those cases within the Supreme Court's exclusive jurisdiction").

ANALYSIS

¶19 Rippey contends that the PWS is unconstitutional on its face and as applied to him. He argues it is facially unconstitutional because subsection (2)(b) of the PWS violates the separation-of-powers principles enshrined in article VIII, section 4 of the Utah Constitution. As applied to him, Rippey argues subsections (2)(b) and (2)(c), working in tandem, violate his federal constitutional rights to appeal, to the effective assistance of trial counsel, to the effective assistance of state-paid counsel and defense resources on appeal, to due process of law, and to equal protection. He also argues that the statute violates his Utah constitutional open courts and uniform operation of laws rights.

¶20 Subsections (2)(b) and (2)(c) of the PWS read:

> (b) A request to withdraw a plea of guilty or no contest, except for a plea held in abeyance, shall be made by motion before sentence is announced. Sentence may not be announced unless the motion is denied. For a plea held in abeyance, a motion to withdraw the plea shall be made within 30 days of pleading guilty or no contest.
>
> (c) Any challenge to a guilty plea not made within the time period specified in Subsection (2)(b) shall be pursued under Title 78B, Chapter 9, Postconviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure.[12]

These subsections require a defendant seeking to withdraw a guilty plea to do so by motion before sentencing. A defendant who seeks to withdraw a guilty plea after sentencing can raise the issue only in a petition filed under the PCRA.

¶21 First, we review the separation-of-powers principles that apply to the PWS. Next, we apply those principles and conclude that the preservation and waiver rules contained in subsections (2)(b) and (2)(c) are procedural. And we clarify that these subsections inappropriately regulate the judiciary's issue-specific jurisdiction. Last, we determine whether the procedural component of the PWS is inextricably intertwined with its substance. Concluding that the procedural component is extractable, we hold that the legislature unconstitutionally created

[12] UTAH CODE § 77-13-6(2)(b) to (2)(c).

a procedural rule when it enacted subsection (2)(b) and the related waiver contained in subsection (2)(c) of the statute. In light of that holding, we decline to address Rippey's remaining constitutional challenges to the PWS.

I. THE UTAH CONSTITUTION EMPOWERS THE LEGISLATURE TO ENACT SUBSTANTIVE LAWS AND THE JUDICIARY TO ADOPT PROCEDURAL RULES

¶22 We begin by discussing the principles that guide a separation-of-powers analysis and how those principles apply to the PWS. The Utah Constitution declares that the "powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial."[13] This division means that each branch of government has powers reserved to it, but also that each branch's exercise of its powers is checked and balanced by the powers of the other two branches.

¶23 Relevant here, the Utah Constitution designates to the legislature the power to enact substantive laws.[14] Substantive laws are laws that create, destroy, or alter "the rights and duties of . . . parties and which may give rise to a cause [of] action."[15] But the Utah Constitution designates to the judiciary the power to adopt rules to govern procedure in Utah courts.[16] Procedural rules prescribe the "practice and procedure or the legal machinery by which the substantive law is . . . made effective."[17] While the legislature cannot independently create procedural rules,[18] it can by agreement of a super-majority of legislators amend the rules of procedure the judiciary has adopted.[19]

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[13] UTAH CONST. art. V, § 1.

[14] *See id.* art. VI, § 1.

[15] *Petty v. Clark*, 192 P.2d 589, 593 (Utah 1948).

[16] UTAH CONST. art. VIII, § 4.

[17] *Petty*, 192 P.2d at 594.

[18] *Brown v. Cox*, 2017 UT 3, ¶¶ 17, 20, 387 P.3d 1040 ("By the constitution's plain language, the Legislature does not adopt rules of procedure and evidence; it amends the rules the supreme court creates.").

[19] *Id.*; UTAH CONST. art. VIII, § 4 ("The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme (continued . . .)

¶24 We address Rippey's challenge under this framework. The parties agree that in enacting the PWS, the legislature did not purport to amend an existing rule of procedure adopted by the judiciary. This means that, to comply with article VIII of the Utah Constitution, the PWS must be substantive: it must create, alter, or destroy rights.[20] If the PWS is instead procedural—that is, it governs the practice and procedure that make substantive laws effective—it violates the Utah Constitution.[21]

II. SUBSECTION (2)(b) OF THE PLEA WITHDRAWAL STATUTE IS PROCEDURAL

¶25 With this separation-of-powers framework in mind, we now address Rippey's argument that subsection (2)(b) of the PWS is procedural. Rippey's position is straightforward: subsection (2)(b) is procedural because this court said it is. And Rippey is right. In *State v. Rettig*, we reasoned that subsection (2)(b) is "quintessentially procedural" because it "prescribes the manner and means of raising a particular issue in court proceedings."[22]

¶26 Subsection (2)(b)'s text supports *Rettig*'s conclusion. Subsection (2)(b) states that "[a] request to withdraw a plea of guilty or no contest, except for a plea held in abeyance, shall be made by motion before sentence is announced."[23] "For a plea held in abeyance, a motion to withdraw the plea shall be made within 30 days of pleading guilty or no contest."[24] And, the "[s]entence may not be announced unless the motion [to withdraw the guilty plea] is denied."[25] These statutory requirements amount to little more than deadlines for a defendant to file a motion to withdraw, and as *Rettig* pointed out, "[y]ou can't get much more procedural than a filing deadline."[26]

Court upon a vote of two-thirds of all members of both houses of the Legislature.").

[20] *See Petty*, 192 P.2d at 593.

[21] *See id.* at 594; *Brown*, 2017 UT 3, ¶¶ 17, 20.

[22] 2017 UT 83, ¶ 58, 416 P.3d 520.

[23] UTAH CODE § 77-13-6(2)(b).

[24] *Id.*

[25] *Id.*

[26] *Rettig*, 2017 UT 83, ¶ 58.

¶27 The State urges us to reconsider our reasoning in *Rettig* and argues that subsection (2)(b) is substantive because it bars a defendant from raising an unpreserved challenge to the validity of his plea on direct appeal, thus extinguishing his substantive right to vacate his sentence based on the allegedly invalid plea.[27] We disagree.

¶28 Like other rules of preservation, subsection (2)(b) does not create or extinguish legal rights, but instead controls the legal machinery by which those rights operate. Subsection (2)(b) establishes the method for withdrawing a guilty plea and the deadline for doing so.[28] And subsection (2)(c) prevents defendants who miss (2)(b)'s withdrawal deadline from challenging their plea on direct appeal—a waiver sanction that naturally flows from (2)(b)'s preservation rule.[29]

III. SUBSECTION (2)(b) OF THE PLEA WITHDRAWAL STATUTE DOES NOT REGULATE SUBJECT MATTER JURISDICTION

¶29 Having confirmed that subsection (2)(b) of the PWS is procedural, we now address the State's alternative argument that "[r]egardless of whether the time limit in the [PWS] is procedural or substantive, it is jurisdictional and thus within the legislature's purview." Specifically, the State contends that "when the legislature enacts a statute that has the effect of cutting off a court's authority to reach an issue, that is a valid exercise of the legislature's authority to regulate jurisdiction no matter if the statute may be considered procedural." This argument lumps together distinct types of "jurisdiction." And the distinction matters, because not all types of jurisdiction fall under the legislature's authority to regulate.

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[27] The State also suggests that subsection (2)(b) is substantive because, in the retroactivity context, this court has recognized the provision as such. But "the fact that a statute is sufficiently 'substantive' to bar its retroactive application doesn't tell us anything meaningful about whether it is 'substantive' under article VIII, section 4." *Id.* ¶ 56 n.11.

[28] *See id.* ¶ 58.

[29] *Id.* ¶ 47. We discuss subsection (2)(c)'s waiver component below. *See infra* ¶¶ 34–39.

¶30 In *Rettig*, we stated that "[t]he notion of 'jurisdiction' is a slippery one."[30] It is a "word that means different things in different circumstances."[31] And we have, at times, used "the hazy term 'jurisdiction' without any classification or definition."[32] Two distinct types of jurisdiction are relevant to this case.

¶31 The first type is subject matter jurisdiction. We have referred to this type of jurisdiction in part as the "statutory limits on the class of cases assigned to the authority of a certain court."[33] Article VIII, section 3 of the Utah Constitution gives the legislature the authority to set certain limits on this type of jurisdiction, and the legislature's exercise of that power does not infringe on the judiciary's authority to adopt rules of procedure.[34]

¶32 The second relevant type of jurisdiction is the judiciary's issue-specific jurisdiction. This is "the more limited notion" of a court's "power to reach a certain question presented."[35] We noted in *Rettig* that we have authority to enact "commonplace" procedural rules, including rules of preservation and waiver.[36] These rules "create a jurisdictional bar . . . in the sense that they foreclose the power of the court to consider issues not properly preserved and barred by a principle of waiver."[37] The Utah Constitution "indicate[s] that this sort of jurisdictional bar is a matter within our power to regulate by the promulgation of a rule of procedure."[38] And though distinct from subject matter jurisdiction, "the effect of this kind of rule is properly viewed as

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[30] 2017 UT 83, ¶ 36, 416 P.3d 520 (cleaned up).

[31] *Id.* (cleaned up).

[32] *Id.* ¶ 65 (Durham, J., concurring in the result); *see, e.g.*, *Granite Sch. Dist. v. Young*, 2023 UT 21, ¶¶ 30–32, 537 P.3d 225.

[33] *In re Adoption of B.B.*, 2017 UT 59, ¶¶ 121, 129, 417 P.3d 1 (Lee, A.C.J., opinion of the court in part).

[34] *See also Rettig*, 2017 UT 83, ¶ 37.

[35] *Id.* ¶ 39.

[36] *Id.* ¶ 17 ("Rules of [preservation and waiver] are commonplace." (cleaned up)).

[37] *Id.* ¶ 35 (cleaned up).

[38] *Id.* ¶ 38.

'jurisdictional' in the narrow sense of regulating the scope of a court's authority to address a certain issue."[39]

¶33 Many of our cases analyzing the PWS describe subsection (2)(b) as imposing "a jurisdictional bar on late-filed motions to withdraw guilty pleas."[40] The State is correct to note that (2)(b), in creating a rule of preservation, has jurisdictional effect. But, as we made clear in *Rettig*, the jurisdiction it regulates is the limited kind that we control through rules of procedure, not the subject matter jurisdiction that the legislature controls through statute.[41] And because (2)(b)—an otherwise procedural rule—does not implicate subject matter jurisdiction, the legislature lacks authority to impose it.

IV. SUBSECTION (2)(c) OF THE PLEA WITHDRAWAL STATUTE INCLUDES BOTH A SUBSTANTIVE RIGHT AND A PROCEDURAL RULE

¶34 Having established that subsection (2)(b) of the PWS is procedural, we now consider whether subsection (2)(c) also contains a procedural rule. Rippey directs his separation-of-powers challenge only at subsection (2)(b) of the PWS. And under normal

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[39] *Id.*

[40] *Grimmett v. State*, 2007 UT 11, ¶ 8, 152 P.3d 306 ("[Subsection (2)(b)] establishes the filing limitations that govern a criminal defendant's right to withdraw a guilty plea. These filing limitations are jurisdictional."); *see State v.* Merrill, 2005 UT 34, ¶ 17, 114 P.3d 585; *State v. Allgier*, 2017 UT 84, ¶ 21, 416 P.3d 546 ("[O]ur precedent that the [PWS] imposes a jurisdictional bar is well established.").

[41] The State suggests that *Rettig* ignored earlier cases that reached a contrary conclusion, among them *State v. Larsen*, 850 P.2d 1264 (Utah 1993), and *City of Monticello v. Christensen*, 788 P.2d 513 (Utah 1990). But these cases speak to different issues than the one before us. In *Larsen*, we analyzed the language "as prescribed by law" to determine whether the legislature intended a statute or procedural rule to govern a stay of a criminal sentence pending appeal. 850 P.2d at 1266–67. And in *Christensen*, we addressed whether a statute that allowed an appeal of a justice court ruling to proceed as a de novo trial in a district court comported with the constitutional appeal guarantee in the Utah Constitution. 788 P.2d 515–19. Neither case compels an answer to the question presented here, which is whether the legislature can control our issue-specific jurisdiction.

circumstances, we would confine our analysis to that subsection only. But Rippey's argument and the State's response also implicate the waiver contained in subsection (2)(c). And so we turn now to that waiver.

¶35 Subsection (2)(c) reads, "Any challenge to a guilty plea not made within the time period specified in Subsection (2)(b) shall be pursued under" the PCRA.[42] *Rettig* is clear that subsection (2)(c) includes a substantive right: (2)(c) allows a defendant to raise unpreserved challenges to a guilty plea through the PCRA, and that established "a new legal remedy."[43] "The establishment of a new remedy is a core matter of substance—clearly within the power of the legislature."[44] Because neither party challenges *Rettig*'s holding on this point, we treat it as binding.

¶36 Although we held in *Rettig* that (2)(c) is substantive, our analysis of (2)(c) was incomplete. There, the appellant challenged only the constitutionality of subsection (2)(c), so we expressly declined to consider any challenge to (2)(b)—the preservation rule—or to consider whether the two provisions were inextricably intertwined.[45] At the same time, we intimated that, along with a substantive right, subsection (2)(c) also contains a procedural component: the companion "waiver" to (2)(b)'s preservation rule.[46] And we noted that the "procedural dimension of the preservation rule in the statute—the time deadline it sets for the filing of motions—may be a potent basis for questioning the constitutionality of this statute under article VIII, section 4."[47] We also held that ordinary rules of preservation and waiver do not foreclose any substantive right.[48] "They simply prescribe a sanction

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[42] UTAH CODE § 77-13-6(2)(c).

[43] 2017 UT 83, ¶ 53, 416 P.3d 520.

[44] *Id.*

[45] *Id.* ¶¶ 59–60.

[46] *Id.* ¶ 47 (citing subsection (2)(c) and stating that the PWS "prescribes a strict waiver sanction that forecloses review for plain error on direct appeal").

[47] *Id.* ¶ 59 n.14.

[48] *Id.* ¶¶ 20–21 (discussing Rettig's right to appeal claim).

for the failure to satisfy the timing deadlines set forth in the rule," and "that effect is as wide-ranging as it is commonplace."[49]

¶37 Rippey today brings that forecasted challenge to subsection (2)(b). And we now determine that subsections (2)(b) and (2)(c) together create a rule of preservation and waiver, with subsection (2)(c) containing the waiver. It does so by making explicit reference to the rule of preservation created by subsection (2)(b): "[a]ny challenge to a guilty plea not made within the time period specified in Subsection (2)(b) shall be pursued under" the PCRA.[50]

¶38 We have already concluded that subsection (2)(b) is procedural, and accordingly must be stricken from the text of the PWS. But because subsection (2)(c) relies on (2)(b)'s procedural mechanism, removing (2)(b) leaves (2)(c)'s waiver untethered. Without being able to reference "the time period specified in Subsection (2)(b)," (2)(c) contains an inactionable command. And without a defined time period, *no* defendant could be subject to the waiver rule or required to pursue their challenge to their plea through the PCRA. We thus conclude that we cannot fully address Rippey's challenge to subsection (2)(b) without addressing (2)(c) as well.

¶39 To the extent subsection (2)(c) allows defendants to challenge their plea under the PCRA, that is a clear substantive right. But to the extent (2)(c) embeds a sanction for not meeting the requirements of (2)(b), that portion is procedural and beyond the power of the legislature to enact.

V. THE PROCEDURAL RULES OF SUBSECTIONS (2)(b) AND (2)(c) ARE NOT INEXTRICABLY INTERTWINED WITH SUBSECTION (2)(c)'S SUBSTANTIVE RIGHT

¶40 Having established that the PWS contains unconstitutional procedural rules of preservation and waiver, we now analyze whether we must still uphold those rules because they are inextricably intertwined with the substantive law of the PWS. In *Rettig*, we did "not need to reach whether subsections (2)(b) and (2)(c) are 'inextricably intertwined' in a manner insulating the broader statutory scheme from challenge (even if one of these provisions is procedural)" because the appellant did not challenge

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[49] *Id.* ¶ 21.

[50] UTAH CODE § 77-13-6(2)(c).

subsection (2)(b).[51] With subsection (2)(b) on the table, we now undertake the inextricably intertwined analysis.

¶41 We have previously held that a procedural provision in a statute does not violate separation-of-powers principles when it is attached to a substantive right and "cannot be stripped away without leaving the right or duty created meaningless."[52] Said another way, "a procedural rule may be so intertwined with a substantive right that the court must view it as substantive."[53] The State argues that we should view the procedural parts of subsections (2)(b) and (2)(c) as inextricably intertwined with their substance because "the exclusive nature of [the PCRA] remedy comes into play only in conjunction with" and "is superfluous" without the time limits of subsection (2)(b).

¶42 The State points to our analysis in *Drej* as supportive of its position that we cannot untangle the substance and procedure of the PWS, but our reasoning in *Drej* is distinguishable.[54] In *Drej*, we considered whether the special mitigation statute complied with the separation-of-powers provisions of article VIII.[55] The statute at issue allowed criminal defendants to raise the affirmative defense of special mitigation.[56] The parties in *Drej* did not argue that the creation of the special mitigation defense was procedural.[57] Nor could they have; the "statute plainly creates and defines the right to present special mitigation to a jury," and therefore is substantive.[58]

¶43 The issue instead was what burden of proof the special mitigation statute required a defendant to meet to successfully invoke that defense.[59] We noted that whether a statute that assigned a burden of proof was procedural or substantive was a

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[51] 2017 UT 83, ¶ 60, 416 P.3d 520.

[52] *State v. Drej*, 2010 UT 35, ¶ 31, 233 P.3d 476.

[53] *Id.* ¶ 30.

[54] *See id.*

[55] *See id.* ¶¶ 25–31.

[56] *See* UTAH CODE § 76-5-205.5.

[57] *Drej*, 2010 UT 35, ¶ 11.

[58] *Id.* ¶ 28.

[59] *See id.* ¶ 11.

question of first impression and that other state courts were split on the issue.[60] But we found guidance in the approach that the U.S. Supreme Court took in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* when addressing the same issue.[61] There, the Court concluded that assigning a burden of proof was procedural, in that it "affect[ed] the exercise of judicial power."[62] But the Court reasoned that "[p]rovisions that create presumptions, or assign burdens of proof, or prescribe remedies . . . are also incidental to Congress'[s] power to define the right that it has created."[63] Applying that reasoning in *Drej*, we held the burden of proof was so intertwined with the substantive right to present mitigation that the court had to view it as substantive.[64]

¶44 The State claims that our reasoning from *Drej* applies here. Specifically, it argues that subsections (2)(b) and (2)(c) are inextricably intertwined because "the exclusive nature of [subsection (2)(c)'s PCRA] remedy comes into play only in conjunction with the time limits of subsection (2)(b)." And because stripping away the procedure created by (2)(b) would render the substantive right created by (2)(c) meaningless, we must treat that procedural subsection as substantive.[65]

¶45 But the scenario we faced in *Drej* is not what we face today. In *Drej*, the legislature created a statute that was overwhelmingly substantive aside from a small procedural component. Here, the legislature has enacted a statute that is, at its core, a procedural rule. Subsections (2)(b) and (2)(c) of the PWS are fundamentally a rule of

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[60] *Id.* ¶ 29.

[61] *Id.* ¶¶ 30–31 (discussing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), *superseded by statute as recognized in Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 132 n.2 (1995) (Ginsburg, J., concurring)).

[62] *Marathon Pipe Line Co.*, 458 U.S. at 83.

[63] *Drej*, 2010 UT 35, ¶ 30 (cleaned up) (citing *Marathon Pipe Line Co.*, 458 U.S. at 83).

[64] *Id.* ¶ 31.

[65] While we leave *Rettig*'s holding untouched, we note it is dubious whether subsection (2)(c) created a substantive right to challenge a plea that did not already exist under the PCRA.

preservation and waiver. And as we held in *Rettig* and affirm with our analysis above, that rule is fundamentally procedural.[66]

¶46 Our primary concern when interpreting article VIII is to ensure that the branches of government, including the judiciary, exercise only the powers that the Utah Constitution appoints to them. In *Drej*, we held that it was appropriate to allow the legislature to "incidental[ly]" infringe upon the judiciary's authority to adopt procedural rules because that infringement was necessary for the legislature to define the right that it had created.[67] That logic does not apply when the balance between substantive law and procedural infringement tips in the other direction.

¶47 Accordingly, we reject the State's argument that our holding in *Drej* prevents us from excising the procedural portions of subsection (2) of the PWS from the substantive ones. Because subsection (2)(b) is procedural, we strike it down as an unconstitutional infringement on this court's authority to adopt rules of procedure. And while we abide by *Rettig*'s conclusion that subsection (2)(c) creates a substantive right to challenge a guilty plea under the PCRA, for the reasons articulated above, we hold that its procedural component lacks legal effect once subsection (2)(b) is removed. Thus, when shorn of its procedural content by our decision today, subsection (2)(c) simply allows any challenge to a guilty plea to be pursued under the PCRA.

VI. THE STANDARD RULES OF PRESERVATION APPLY TO PLEA WITHDRAWAL

¶48 Having stricken subsection (2)(b) and the corresponding waiver rule embedded in subsection (2)(c) of the PWS, we next address how plea withdrawal works in the absence of these procedural rules.[68] We hold that without subsection (2)'s special rule of preservation and waiver, our normal rules of preservation and waiver apply. Under those rules, "[a]n issue is preserved for appeal when it has been presented to the district court in such a

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[66] 2017 UT 83, ¶ 58.

[67] 2010 UT 35, ¶¶ 30–31 (cleaned up).

[68] Because the withdrawal of a not-guilty plea is governed by subsection (1), this decision does not affect that subsection. *See* UTAH CODE § 77-13-6(1).

way that the court has an opportunity to rule on it."[69] If a party "fails to raise and argue an issue in the [district] court, it has failed to preserve the issue, and an appellate court will not typically reach that issue absent a valid exception to preservation."[70]

¶49 In practice, this means that whether a defendant may challenge a guilty plea on direct appeal will depend on whether he attempted to withdraw that plea in the district court in a way that the district court had the opportunity to rule on it. If the defendant does, then the issue of the plea's validity is preserved and may be argued on direct appeal. If the defendant does not preserve the issue of the plea's validity, then to challenge that plea on direct appeal the defendant will need to show that an exception to preservation applies.[71]

¶50 Moving forward, this case is governed by those same rules. In an order issued alongside this decision, we ask the parties to brief the merits of Rippey's challenges to his plea, conviction, or sentence under the standards articulated in this opinion.[72]

CONCLUSION

¶51 Rippey challenges the constitutionality of the PWS. We hold that subsection (2)(b) and the waiver component of subsection (2)(c) of the PWS were unconstitutionally enacted in violation of article VIII, section 4 of the Utah Constitution. We keep this case to hear further argument on Rippey's challenges to his guilty plea, conviction, or sentence.

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[69] *See Patterson v. Patterson*, 2011 UT 68, ¶ 12, 266 P.3d 828 (cleaned up).

[70] *State v. Johnson*, 2017 UT 76, ¶ 15, 416 P.3d 443; *see also id.* ¶¶ 20–24 (listing three exceptions to preservation: plain error, ineffective assistance of counsel, and exceptional circumstances).

[71] *See id.* ¶ 15.

[72] In another order issued alongside this decision, we lift the stay on the related cases. *See supra* ¶ 18 n.11. Pursuant to rule 42 of the Utah Rules of Appellate Procedure, we pour those cases back over to the court of appeals for further proceedings under the standards articulated in this opinion.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

These findings may be based on questioning of the defendant on the record or, if used, a written statement reciting these factors after the court has established that the defendant has read, understood, and acknowledged the contents of the statement. If the defendant cannot understand the English language, it will be sufficient that the statement has been read or translated to the defendant.

Unless specifically required by statute or rule, a court is not required to inquire into or advise concerning any collateral consequences of a plea.

(f) **Motion to withdraw plea.**

(1) A plea of not guilty may be withdrawn at any time prior to conviction.

(2) A plea of guilty or no contest may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made.

(3) A request to withdraw a plea of guilty or no contest, except for a plea held in abeyance, must be made by written motion before sentence is announced. Sentence may not be announced unless the written motion is denied. For a plea held in abeyance, a motion to withdraw the plea must be made within 30 days of the entry of the plea.

(4) Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty, no contest or guilty and mentally ill is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under ~~Utah Code § 77-13-6~~ paragraph (f)(3).

(g) **Plea in domestic violence offense.** If the defendant pleads guilty, no contest, or guilty and mentally ill to a misdemeanor crime of domestic violence, as defined in Utah Code § 77-36-1, the court will advise the defendant orally or in writing that, if the case meets the criteria of 18 U.S.C. § 921(a)(33) or Utah Code § 76-10-503 then pursuant to

federal law or state law, it is unlawful for the defendant to possess, receive or transport any firearm or ammunition. The failure to advise does not render the plea invalid or form the basis for withdrawal of the plea.

(h) **Plea recommendations.**

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

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

(i) **Plea agreements.**

~~(i)~~(1) The judge will not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney.

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

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

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

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

(l) **Strict compliance not necessary.** Compliance with this rule will be determined by examining the record as a whole. Any variance from procedure required by this rule

which does not affect substantial rights will be disregarded. Failure to comply with this rule is not, by itself, sufficient grounds for a collateral attack on a guilty plea.

Current Rules with amendment in red

Utah R. Crim. P. 11

(f) Motion to Withdraw Plea. A motion to withdraw a plea must be made within 30 days after sentencing. Failure to advise the defendant of the time limits for filing any motion to withdraw a plea ~~of guilty, no contest or guilty and mentally ill~~ is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under this rule. ~~and under Utah Code § 77-13-6~~. A motion to withdraw from a plea in abeyance agreement must be made within 30 days after entry of the plea in abeyance order by the court.

Utah R. App. P. 4

(b) Time for Appeal Extended by Certain Motions.

(1) If a party timely files in the trial court any of the following, the time for all parties to appeal from the judgment runs from the entry of the dispositive order:

(A) A motion for judgment under Rule 50(b) of the Utah Rules of Civil Procedure;

(B) A motion to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted, under Rule 52(b) of the Utah Rules of Civil Procedure;

(C) A motion to alter or amend the judgment under Rule 59 of the Utah Rules of Civil Procedure;

(D) A motion for a new trial under Rule 59 of the Utah Rules of Civil Procedure;

(E) A motion for relief under Rule 60(b) of the Utah Rules of Civil Procedure if the motion is filed no later than 28 days after the judgment is entered;

(F) A motion or claim for attorney fees under Rule 73 of the Utah Rules of Civil Procedure; or

(G) A motion for a new trial under Rule 24 of the Utah Rules of Criminal Procedure.

(H) A motion to withdraw a plea under Rule 11 of the Utah Rules of Criminal Procedure.

Utah Code § 77-13-6

(1) A plea of not guilty may be withdrawn at any time prior to conviction.

(2)~~(a)~~ A plea of guilty or no contest may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made. A motion to withdraw a plea shall be made by motion in accordance with Utah Rule of Criminal Procedure 11.

~~(b) A to withdraw a plea of guilty or no contest except for a plea held in abeyance, shall be made by motion. before sentence is announced. Sentence may not be announced unless the motion is denied. For a plea held in abeyance, a motion to withdraw the plea shall be made within 30 days of entering the plea in abeyance agreement. pleading guilty or no contest.~~

~~(c) Any challenge to a guilty plea not made within the time period specified in Subsection (2)(b) shall be pursued under Title 78B, Chapter 9, Postconviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure.~~

Tab 5

This opinion is subject to revision before final publication in the Pacific Reporter

2024 UT 37

IN THE

SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Respondent,

v.

DEREK J. WILLDEN,
Petitioner.

No. 20220747
Heard February 7, 2024
Filed September 5, 2024

On Appeal of Interlocutory Order

Third District, Salt Lake County
The Honorable Elizabeth A. Hruby-Mills
No. 211911155

Attorneys:

Sean D. Reyes, Att'y Gen., Christopher A. Bates,
Andrew F. Peterson, Deputy Solics. Gen., Salt Lake City,
for respondent
Dain E. Smoland, Salt Lake City, for petitioner

CHIEF JUSTICE DURRANT authored the opinion of the Court, in which ASSOCIATE CHIEF JUSTICE PEARCE, JUSTICE PETERSEN, JUSTICE HAGEN, and JUSTICE POHLMAN joined.

JUSTICE HAGEN authored a concurring opinion, in which JUSTICE PETERSEN joined.

CHIEF JUSTICE DURRANT, opinion of the Court:

INTRODUCTION

¶1 In 2021, Derek Willden was charged with several counts of physical and sexual assault. While preparing for Willden's trial, the State asked the district court to order Willden to disclose certain information pursuant to Utah Rule of Criminal Procedure 16(b).

One category of items that the State sought—audio recordings of interviews that Willden's counsel had conducted with witnesses—is relevant to this appeal.

¶2 Willden objected to the State's discovery motion, arguing that the recordings were attorney work product. Compelled disclosure of those documents would, Willden argued, violate the protection that rule 16(b)(4) affords to attorney work product, as well as his rights under the Utah and United States Constitutions. The district court was unpersuaded and gave Willden thirty days to turn over the recordings. Willden petitioned for interlocutory appeal of that decision, the court of appeals granted his petition, and we recalled this case to hear it directly.

¶3 This case is our first opportunity to consider the language of rule 16(b) following its amendment in 2021. As amended, the rule states that a criminal defendant's "disclosure obligations do not include . . . attorney work product."[1] We take that language at face value. The recorded interviews the district court ordered Willden to disclose are attorney work product, and rule 16(b)(4) protects attorney work product from compelled disclosure. Accordingly, we reverse the district court's order. Because we resolve this case based on rule 16(b), we do not reach Willden's constitutional arguments.

BACKGROUND[2]

¶4 In October 2021, Derek Willden was charged with several crimes based on allegations that he physically and sexually assaulted his domestic partner. Willden and his partner have two sons, and both Willden and the State suggest that the sons may have witnessed parts of the alleged assault.

¶5 To prepare for trial, Willden's defense counsel and an investigator interviewed the sons regarding their memories of the night in question. Willden's counsel made and kept audio

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[1] UTAH R. CRIM. P. 16(b)(4).

[2] "Because this case comes to us on an interlocutory appeal, the allegations we recite have not been tried and therefore remain allegations." *State v. Stewart*, 2018 UT 24, ¶ 2 n.1, 438 P.3d 515. Accordingly, "we recount the facts as alleged and in a light most favorable to the ruling below." *State v. Taylor*, 2015 UT 42, ¶ 2 n.2, 349 P.3d 696.

recordings of those interviews. After Willden was bound over for trial, but before any trial date was set, the State moved for discovery under Utah Rule of Criminal Procedure 16(b). Among other things, the State asked for a list of the witnesses that Willden intended to call at trial and any statements made by those witnesses. Later events show that this request was in part designed to elicit the recordings of the sons' interviews.

¶6 Willden opposed the State's motion, arguing that the request would violate rule 16(b)(4), as well as his rights under the Utah and United States Constitutions. Willden also contended that the request was premature, as he could not know what witnesses he would call or what statements he would elicit from them until after the State had presented its case in chief. The State countered that its request was permitted by rule 16(b), that the request wouldn't violate any of Willden's constitutional rights, and that it was disingenuous for Willden to claim that he was wholly ignorant of what witnesses and statements he intended to use at trial.

¶7 The district court heard oral argument on the issue. During that hearing, the State suggested it would call the sons as prosecution witnesses and accordingly broadened its discovery request to include any statements Willden intended to use for impeachment. After listening to both sides, the district court orally granted the State's discovery motion. The judge reasoned that the requested recordings could be redacted so that they did not contain any of defense counsel's "opinion . . . analysis . . . [or] strategy," but instead contained "simply the statements made by the witness[es]." So edited, the judge believed, the recordings would not contain any attorney work product and thus would not be protected by rule 16. The district court then issued a written order that gave Willden thirty days to disclose the recordings.[3]

¶8 Before the thirty-day deadline expired, Willden sought permission to file an interlocutory appeal challenging the discovery order. After the court of appeals granted Willden's request, we

[3] When the district court issued its oral ruling at the end of the hearing, trial had been set for less than thirty days out. But that trial date had been stricken without a replacement when the district court issued its written order some time later.

recalled the case. We have jurisdiction under Utah Code subsection 78A-3-102(3)(j).

STANDARD OF REVIEW

¶9 Willden contends that the district court's discovery order violates Utah Rule of Criminal Procedure 16, as well as his rights under the Utah and United States Constitutions. "As a general rule, we grant district courts . . . deference in matters of discovery . . . ."[4] But the proper interpretation of a rule of procedure or constitutional provision is a question of law.[5] Because Willden challenges the district court's interpretation of rule 16, we review its decision for correctness.[6]

ANALYSIS

¶10 Before we reach the merits of Willden's challenge, we first address the burden he bears on appeal. The State argues that it is not enough for Willden to prove that the district court's order was in error; he must also show that the order will cause him prejudice. In support, the State cites our harmless error rule, which provides that "an erroneous decision by a trial court cannot result in reversible error unless the error is harmful."[7] We agree that a party seeking an interlocutory appeal under rule 5 of the Utah Rules of Appellate Procedure must show that the alleged error merits review. But we disagree with the State about when that showing must occur.

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[4] *Dahl v. Dahl*, 2015 UT 79, ¶ 63, 459 P.3d 276.

[5] *See State v. Bybee*, 2000 UT 43, ¶ 10, 1 P.3d 1087 ("The proper interpretation of a rule of procedure is a question of law. . . ." (cleaned up)); *Dexter v. Bosko*, 2008 UT 29, ¶ 5, 184 P.3d 592 ("We review de novo a district court's interpretation of constitutional provisions, granting it no deference." (cleaned up)).

[6] *See In re United Effort Plan Tr.*, 2013 UT 5, ¶ 18, 296 P.3d 742.

[7] *State v. Lafferty*, 2001 UT 19, ¶ 42, 20 P.3d 342 (cleaned up); *see also* UTAH R. CRIM. P. 30(a) ("Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded.").

¶11 "As a general rule only *final* judgments are subject to an appeal."[8] But where a party believes that an interlocutory[9] decision made by a court should be subject to immediate appellate review, the party may file "a petition for permission to appeal from the interlocutory order with the appellate court with jurisdiction over the case."[10] The decision to grant or deny such a petition rests with the discretion of the appellate court: a rule 5 appeal is "not an appeal as a matter of right."[11] And permission to appeal "may be granted only if it appears that the order involves substantial rights and may materially affect the final decision or that a determination of the correctness of the order before final judgment will better serve the administration and interests of justice."[12] This means that, for an interlocutory appeal to be heard at all, an appellate court must decide that the issue on appeal "involves substantial rights," and that it either will "materially affect the final decision" or that the interests of justice otherwise warrant granting the petition.

¶12 Indeed, that was the case here. Willden argued in his petition for interlocutory review that the district court's discovery order involved his substantial rights, and that interlocutory review was warranted because "the unique type of harm threatened by [the order] cannot be remediated with an appeal after trial." By granting Willden's petition, the court of appeals seems to have agreed with those assertions. We see little merit in requiring

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[8] *Washington Townhomes, LLC v. Wash. Cnty. Water Conservation Dist.*, 2016 UT 43, ¶ 5, 388 P.3d 753.

[9] *See Interlocutory*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("[I]nterim or temporary; not constituting a final resolution of the whole controversy.").

[10] UTAH R. APP. P. 5(a). Our cases note two other ways of obtaining review of an interlocutory decision: "appeals that are expressly authorized by statute" and "appeals under rule 54(b) of the Utah Rules of Civil Procedure." *Mellor v. Wasatch Crest Mut. Ins.*, 2012 UT 24, ¶ 16, 282 P.3d 981. Because Willden sought interlocutory review under rule 5, neither of those alternative avenues are at issue in this case.

[11] *Copper Hills Custom Homes, LLC v. Countrywide Bank, FSB*, 2018 UT 56, ¶ 14, 428 P.3d 1133.

[12] UTAH R. APP. P. 5(g).

Willden to again demonstrate that the error he claims is worthy of review. Thus, appellants on interlocutory review are not required, as part of their burden on appeal, to show prejudice flowing from the error.

¶13 Turning to the merits of the case, we first consider the amended language of rule 16(b) and how it protects a criminal defendant's attorney work product. We then apply the language of the rule to the facts of this case and conclude that the district court's order violates rule 16(b).

I. RULE 16(b)

¶14 Rule 16 of the Utah Rules of Criminal Procedure provides a framework for determining the discovery obligations of parties in a criminal case. Its layout is relatively simple: subparagraphs (a) and (b) describe the disclosure obligations of prosecutors and defendants respectively; subparagraphs (c) through (f) describe the procedures, limitations, and potential sanctions that apply to those obligations.[13]

¶15 Subparagraph 16(b), at issue in this case, has a similar structure to the larger rule. It first enumerates a defendant's disclosure obligations. Subparagraph (b)(1) states the general rule that "[t]he 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."[14] Subparagraph (b)(2) states that defendants who intend to raise a defense of alibi or insanity "must disclose to the prosecutor such information as required by statute."[15] And subparagraph (b)(3) requires defendants to disclose a list of the witnesses "whom the defense intends to call" at trial and "[a]ny exhibits that the defense intends to introduce at trial" no later than fourteen days, "or as soon as practicable, before trial."[16]

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[13] UTAH R. CRIM. P. 16.

[14] *Id.* R. 16(b)(1).

[15] *Id.* R. 16(b)(2); *see also* UTAH CODE § 77-14-2 (requiring defendants to submit notice of an alibi defense); *id.* § 77-14-4 (requiring defendants to submit notice of an insanity defense).

[16] UTAH R. CRIM. P. 16(b)(3)(A)–(B).

¶16 Subparagraph (b)(4) states that a "defendant's disclosure obligations do not include information or material that is privileged or attorney work product."[17] This language creates a clear hierarchy; subparagraphs (b)(1)–(3) create disclosure obligations, and subparagraph (b)(4) limits those obligations. This means that subparagraphs (b)(1)–(3) cannot be used to compel a defendant to disclose information or material protected by (b)(4).[18] So, for example, if a prosecutor requests that a defendant disclose evidence under rule 16(b)(1), the defendant could defeat that request by showing that the evidence in question is "privileged or attorney work product."[19]

¶17 At issue in this case is the protection that subparagraph (b)(4) provides to attorney work product in particular. We provided the governing definition of attorney work product in *Gold Standard v. American Barrick*.[20] Under *Gold Standard*, attorney work product refers to "(1) . . . documents and tangible things otherwise discoverable, (2) prepared in anticipation of litigation or for trial, (3) by or for another party or by or for that party's representative."[21]

¶18 Though this definition is broad, we expect that in most cases the disclosure obligations created by rule 16(b)(1)–(3) will not intersect with the protection that subparagraph (b)(4) provides to work product. For example, subparagraph (b)(2) references the

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[17] *Id.* R. 16(b)(4). This subparagraph also notes that "[a]ttorney work product protection is not subject to the exception in Rule 26(b)(6) of the Utah Rules of Civil Procedure." *Id.*

[18] Because of the limited issue on appeal in this case, we do not reach the question of whether rule 16(b)(4) limits disclosure obligations that stem from other sources, such as the Utah Rules of Evidence, or a court's inherent authority to manage a trial. *See, e.g.*, UTAH R. EVID. 612 (requiring parties to turn over documents used to refresh a witness's memory either while the witness is testifying, or "before testifying, if the court decides that justice requires the party to have those options").

[19] *See* UTAH R. CRIM. P. 16(b)(4).

[20] *Gold Standard, Inc. v. Am. Barrick Res. Corp.*, 805 P.2d 164 (Utah 1990).

[21] *Id.* at 168.

disclosures required by the alibi statute.[22] That statute obligates a defendant "who intends to offer evidence of an alibi" to provide the prosecutor with a written notice including "the place where the defendant claims to have been at the time of the alleged offense" and "the names and addresses of the witnesses by whom [the defendant] proposes to establish alibi."[23]

¶19 While this sort of notice may nominally be considered work product under the *Gold Standard* definition, there is a commonsense difference between an attorney's work product and documents created solely for the purpose of being filed with the court or disclosed to an opposing party. The work product doctrine is designed to allow an attorney to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories[,] and plan his strategy without undue and needless interference."[24]

¶20 That process often takes the form of "interviews, statements, memoranda, correspondence, briefs," and other documents.[25] If those documents were "open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten," and "the interests of the clients and the cause of justice would be poorly served."[26] In contrast, documents produced for the sole purpose of complying with a party's pre-trial disclosure obligations are categorically different. They are created with the knowledge that they will be viewed by opposing parties, and there is thus no loss of privacy when such documents are turned over.[27]

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[22] UTAH R. CRIM. P. 16(b)(2).

[23] UTAH CODE § 77-14-2(1).

[24] *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

[25] *Id.*

[26] *Id.*

[27] This logic also suggests that preparatory drafts of documents *are* attorney work product and, as a result, are subject to rule 16(b)(4)'s protection.

II. THE DISTRICT COURT'S ORDER VIOLATED RULE 16(b)

¶21 With that framework in mind, we turn to examine whether the district court's pretrial discovery order in this case violated rule 16(b). This analysis requires that we ask two questions. Did the court's pre-trial discovery order align with the discovery obligations placed on Willden by rule 16(b)(1)–(3)? And if so, did the order require Willden to disclose attorney work product?

¶22 As to the first question, the district court concluded that the State's request for disclosure of the witness recordings satisfied the requirements of rule 16(b)(1), which obligates defendants to "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."[28] Willden does not directly challenge that conclusion on appeal, and we assume, without deciding, that it is correct.

¶23 As to the second question, the State argues that "verbatim witness statements . . . are not attorney work product." This is because, in the State's eyes, the work product doctrine is designed to protect the thoughts and impressions of an attorney, not the facts that an attorney observed. Accordingly, the "factual record of what a witness said during an interview" doesn't contain anything that deserves the protection of the work product doctrine. The district court offered a similar analysis when it ordered Willden to turn over the interview recordings. The court acknowledged that the recordings contained attorney work product, but it suggested that the attorney work product could be removed if the recordings were edited so that they contained only the factual statements made by the witnesses.

¶24 While these arguments may have succeeded under the pre-amendment version of rule 16, they fail to gain purchase under the current version.[29] Our court of appeals had interpreted the old

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[28] UTAH R. CRIM. P. 16(b)(1).

[29] *Compare id.* R. 16(c) (2010) ("Except as otherwise provided or as privileged, the defense shall disclose to the prosecutor such information as required by statute . . . and any other item of evidence which the court determines on good cause shown should (continued . . .)

version of rule 16 as permitting reliance upon a distinction drawn by the Utah Rules of Civil Procedure.[30] Under that distinction, courts could distinguish between "core" attorney work product, which contains the thoughts and impressions of an attorney, and "factual" work product, which does not.[31] The amendments to rule 16(b) now explicitly forbid such reliance: "Attorney work product protection is not subject to the exception in Rule 26(b)(6) of the Utah Rules of Civil Procedure."[32] With that connection severed, rule 16(b) no longer provides a way to distinguish between different classifications of attorney work product.

¶25 Because we reject the State's argument on this point, we determine whether the interview recordings are work product based on the definition of attorney work product we set out in *Gold Standard*.[33] Under that definition, work product is defined as "(1) . . . documents and tangible things otherwise discoverable, (2) prepared in anticipation of litigation or for trial, (3) by or for another party or by or for that party's representative."[34] The interview recordings satisfy each element of that standard. The

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be made available to the prosecutor . . . ."), *with id.* R. 16(b)(4) (2024) ("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)(6) of the Utah Rules of Civil Procedure.").

[30] *See, e.g.*, *State v. Steffen*, 2020 UT App 95, ¶ 32 n.9, 468 P.3d 568.

[31] *See S. Utah Wilderness All. v. Automated Geographic Reference Ctr.*, 2008 UT 88, ¶ 24, 200 P.3d 643 (interpreting the attorney work product protections provided by Utah Rule of Civil Procedure 26).

[32] UTAH R. CRIM. P. 16(b)(4); *see* UTAH R. CIV. P. 26(b)(6) (allowing discovery of attorney work product that does not contain "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party" upon a showing "that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain substantially equivalent materials by other means").

[33] *Gold Standard, Inc. v. Am. Barrick Res. Corp.*, 805 P.2d 164 (Utah 1990).

[34] *Id.* at 168.

audio files at issue (1) are tangible things capable of being discovered, (2) were created in preparation for trial, and (3) were created for Willden's legal representative by an investigator retained by that representative.

CONCLUSION

¶26 Given our interpretation of rule 16, the determination that the interview recordings are work product resolves this appeal. Because these witness recordings are attorney work product, they are protected by rule 16(b)(4). And because rule 16(b)(4)'s protection of work product trumps the discovery obligations that may be created by the other subparagraphs of rule 16(b), the district court erred by ordering Willden to disclose the recordings under rule 16(b)(1). Accordingly, we reverse the district court's discovery order and remand this case for further proceedings.

JUSTICE HAGEN, concurring in the Opinion of the Court:

¶27 We fully join in the opinion of the court. The plain language of rule 16(b) of the Utah Rules of Criminal Procedure, coupled with our caselaw defining attorney work product, compels the conclusion that witness statements gathered by the defense in anticipation of litigation are exempt from disclosure. We write separately to note that a majority of states do impose a reciprocal discovery obligation on the defense to turn over witness statements. Those state rules were driven by a series of developments in federal law beginning nearly seventy years ago.

¶28 The prosecution's duty to turn over witness statements originated in *Jencks v. United States*, 353 U.S. 657 (1957). In *Jencks*, two of the prosecution's witnesses testified on cross-examination that they had made prior oral and written statements to the FBI. *Id.* at 665. The defense sought an order requiring the prosecution to produce those statements, but the trial court denied the request. *Id.* at 665–66. The Fifth Circuit Court of Appeals affirmed, holding that disclosure was not required because the defense had not made a preliminary showing that the statements were inconsistent with the witnesses' testimony. *See id.* at 666 & n.11.

¶29 The Supreme Court reversed, holding that the trial court should have ordered the prosecution to produce the witnesses' statements. *Id.* at 672. Because "the accused is helpless to know or discover conflict without inspecting the reports," the Court held

that the defense is not required to make a preliminary showing of inconsistency. *Id.* at 668–69. Instead, the defense is entitled to inspect any statements that "are shown to relate to the testimony of the witness." *Id.* at 669. "Only after inspection of the reports by the accused, must the trial judge determine admissibility—e.g., evidentiary questions of inconsistency, materiality and relevancy—of the contents and the method to be employed for the elimination of parts immaterial or irrelevant." *Id.*

¶30 The Court's holding in *Jencks* was later codified as the Jencks Act. *See* 18 U.S.C. § 3500. The Act requires federal prosecutors to disclose any statement a witness made or adopted that "relates to the subject matter as to which the witness has testified."[35] *Id.* § 3500(b). A court will order the prosecution to produce these statements upon the defendant's motion, but only after direct examination of the witness concludes. *Id*.

¶31 After the Jencks Act was passed, the Supreme Court decided *United States v. Nobles*, 422 U.S. 225 (1975). In that case, a defense investigator had conducted pretrial interviews of two prosecution witnesses and memorialized those conversations in a written report. *Id.* at 227. Defense counsel relied on that report when cross-examining the witnesses and then called the investigator to testify about the interviews.[36] *Id.* at 227–29. The trial court ordered the defense to produce a copy of the report for the court to inspect and redact *in camera*, after which the court would provide the report to the prosecution. *Id.* at 229. When the defense refused to produce the report, the court prohibited the investigator from testifying. *Id.* On appeal, the Ninth Circuit Court of Appeals reversed, holding, in part, "that the Fifth Amendment prohibited the disclosure condition imposed in this case." *Id.* at 229–30.

¶32 The Supreme Court granted certiorari and reversed the Ninth Circuit's decision. *Id.* at 227. The Court rejected the idea "that

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[35] The term "statement" includes a written statement signed or adopted by the witness, a recording or "substantially verbatim recital of an oral statement made by" the witness, and any statement made by the witness to a grand jury. 18 U.S.C. § 3500(e).

[36] In contrast to the present case, the defense in *United States v. Nobles*, 422 U.S. 225 (1975), waived any work product privilege by using the reports at trial. *See id.* at 239–40.

the Fifth Amendment renders criminal discovery basically a one-way street." *See id.* at 233 (cleaned up). The Court explained that the defendant's Fifth Amendment right against self-incrimination is "personal to the defendant" and "does not extend to the testimony or statements of third parties called as witnesses at trial." *Id.* at 234.

¶33 The Court also rejected the argument that the trial court violated the defendant's Sixth Amendment right to compulsory process and cross-examination by conditioning the investigator's testimony on disclosure of the report. *See id.* at 241. The Court explained that "[t]he Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." *Id.*

¶34 In reaching those conclusions, the Court emphasized how the adversarial system serves to accomplish the "dual aim of our criminal justice system[,] . . . that guilt shall not escape or innocence suffer." *Id.* at 230 (cleaned up). Quoting its decision in *United States v. Nixon*, 418 U.S. 683 (1974), the Court continued:

> "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense."

Nobles, 422 U.S. at 230–31 (quoting *Nixon*, 418 U.S. at 709).

¶35 Five years after deciding *Nobles*, the Supreme Court promulgated rule 26.2 of the Federal Rules of Criminal Procedure. *See generally* FED. R. CRIM. P. 26.2 (1980). The rule not only imported the substance of the Jencks Act into the criminal rules, but also imposed a reciprocal discovery obligation on the defense, which has come to be known as "reverse Jencks." *See, e.g.*, *United States v. Hsia*, 24 F. Supp. 2d 14, 29 (D.D.C. 1998) (referring to "reverse Jencks material" under rule 26.2). The adoption of rule 26.2

reflected two policy judgments: "(i) that the subject matter—production of the statements of witnesses—is more appropriately dealt with in the criminal rules; and (ii) that in light of . . . *Nobles* . . . , it is important to establish procedures for the production of defense witnesses' statements as well." FED. R. CRIM. P. 26.2 advisory committee's note to 1979 addition. Rule 26.2 was "designed to place the disclosure of prior relevant statements of a defense witness in the possession of the defense on the same legal footing as is the disclosure of prior statements of prosecution witnesses in the hands of the government under the Jencks Act." *Id.*

¶36 By the time rule 26.2 was adopted, several state courts had already "concluded that witness statements in the hands of the defense at trial should be disclosed on the same basis that prosecution witness statements are disclosed, in order to promote the concept of the trial as a search for truth." *See id.* (citing cases). And today, twenty-nine states have adopted rules of criminal procedure that require the defense to turn over "reverse Jencks" material.[37]

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[37] *See* ARIZ. R. CRIM. P. 15.2(c)(1) (requiring the defense to provide the prosecution with any written or recorded statement of each person the defense intends to call as a witness at trial); CAL. PENAL CODE § 1054.3(a)(1) (requiring the defense to disclose any relevant written or recorded statements of those the defense intends to call as witnesses at trial); CONN. PRACTICE BOOK §§ 40-13(b), -15 (allowing the prosecution access, upon request, to statements of witnesses other than the defendant in the defense's possession relating to the subject matter about which each witness will testify, including written, recorded, transcribed, or substantially verbatim content); DEL. SUPER. CT. CRIM. R. P. 16(d)(1)(E) (allowing the prosecution access, upon request, to any relevant written or recorded statements of witnesses); FLA. R. CRIM. P. 3.220(d) (requiring any defendant who elects to participate in discovery to disclose the statements of all witnesses the defense expects to call at trial); GA. CODE § 17-16-7 (requiring the defense to produce any statement of any witness the defense intends to call at trial if that statement is in the possession of the defense and relates to the subject matter of the witness's testimony); HAW. R. PENAL P. 16(c)(2)(i) (requiring the defense to disclose relevant written or (continued . . .)

recorded statements—except statements recorded by defense counsel—of those witnesses the defense intends to call at trial); ILL. SUP. CT. R. 413(d)(1) (allowing the prosecution access, upon filing of a written motion, to relevant written or recorded statements—in the defense's possession—of those witnesses the defense intends to call at trial); IND. R. CRIM. P. 2.5(C)(1)(a) (requiring the defense to produce relevant written or recorded statements of witnesses the defense intends to call at trial); IOWA R. CRIM. P. 2.14(2)(a) (requiring the defense to turn over statements in the defense's possession that are not privileged, other than those of the defendant, if the court orders the prosecution to permit the defense to inspect certain discretionary discovery items in the prosecution's possession); LA. CODE CRIM. P. 725.1(B)(1) (allowing the prosecution access, upon request, to any written or recorded statements of any witness the defense intends to call at trial); MASS. R. CRIM. P. 14(a)(1)(B) (requiring the defense to disclose the statements of those witnesses the defense intends to call at trial); MICH. CT. R. 6.201(A)(2) (allowing the prosecution access, upon request, to any written or recorded statement—including electronically recorded statements but excluding any statement made by the defendant—relating to the case by those witnesses the defense may call at trial); MINN. R. CRIM. P. 9.02 subd. 1(4) (allowing the prosecution access, upon request, to relevant written or recorded statements of witnesses the defense intends to call at trial, statements of prosecution witnesses obtained by the defense, written summaries known to the defense of the substance of any oral statements made by prosecution witnesses to the defense, and the substance of any oral statements that relate to the case made by witnesses the defense intends to call at trial); MISS. R. CRIM. P. 17.3(1) (requiring any defendant that requests discovery to disclose to the prosecution the contents of any statement that is written, recorded, or otherwise preserved of all witnesses-in-chief that the defense may offer at trial); MO. SUP. CT. R. 25.05(a)(2) (allowing the prosecution access, upon request, to written or recorded statements of witnesses the defense intends to call at trial, as well as existing memoranda reporting or summarizing part or all of their oral statements); MONT. CODE ANN. § 46-15-323(4), (6)(a) (requiring the defense to disclose all written reports or statements made by witnesses that the defense intends to use at trial); NEB. REV. STAT.

(continued . . .)

¶37 The question of whether we should follow the lead of those jurisdictions is not before us today. In a pending appeal such as this, we apply our rules as they are. *See, e.g.*, *In re Discipline of Steffensen*, 2016 UT 18, ¶ 11, 373 P.3d 186 (commenting that "a policy argument is a perfectly respectable basis for a request for a forward-looking amendment to our rules," but such an argument "falls far short as a ground for overriding the clear terms of an existing rule" because "[o]ur rules . . . are entitled to respect unless

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§ 29-1916(1) (allowing the court to require the defendant to grant the prosecution access to items comparable to written or recorded statements); NEV. REV. STAT. § 174.245(1)(a) (allowing the prosecution to request written or recorded statements of witnesses that the defense intends to call during the defendant's case-in-chief); N.H. R. CRIM. P. 12(b)(4)(C) (requiring the defense to provide the state with all statements, including written, recorded, or transcribed statements, from witnesses that the defense anticipates calling at trial); N.J. CT. R. 3:13-3(b)(2)(C) (requiring the defense to provide the state with written statements or summarized oral statements made by witnesses that the state may call as a witness at trial); NMRA, RULE 5-502(A)(3) (requiring the defense to disclose any statements made by witnesses the defendant intends to call at trial); N.Y. CRIM. PROC. § 245.20(4) (requiring the defense to disclose all written, recorded, or summarized statements of witnesses that the defense intends to call at trial); OHIO CRIM. R. 16(H)(5) (requiring the defense to provide the prosecution with any written or recorded statements from witnesses in the defendant's case-in-chief or in surrebuttal); OKLA. STAT. tit. 22, § 2002(B)(1) (allowing the state to request the defense to disclose written, recorded, or summarized witness statements); OR. REV. STAT. § 135.835(1) (requiring the defense to disclose relevant written or recorded statements or memoranda of oral statements from witnesses the defense intends to call at trial); R.I. SUPER. CT. R. CRIM. P. 16(b)(5) (allowing the state to request all written or recorded verbatim statements of witnesses that the defense expects to call at trial, or a summary of the testimony that witnesses are expected to give at trial); WASH. SUPER. CT. CRIM R. 4.7(b)(1) (requiring the defense to disclose the substance of oral statements or any written or recorded statements made by witnesses); WIS. STAT. § 971.23(2m)(am) (allowing the prosecution to demand that the defense disclose any relevant written or recorded statements from witnesses).

and until we amend them"). But in addition to our appellate review responsibilities, this court is charged with promulgating rules of procedure. UTAH CONST. art. VIII, § 4. And, as far as we can tell, our court has never considered whether to amend the Utah Rules of Criminal Procedure to adopt a "reverse Jencks" requirement.

¶38 Anyone wishing to propose a potential rule change may petition this court to refer the matter to our Advisory Committee on the Rules of Criminal Procedure or may contact the committee directly. That committee consists of members appointed by this court to represent a cross-section of interests and is charged with studying proposed rule changes, gathering input from various stakeholders, considering public comment, and making recommendations to this court. That is the appropriate forum in which interested parties can advance policy arguments for and against adopting a "reverse Jencks" requirement. And that process will enable this court to make the most informed decision as to whether an amendment to rule 16(b) is warranted.

Rule 16. Discovery

(a) Disclosures by Prosecutor.

(1) *Mandatory Disclosures*. Unless otherwise prohibited by law, ~~T~~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;

(i) non-exculpatory written or recorded statements between a prosecutor and a state witness in preparation for trial are excluded.

(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, except that a prosecutor must disclose all evidence that the prosecutor relied upon to file the information within five days after the day on which the prosecutor receives a request for discovery from the defendant. 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 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)(6) of the Utah Rules of Civil Procedure.

(b) Disclosures by Defense.

(1) *Mandatory Disclosures*. Unless otherwise prohibited by law, the defense must disclose to the State the following material or information related to the case of which the defense has knowledge and control:

(A) all defenses the defense intends to assert at trial, including, but not limited to, alibi, insanity, self-defense, defense of others, entrapment, impotency, insufficiency of a prior conviction, mistaken identity, or any other defense as required by statute;

Commented [TH1]: From Arizona rule. Not sure if we need to add or remove any of these.

(B) the name and current contact information of each witness, including any character witness, other than the defendant, the defense intends to call as witnesses at trial;

(C) any written or recorded statement of each of the above witnesses, or if no written or recorded statements are available, a summary of any statement made by the above witnesses.

(D) information about each expert the defense intends to call at trial, including;

(i) the expert's name, address, and qualifications;

(ii) any report prepared by the expert and the result of any completed physical examination, scientific test, experiment, or comparison conducted by the expert; and

(iii) if the expert will testify at trial without preparing a written report, a summary of the general subject matter and opinions on which the expert is expected to testify.

(E) copies of any exhibits the defense intends to introduce at trial.

(2) Timing of Mandatory Disclosures. The defense's duty to disclose under paragraph (b)(1) is a continuing duty as the material or information becomes known to the defense. The defense's disclosures must be made as soon as practicable following the prosecutor's disclosures.

Commented [TH2]: I was hesitant to put in a specific number of days because I don't want to incentivize defense attorneys stonewalling until the last minute. Thoughts?

~~(1)~~ (3) *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)~~ (4) *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)~~ (5) *Information not Subject to Disclosure.* The defendant's disclosure obligations do not include information or material that is privileged or attorney work product, unless such privilege is waived. Attorney work product protection is not subject to the exception in Rule 26(b)(6) 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.