MEETING AGENDA

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF EVIDENCE

Matheson Courthouse
450 South State Street
Council Room (N301)

March 19, 2019
5:15 p.m. to 6:45 p.m.

Mr. John Lund, Presiding

Light dinner will be served

MEMBER PRESENT	**GUESTS PRESENT**
Hon. Matthew Bates Ms. Tenielle Brown Ms. Deborah Bulkeley Ms. Nicole Salazar-Hall Mr. Mathew Hansen Mr. Ed Havas Mr. Chris Hogle Mr. John Lund Hon Linda Jones Hon. David Mortensen Mr. Terry Rooney Ms. Lacey Singleton Ms. Michalyn Steele Hon. Vernice Trease Ms. Teresa Welch Mr. Dallas Young Mr. Adam Alba Ms. Jacey Skinner	
MEMBERS EXCUSED	**STAFF PRESENT** Ms. Cathy Dupont Ms. Nancy Merrill

1. Welcome & Approval of Minutes (2/5/19) *(attached).....John Lund*

2. Legislative Session Review *(attached)*.……*Cathy Dupont*

3. Rule 804 *(attached)*.……*Lacey Singleton and Subcommittee*

4. Rule 106 *(attached)*.……*Teresa Welch, Judge Mortensen*

5. Rule 617*(attached)*.……*Linda Jones and Subcommittee*

6. Other Business

TAB 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES

Tuesday – February 5, 2019
5:15 p.m.
Council Room

Mr. John Lund, Presiding

MEMBER PRESENT	GUESTS PRESENT
Tenielle Brown Deborah Bulkeley Ed Havas John Lund Hon. Linda Jones Hon. Judge Bates Lacey Singleton Michalyn Steele Teresa Welch Dallas Young	Representative Lowry Snow Jaqueline Carlton, Office of Legislative Research and General Counsel
MEMBERS EXCUSED Adam Alba Hon. Judge Mortensen Mathew Hansen Chris Hogle Nicole Salazar-Hall Terry Rooney Hon. Vernice Trease Jacey Skinner	STAFF PRESENT Cathy Dupont Nancy Merrill

1. WELCOME AND APPROVAL OF MINUTES: (Mr. John Lund)

Mr. Lund welcomed everyone to the meeting.

2. Victim Advocate Privilege:

John Lund welcomed Representative Snow to the meeting and reviewed his suggested edits to Representative Snow's draft of H.J.R. 3 Victim Advocate Privilege; the Committee had a lengthy discussion with Representative Snow about the proposed edits.

In the Victim Communication section of the rule they discussed several possibilities with Representative Snow including:

- Linking the definition of Victim Advocate Communication in the resolution to the definition of Advocacy Services in the proposed statue in HB 53.
- adding "for purposes of advocacy services" to the definition of victim advocate communication.
- (b) Statement of Privilege:
- keep the Statement of Privilege (lines 44-46) and Who May Claim the privilege (lines 47-51)

(d) Exceptions:

- (d) (1) they suggested adding the language when a victim or guardian conservator of a victim provides written or informed consent so long as the guardian of the victim is not the accused
- (d)(2) The Committee expressed concerns that this section is too broad
- They proposed to strike (d)(2) and (d)(3) and leave d(4)

The Committee discussed the narrow time line that they have for drafting the rule. Representative Snow informed the Committee that he will make an effort to move a version of the H.J.R.3 forward during the current Legislative Session. He agreed to use the discussion from todays meeting and if the Evidence Advisory Committee can submit a draft in a timely manner he will consider it. Also, Representative Snow noted that the rule can be amended during the process.

3. Rule 804:

The Committee will address Rule 804 at the next meeting.

4. Rule 106:

The Committee will address Rule 106 at the next meeting.

5. Rule 617:

The Committee will address Rule 617 at the next meeting.

6. Other Business

The Committee agreed to meet next on March 19th at the AOC in the Council Room.

TAB 2

LEGISLATIVE GENERAL COUNSEL
₵ Approved for Filing: J. Carlton ₵
₵ 02-27-19 2:21 PM ₵

H.B. 53
2nd Sub. (Gray)

Representative V. Lowry Snow proposes the following substitute bill:

VICTIM COMMUNICATIONS AMENDMENTS

2019 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: V. Lowry Snow

Senate Sponsor: Todd Weiler

LONG TITLE

General Description:

This bill enacts provisions related to victim communications.

Highlighted Provisions:

This bill:

- enacts the Privileged Communications with Victim Advocates Act, including:
  - providing a purpose statement;
  - defining terms;
  - outlining the scope of the part;
  - providing a privilege for confidential communications;
  - addressing government records; and
  - requiring certain notices;
- addresses examination of a victim advocate; and
- makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

2nd Sub. H.B. 53

AMENDS:

78B-1-137, as renumbered and amended by Laws of Utah 2008, Chapter 3

ENACTS:

77-38-401, Utah Code Annotated 1953

77-38-402, Utah Code Annotated 1953

77-38-403, Utah Code Annotated 1953

77-38-404, Utah Code Annotated 1953

77-38-405, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Part 4. Privileged Communications with Victim Advocates Act.

Section 1. Section **77-38-401** is enacted to read:

77-38-401. Title.

This part is known as the "Privileged Communications with Victim Advocates Act."

Section 2. Section **77-38-402** is enacted to read:

77-38-402. Purpose.

It is the purpose of this part to enhance and promote the mental, physical, and emotional recovery of victims by restricting the circumstances under which a confidential communication with the victim may be disclosed.

Section 3. Section **77-38-403** is enacted to read:

77-38-403. Definitions.

As used in this part:

(1) "Advocacy services" means assistance provided that supports, supplements, intervenes, or links a victim or a victim's family with appropriate resources and services to address the wide range of potential impacts of being victimized.

(2) "Advocacy services provider" means an entity that has the primary focus of providing advocacy services in general or with specialization to a specific crime type or specific type of victimization.

(3) "Confidential communication" means a communication that is intended to be confidential between a victim and a victim advocate for the purpose of obtaining advocacy services.

(4) "Criminal justice system victim advocate" means an individual who:

(a) is employed or authorized to volunteer by a government agency that possesses a role or responsibility within the criminal justice system;

(b) has as a primary responsibility addressing the mental, physical, or emotional recovery of victims;

(c) completes a minimum 40 hours of trauma-informed training:

(i) in crisis response, the effects of crime and trauma on victims, victim advocacy services and ethics, informed consent, and this part regarding privileged confidential communication; and

(ii) that have been approved or provided by the Utah Office for Victims of Crime; and

(d) is under the supervision of the director or director's designee of the government agency.

(5) "Health care provider" means the same as that term is defined in Section 78B-3-403.

(6) "Mental health therapist" means the same as that term is defined in Section 58-60-102.

(7) "Nongovernment organization victim advocate" means an individual who:

(a) is employed or authorized to volunteer by an nongovernment organization advocacy services provider;

(b) has as a primary responsibility addressing the mental, physical, or emotional recovery of victims;

(c) has a minimum 40 hours of trauma-informed training:

(i) in assisting victims specific to the specialization or focus of the nongovernment organization advocacy services provider and includes this part regarding privileged confidential communication; and

(ii) (A) that have been approved or provided by the Utah Office for Victims of Crime; or

(B) that meets other minimally equivalent standards set forth by the nongovernment organization advocacy services provider; and

(d) is under the supervision of the director or the director's designee of the nongovernment organization advocacy services provider.

(8) "Record" means a book, letter, document, paper, map, plan, photograph, file, card, tape, recording, electronic data, or other documentary material regardless of physical form or characteristics.

(9) "Victim" means:

(a) a "victim of a crime" as defined in Section 77-38-2;

(b) an individual who is a victim of domestic violence as defined in Section 77-36-1; or

(c) an individual who is a victim of dating violence as defined in Section 78B-7-402.

(10) "Victim advocate" means:

(a) a criminal justice system victim advocate;

(b) a nongovernment organization victim advocate; or

(c) an individual who is employed or authorized to volunteer by a public or private entity and is designated by the Utah Office for Victims of Crime as having the specific purpose of providing advocacy services to or for the clients of the public or private entity.

(d) "Victim advocate" does not include an employee the Utah Office for Victims of Crime.

Section 4. Section **77-38-404** is enacted to read:

77-38-404. Scope of part.

This part governs the disclosure of a confidential communication to a victim advocate, except that:

(1) if Title 53B, Chapter 28, Part 2, Confidential Communications for Institutional Advocacy Services Act, applies, that part governs; and

(2) if Part 2, Confidential Communications for Sexual Assault Act, applies, that part governs.

Section 5. Section **77-38-405** is enacted to read:

77-38-405. Disclosure of a communication given to a victim advocate.

(1) (a) A victim advocate may not disclose a confidential communication with a victim, including a confidential communication in a group therapy session, except:

(i) that a criminal justice system victim advocate shall provide the confidential communication to a prosecutor who is responsible for determining whether the confidential communication is exculpatory or goes to the credibility of a witness;

(ii) that a criminal justice system victim advocate may provide the confidential

communication to a parent or guardian of a victim if the victim is a minor and the parent or guardian is not the accused, or a law enforcement officer, health care provider, mental health therapist, domestic violence shelter employee, an employee of the Utah Office for Victims of Crime, or member of a multidisciplinary team assembled by a Children's Justice Center or a law enforcement agency for the purpose of providing advocacy services; or

(iii) to the extent allowed by the Utah Rules of Evidence.

(b) If a prosecutor determines that the confidential communication is exculpatory or goes to the credibility of a witness, after the court notifies the victim and the defense attorney of the opportunity to be heard at an in camera review, the prosecutor will present the confidential communication to the victim, defense attorney, and the court for in camera review in accordance with the Utah Rules of Evidence.

(2) A record that contains information from a confidential communication between a victim advocate and a victim may not be disclosed under Title 63G, Chapter 2, Government Records Access and Management Act, to the extent that it includes the information about the confidential communication.

(3) A criminal justice system victim advocate, as soon as reasonably possible, shall notify a victim, or a parent or guardian of the victim if the victim is a minor and the parent or guardian is not the accused:

(a) whether a confidential communication with the criminal justice system victim advocate will be disclosed to a prosecutor and whether a statement relating to the incident that forms the basis for criminal charges or goes to the credibility of a witness will also be disclosed to the defense attorney; and

(b) of the name, location, and contact information of one or more nongovernment organization advocacy services providers specializing in the victim's service needs, when a nongovernment organization advocacy services provider exists and is known to the criminal justice system victim advocate.

Section 6. Section **78B-1-137** is amended to read:

78B-1-137. Witnesses -- Privileged communications.

There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore, a person cannot be examined as a witness in the following cases:

(1) (a) Neither a wife nor a husband may either during the marriage or afterwards be, without the consent of the other, examined as to any communication made by one to the other during the marriage.

(b) This exception does not apply:

(i) to a civil action or proceeding by one spouse against the other;

(ii) to a criminal action or proceeding for a crime committed by one spouse against the other;

(iii) to the crime of deserting or neglecting to support a spouse or child;

(iv) to any civil or criminal proceeding for abuse or neglect committed against the child of either spouse; or

(v) if otherwise specifically provided by law.

(2) An attorney cannot, without the consent of the client, be examined as to any communication made by the client to the attorney or any advice given regarding the communication in the course of the professional employment. An attorney's secretary, stenographer, or clerk cannot be examined, without the consent of the attorney, concerning any fact, the knowledge of which has been acquired as an employee.

(3) A member of the clergy or priest cannot, without the consent of the person making the confession, be examined as to any confession made to either of them in their professional character in the course of discipline enjoined by the church to which they belong.

(4) A physician or surgeon cannot, without the consent of the patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable the physician or surgeon to prescribe or act for the patient. However, this privilege shall be waived by the patient in an action in which the patient places the patient's medical condition at issue as an element or factor of the claim or defense. Under those circumstances, a physician or surgeon who has prescribed for or treated that patient for the medical condition at issue may provide information, interviews, reports, records, statements, memoranda, or other data relating to the patient's medical condition and treatment which are placed at issue.

(5) A public officer cannot be examined as to communications made in official confidence when the public interests would suffer by the disclosure.

(6) (a) A sexual assault counselor as defined in Section 77-38-203 cannot, without the consent of the victim, be examined in a civil or criminal proceeding as to any confidential

communication as defined in Section 77-38-203 made by the victim.

(b) A victim advocate as defined in Section 77-38-403 may not, without the written consent of the victim, or the victim's guardian or conservator if the guardian or conservator is not the accused, be examined in a civil or criminal proceeding as to a confidential communication, as defined in Section 78-38-403, unless the victim advocate is a criminal justice system victim advocate, as defined in Section 78-38-403, and is examined in camera by a court to determine whether the confidential communication is privileged.

LEGISLATIVE GENERAL COUNSEL
₵ Approved for Filing: J. Carlton ₵
₵ 02-27-19 5:18 PM ₵

H.J.R. 3
2nd Sub. (Gray)

Representative V. Lowry Snow proposes the following substitute bill:

JOINT RESOLUTION ADOPTING PRIVILEGE UNDER RULES OF EVIDENCE

2019 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: V. Lowry Snow

Senate Sponsor: Todd Weiler

LONG TITLE

General Description:

This joint resolution adopts a privilege under the rules of evidence related to confidential communications of victims.

Highlighted Provisions:

This resolution:

- defines terms;
- states the privilege and who may claim the privilege; and
- provides for exceptions from the privilege.

Special Clauses:

This bill provides a special effective date.

Utah Rules of Evidence Affected:

ENACTS:

Rule 512, Utah Rules of Evidence

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

As provided in Utah Constitution Article VIII, Section 4, the Legislature may amend

rules of procedure and evidence adopted by the Utah Supreme Court upon a two-thirds vote of all members of both houses of the Legislature:

Section 1. **Rule 512**, Utah Rules of Evidence is enacted to read:

Rule 512. Victim Communications.

(a) **Definitions.**

(a) (1) "Advocacy services" means the same as that term is defined in UCA § 77-38-403.

(a) (2) "Confidential communication" means a communication that is intended to be confidential between a victim and a victim advocate for the purpose of obtaining advocacy services as defined in UCA § 77-38-403.

(a) (3) "Criminal justice system victim advocate" means the same as that term is defined in UCA § 77-38-403.

(a) (4) "Health care provider" means the same as that term is defined in UCA § 78B-3-403.

(a) (5) "Mental health therapist" means same as that term is defined in UCA § 58-60-102.

(a) (6) "Victim" means an individual defined as a victim in UCA § 77-38-403.

(a) (7) "Victim advocate" means the same as that term is defined in UCA § 77-38-403.

(b) **Statement of the Privilege.** A victim communicating with a victim advocate has a privilege during the victim's life to refuse to disclose and to prevent any other person from disclosing a confidential communication.

(c) **Who May Claim the Privilege.** The privilege may be claimed by the victim engaged in a confidential communication, or the guardian or conservator of the victim engaged in a confidential communication if the guardian or conservator is not the accused. An individual who is a victim advocate at the time of a confidential communication is presumed to have authority during the life of the victim to claim the privilege on behalf of the victim.

(d) **Exceptions.** An exception to the privilege exists in the following circumstances:

(d) (1) when the victim, or the victim's guardian or conservator if the guardian or conservator is not the accused, provides written, informed, and voluntary consent for the disclosure, and the written disclosure contains:

(d) (1) (A) the specific confidential communication subject to disclosure;

(d) (1) (B) the limited purpose of the disclosure; and

(d) (1) (C) the name of the individual or party to which the specific confidential communication may be disclosed.

(d) (2) when the confidential communication is required to be disclosed under Title 62A, Chapter 4a, Child and Family Services, or Section 62A-3-305;

(d) (3) when the confidential communication is evidence of a victim being in clear and immediate danger to the victim's self or others;

(d) (4) when the confidential communication is evidence that the victim has committed a crime, plans to commit a crime, or intends to conceal a crime;

(d) (5) if the confidential communication is with a criminal justice system victim advocate, the criminal justice system victim advocate may disclose the confidential communication to a parent or guardian if the victim is a minor and the parent or guardian is not the accused, or a law enforcement officer, health care provider, mental health therapist, domestic violence shelter employee, an employee of the Utah Office for Victims of Crime, or member of a multidisciplinary team assembled by a Children's Justice Center or law enforcement agency for the purpose of providing advocacy services;

(d) (6) if the confidential communication is with a criminal justice system victim advocate, the criminal justice system victim advocate must disclose the confidential communication to a prosecutor under UCA § 77-38-405;

(d) (7) if the confidential communication is with a criminal justice system victim advocate, and a court determines, after the victim and the defense attorney have been notified and afforded an opportunity to be heard at an in camera review, that:

(d) (7) (A) the probative value of the confidential communication and the interest of justice served by the admission of the confidential communication substantially outweigh the adverse effect of the admission of the confidential communication on the victim or the relationship between the victim and the criminal justice system victim advocate; or

(d) (7) (B) the confidential communication is exculpatory evidence, including impeachment evidence.

Section 2. **Effective date.**

(1) Except as provided in Subsection (2), this resolution takes effect on July 31, 2019.

(2) If the Utah Supreme Court adopts a rule of privilege for victim communications on

or before July 30, 2019, this resolution does not take effect.

LEGISLATIVE GENERAL COUNSEL
₵ Approved for Filing: J. Carlton ₵
₵ 03-04-19 11:55 AM ₵

H.J.R. 25

JOINT RESOLUTION TO AMEND RULE OF EVIDENCE

2019 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Ken Ivory

Senate Sponsor: _____

LONG TITLE

General Description:

This joint resolution amends the Utah Rules of Evidence, Rule 409, regarding expressions of sympathy and compassion by a nonprofit entity.

Highlighted Provisions:

This resolution:

- defines terms;
- amends Utah Rules of Evidence, Rule 409, for expressions of apology; and
- makes technical and conforming changes.

Special Clauses:

This resolution provides a special effective date.

Utah Rules of Evidence Affected:

AMENDS:

Rule 409, Utah Rules of Evidence

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

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

Section 1. **Rule 409**, Utah Rules of Evidence is amended to read:

H.J.R. 25

Rule 409. Payment of medical and similar expenses; expressions of apology and compassion.

(a) **Definitions.**

(a) (1) "Compassionate care" means to give aid or service to meet the needs of an injured individual.

(a) (2) "Injured individual" means:

(a) (2) (A) an individual injured because of negligence or other cause; or

(a) (2) (B) an individual representing an individual described in paragraph (a)(1)(A).

(a) (3) "Nonprofit entity" means:

(a) (3) (A) an entity that is:

(a) (3) (A) (i) a benevolent, educational, voluntary health, philanthropic, humane, patriotic, religious or eleemosynary, social welfare or advocacy, public health, environmental or conservation, or civic organization;

(a) (3) (A) (ii) for the benefit of a public safety, law enforcement, or firefighter fraternal association;

(a) (3) (A) (iii) established for a charitable purpose; or

(a) (3) (A) (iv) tax exempt under Internal Revenue Code, Section 501(c)(3); or

(a) (3) (B) an individual representing an entity described in paragraph (a)(2)(A).

[~~(a)~~] (b) **Payments of Medical and Similar Expenses.** Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

[~~(b)~~] (c) **Expressions of Apology.** Evidence of unsworn statements, affirmations, gestures, or conduct made to a patient or a person associated with the patient by a defendant that expresses the following is not admissible in a malpractice action against a health care provider or an employee of a health care provider to prove liability for an injury[~~;~~]:

(c) (1) apology, sympathy, commiseration, condolence, compassion, or general sense of benevolence; or

(c) (2) a description of the sequence of events relating to the unanticipated outcome of medical care or the significance of events.

(d) **Expressions of Compassion by Nonprofit Entities.** In a civil action or arbitration proceeding relating to an issue of negligence, injury, or the mitigation of damages, any

unsworn statement, affirmation, gesture, or conduct made to an injured individual or the injured individual's family by a nonprofit entity is inadmissible as evidence of the issue of negligence, injury, or the mitigation of damages if the unsworn statement, affirmation, gesture, or conduct:

(d) (1) expresses:

(d) (1) (A) sympathy, commiseration, condolence, or compassion; or

(d) (1) (B) a general sense of benevolence;

(d) (2) demonstrates an act of compassionate care; or

(d) (3) is a description of the following, if made in connection with an unsworn statement, affirmation, gesture, or conduct described in Subsection (d)(1) or (d)(2):

(d) (3) (A) the sequence of events relating to the facts regarding the issue of negligence, injury, or the mitigation of damages; or

(d) (3) (B) the significance of events.

Section 2. **Legislative note.**

It is the intent of the Legislature that when the Court Rules are compiled and printed, the Legislative Note is amended as follows:

"In 2010, the Utah Legislature amended Rule 409 by a two-thirds vote in both houses, adding paragraph [~~(b)~~] (c) and making related changes. In 2011, the Legislature further amended the rule by a two-thirds vote in both houses to make it follow more closely Utah Code Ann. Sec. 78B-3-422. In 2019, the Legislature amended Rule 409 by a two-thirds vote in both houses, adding paragraphs (a) and (d).

The intent and purpose of amending the rule with paragraph [~~(b)~~] (c) is to encourage expressions of apology, empathy, and condolence and the disclosure of facts and circumstances related to unanticipated outcomes in the provision of health care in an effort to facilitate the timely and satisfactory resolution of patient concerns arising from unanticipated outcomes in the provision of health care. Patient records are not statements made to patients, and therefore are not inadmissible under this rule.

The intent and purpose of amending the rule with paragraph (d) is to encourage expressions of apology, sympathy, commiseration, condolence, and compassion, a general sense of benevolence, and the disclosure of facts and circumstances by nonprofit entities in an effort to facilitate helping meet the needs of an injured individual.

Section 3. **Contingent effective date.**

This resolution takes effect upon approval by a constitutional two-thirds vote of all members elected to each house.

LEGISLATIVE GENERAL COUNSEL
₵ Approved for Filing: E.A. Evans ₵
₵ 02-19-19 3:58 PM ₵

S.B. 103
4th Sub. (Pumpkin)

Senator Daniel W. Thatcher proposes the following substitute bill:

VICTIM TARGETING PENALTY ENHANCEMENTS

2019 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Daniel W. Thatcher

House Sponsor: Lee B. Perry

LONG TITLE

General Description:

This bill enacts provisions relating to sentencing for a criminal offense committed against a victim who is selected because of certain personal attributes.

Highlighted Provisions:

This bill:

- defines terms;
- provides an enhanced penalty for a criminal offense committed against a victim who is selected because of certain personal attributes; and
- provides that this bill does not affect an individual's constitutional rights, including an individual's constitutional right of free speech.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

ENACTS:

76-3-203.14, Utah Code Annotated 1953

4th Sub. S.B. 103

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **76-3-203.14** is enacted to read:

76-3-203.14. Victim targeting penalty enhancement -- Penalties.

(1) As used in this section "personal attribute" means:

(a) age;

(b) ancestry;

(c) disability;

(d) ethnicity;

(e) familial status;

(f) gender identity;

(g) homelessness;

(h) marital status;

(i) matriculation;

(j) national origin;

Ĥ→ **(k) political expression;**

[~~(k)~~] (l) ←Ĥ race;

Ĥ→ **[~~(l)~~] (m)** ←Ĥ religion;

Ĥ→ **[~~(m)~~] (n)** ←Ĥ sex;

Ĥ→ **[~~(n)~~] (o)** ←Ĥ sexual orientation;

Ĥ→ **[~~(o)~~] (p)** ←Ĥ service in the U.S. Armed Forces;

Ĥ→ **[~~(p)~~] (q)** ←Ĥ status as an emergency responder, as defined in Section 53-2b-102; or

Ĥ→ **[~~(q)~~] (r)** ←Ĥ status as a law enforcement officer, correctional officer, special function officer, or

any other peace officer, as defined in Title 53, Chapter 13, Peace Officer Classifications.

(2) A defendant is subject to enhanced penalties under Subsection (3) if the defendant intentionally selects:

(a) the victim of the criminal offense because of the defendant's belief or perception regarding the victim's personal attribute or a personal attribute of another individual or group of individuals with whom the victim has a relationship; or

(b) the property damaged or otherwise affected by the criminal offense because of the defendant's belief or perception regarding the property owner's, possessor's, or occupant's personal attribute or a personal attribute of another individual or group of individuals with whom the property owner, possessor, or occupant has a relationship.

(3) (a) If the trier of fact finds beyond a reasonable doubt that a defendant committed a criminal offense and selected the victim or property damaged or otherwise affected by the criminal offense in the manner described in Subsection (2), the defendant is subject to an enhanced penalty for the criminal offense as follows:

(i) a class C misdemeanor is a class B misdemeanor;

(ii) a class B misdemeanor is a class A misdemeanor;

(iii) a class A misdemeanor is a third degree felony;

(iv) a third degree felony is a third degree felony punishable by an indeterminate term of imprisonment for not less than one year nor more than five years; and

(v) a second degree felony is a second degree felony punishable by an indeterminate term of imprisonment for not less than two years nor more than 15 years.

(b) If the trier of fact finds beyond a reasonable doubt that a defendant committed a criminal offense that is a first degree felony and selected the victim or property damaged or otherwise affected by the criminal offense in the manner described in Subsection (2), the sentencing judge or the Board of Pardons and Parole shall consider the defendant's selection of the victim or property as an aggravating factor.

(4) This section does not:

(a) apply if:

(i) the penalty for the criminal offense is increased or enhanced under another provision of state law; or

(ii) the personal attribute of the victim or property owner, possessor, or occupant is an element of a criminal offense under another provision of state law;

(b) prevent the court from imposing alternative sanctions as the court finds appropriate;

(c) affect or limit any individual's constitutional right to the lawful expression of free speech or other recognized rights secured by the Utah Constitution or the laws of the state, or by the United States Constitution or the laws of the United States; or

(d) create a special or protected class for any purpose other than a criminal penalty enhancement under this section.

(5) (a) If a final decision of a court of competent jurisdiction holds invalid any provision of this section or the application of any provision of this section to any person or circumstance, the remaining provisions of this section remain effective without the invalidated

provision or application.

(b) The provisions of this section are severable.

LEGISLATIVE GENERAL COUNSEL
₵ Approved for Filing: E.A. Evans ₵
₵ 02-11-19 11:05 AM ₵

S.J.R. 8
2nd Sub. (Salmon)

Senator Daniel W. Thatcher proposes the following substitute bill:

JOINT RESOLUTION AMENDING RULES OF EVIDENCE - VICTIM SELECTION

2019 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Daniel W. Thatcher

House Sponsor: Lee B. Perry

LONG TITLE

General Description:

This joint resolution amends the Utah Rules of Evidence by enacting a rule that prohibits the admissibility of evidence regarding a defendant's selection of a victim, except as specified.

Highlighted Provisions:

This resolution:

- provides that a defendant's expressions or associations are not admissible as evidence of the defendant's selection of a victim for purposes of a victim targeting penalty enhancement, except when the evidence:
  - specifically relates to the criminal offense charged; or
  - is introduced for impeachment.

Special Clauses:

This resolution provides a special effective date.

Utah Rules of Evidence Affected:

ENACTS:

Rule 417, Utah Rules of Evidence

2nd Sub. S.J.R. 8

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

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

Section 1. **Rule 417**, Utah Rules of Evidence is enacted to read:

Rule 417. Admissibility of Evidence of the Actor's Expression or Association in Victim Targeting Criminal Penalty Enhancements.

Evidence of a criminal defendant's expressions or associations is not admissible to establish a penalty enhancement for a defendant's selection of a victim unless the evidence is otherwise admissible under these rules and specifically relates to the defendant's selection of the victim of the offense charged or is introduced for impeachment.

Section 2. **Effective date.**

This resolution takes effect upon approval by a constitutional two-thirds vote of all members elected to each house.

TAB 3

RULE 804 CASE LAW

STATE LAW:

The following states do not have the "similar motive to develop" language.

1. Alabama 804 (b)(1) (1) *Former Testimony.* Testimony of a witness, in a former trial or action, given (A) under oath, (B) before a tribunal or officer having by law the authority to take testimony and legally requiring an opportunity for cross-examination, (C) under circumstances affording the party against whom the witness was offered an opportunity to test his or her credibility by cross-examination, and (D) in litigation in which the issues and parties were substantially the same as in the present cause.
    a. *"The videotaped testimony of the victim, which was recorded during a preliminary hearing, was properly admitted at trial, as the victim, who was hospitalized at the time of the hearing, was unavailable to testify. The appellant argues that the use of the videotape denied him of his right to fully cross-examine the victim. However, the record indicates that the appellant was represented by counsel at the preliminary hearing and that counsel was made aware that the testimony might be used at a future date during the appellant's trial. During the preliminary hearing, the appellant's counsel objected to any future use of the video tape because it would violate the appellant's Sixth Amendment right to confront witnesses. "In order that the testimony of a witness, given on a formal trial or proceeding, may be admissible, it is essential that the party against whom it is offered was given an opportunity to cross-examine the witness during the former trial or proceeding...."It is not essential that the party actually cross-examine the witness at the formal trial or proceeding. His failure to exercise the right when afforded the opportunity does not exclude the former testimony...."If the tribunal, on the former hearing, improperly restricted the right of the party to cross-examine, the former testimony of the witness clearly is inadmissible.*902 "In the trial of a defendant for a crime, the testimony of a now-unavailable witness, given on a former trial of the defendant on the same charge, is not admissible upon the offer of the State in the present trial if the defendant was not represented by counsel on the former trial and if the defendant did not effectively waive his constitutional rights to the assistance of counsel on the former trial*." C. Gamble, *McElroy's Alabama Evidence* § 245.07(5) (3d ed. 1977). *The record indicates that, before the jury venire was qualified in the appellant's trial, a hearing was held in the trial judge's chambers in which the prosecutor indicated that the defense counsel had previously stated that he would stipulate to the fact that the victim was "unavailable" as that term is defined under the law, based on a letter provided from the victim's physician. The prosecutor stated that the defense counsel stipulated that the witness was unavailable "such that testimony from a prior proceeding which meets all the requirements under the opportunity to cross-examine" would be admissible in place of the victim's trial testimony. The prosecutor*

stated that if the appellant had changed his mind, she wanted the victim's physician to be subpoenaed to testify so that the trial court could determine whether or not the victim was unavailable. Defense counsel replied that he unquestionably had stipulated to the fact that the victim was unavailable to testify because he was in the hospital, but defense counsel objected to the introduction of the videotape from the preliminary hearing on the grounds that if the examination had been conducted during a jury trial, he might have asked other questions or cross-examined in another manner. Defense counsel acknowledged that the prosecutor had telephoned him, prior to videotaping the victim's testimony at the preliminary hearing, and that defense counsel had consented to the taping. However, defense counsel argued that he did not consent to its use at a future time. Other jurisdictions have held videotaped testimony of an unavailable witness in a criminal trial admissible under certain "exceptional" circumstances: where the witness is unavailable; where the videotape is made under the supervision of the proper judicial authority and with the defendant present; where the defendant is given his fair rights to cross-examine the witness; and where the videotape is sufficiently clear that the jury is able to observe the witness's demeanor. State v. Jeffries, 55 N.Car.App. 269, 285 S.E.2d 307, app. den., 305 N.C. 398, 290 S.E.2d 367 (1982). See also People v. Wilson, 112 A.D.2d 746, 492 N.Y.S.2d 242, app. den., 66 N.Y.2d 768, 497 N.Y.S.2d 1043, 488 N.E.2d 129 (1985). *In the present case, there is no question that the victim was unavailable to testify at trial. Moreover, there is no question that the testimony was taken at a preliminary hearing before a district judge, and that the victim was testifying under oath. A transcript of the victim's prior testimony is included in the record on appeal and shows that the victim was extensively cross-examined by the appellant's counsel. Therefore, the videotape was properly admitted into evidence.* Ready v. State, 574 So. 2d 894, 901–02 (Ala. Crim. App. 1990)

2. Virginia 804 (b)(1):
    a. "In *Longshore,* the Virginia Supreme Court reiterated that preliminary hearing testimony of an unavailable witness was admissible provided: (1) that the witness is presently unavailable; (2) that the prior testimony of the witness was given under oath (or in a form of affirmation that is legally sufficient); (3) that the prior testimony was accurately recorded or that the person who seeks to relate the testimony of the unavailable witness can state the subject matter of the unavailable witness's testimony with clarity and in detail; and (4) that the party against whom the prior testimony is offered was present, and represented by counsel, at the preliminary hearing and was afforded the opportunity of cross-examination when the witness testified at the preliminary hearing. *380 260 Va. at 3–4, 530 S.E.2d at 146 (citing *Shifflett v. Commonwealth,* 218 Va. 25, 28, 235 S.E.2d 316, 318 (1977); *Fisher v. Commonwealth,* 217 Va. 808, 812–13, 232

S.E.2d 798, 801–02 (1977)). Morgan v. Com., 50 Va. App. 369, 379–80, 650 S.E.2d 541, 546 (2007).

3. Nevada:
    a. "*The Confrontation Clause of the Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. In accordance with that right, prior testimony from a witness unavailable at trial is admissible only if the defendant had "a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In Chavez v. State, we held "that a preliminary hearing can afford a defendant an adequate opportunity to confront witnesses against him pursuant to Crawford." 125 Nev. 328, 337, 213 P.3d 476, 482 (2009). "The adequacy of the opportunity to confront will be decided on a case-by-case basis, turning upon the discovery available to the defendant at the time and the manner in which the magistrate judge allows the cross-examination to proceed." Id. Applying that test to the facts in Chavez, in which a victim of sexual assaults died after testifying at a preliminary hearing but before trial, we noted that "nearly all the discovery was complete" at the time of the hearing, "and the magistrate judge allowed Chavez unrestricted opportunity to confront [the witness] on all the pertinent issues." Id. at 341, 213 P.3d at 485–86. We therefore concluded that admitting the witness's testimony at trial did not violate Chavez's Confrontation Clause rights. See id.* at 341–42, 213 P.3d at 486. State v. Eighth Judicial Dist. Court in & for Cty. of Clark, 412 P.3d 18, 21 (Nev. 2018)

    b. *"We recognize that this court has previously indicated that three conditions must be met before testimony from a preliminary hearing may be used at a criminal trial: "first, that the defendant was represented by counsel at the preliminary hearing; second, that counsel cross-examined the witness; third, that the witness is shown to be actually unavailable at the time of trial." Hernandez v. State, 124 Nev. 639, 645, 188 P.3d 1126, 1130 (2008) (quoting Drummond v. State, 86 Nev. 4, 7, 462 P.2d 1012, 1014 (1970)); see also Grant v. State, 117 Nev. 427, 432, 24 P.3d 761, 764 (2001); Funches v. State, 113 Nev. 916, 920, 944 P.2d 775, 777–78 (1997); Aesoph v. State, 102 Nev. 316, 320, 721 P.2d 379, 381–82 (1986). All of these cases derive from Drummond, in which we tried to reconcile dicta from two United States Supreme Court cases decided in the 1960s. 86 Nev. at 7, 462 P.2d at 1014. But neither Drummond nor the cases cited above addressed the issue of whether an opportunity to cross-examine suffices when no actual cross-examination occurred. See Grant, 117 Nev. at 432 n.5, 24 P.3d at 764 n.5 ("[W]hether mere opportunity is sufficient has not been addressed since in most cases, the witness was actually cross-examined."). Therefore, because those cases did not turn on whether an opportunity to cross-examine is sufficient for confrontation purposes, statements addressing that issue are noncontrolling dicta. See Armenta–Carpio v. State, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013) (declining to apply the doctrine of stare decisis to statements from a prior opinion that "went beyond*

> *answering the limited question that was before the court"). We see no reason to adhere to that dicta when the Supreme Court has since clarified that prior testimony from a witness unavailable at trial is admissible as long as the defendant had "a prior opportunity for cross-examination."*[1] *Crawford*, 541 U.S. at 68, 124 S.Ct. 1354 (emphasis added). State v. Eighth Judicial Dist. Court in & for Cty. of Clark, 412 P.3d 18, 22 (Nev. 2018)

FEDERAL LAW:

There aren't many federal cases that have addressed the issue in the context of Rule 804 only. In fact, they almost all appear to conflate the Confrontation Clause issues with Rule 804. And they always admit the testimony or affirm the admission of the testimony. Below are some examples:

- *U.S. v. Carneglia*, 256 F.R.D. 366 (E.D. N.Y. 2009) (holding that victim's testimony at preliminary hearing on state charges against the defendant was admissible at federal trial, even though the rules and procedures between the proceedings were "slightly different," because the defendant had a "substantial interest in challenging" the testimony at the preliminary hearing).

- *U.S. v. Hargrove*, 382 Fed. Appx. 765 (10th Cir. 2010) (affirming admission of testimony from state preliminary hearing in federal criminal trial because "the motive at a preliminary hearing is sufficiently similar to the motive at trial"). One problem with this case, though, is that it conflates the Confrontation Clause analysis with Rule 804 analysis.

- *U.S. v. Avants*, 367 F.3d 433 (6th Cir. 2004) (affirming admission of testimony from state preliminary hearing in federal criminal trial because the defendant's motive in both cases was to discredit the witness). This case also conflates the Confrontation Clause with Rule 804.

TAB 4

Rule 106. Remainder of or related writings or recorded statements.

(a) If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement--necessary to qualify, explain, or place into context the portion already introduced, even if the remainder is otherwise inadmissible under these rules.

(b) Exceptions: If the introduction of the remainder is inadmissible under an Article V privilege, both the initial statement and the remainder shall be excluded.

TAB 5

Subcommittee on Eyewitness Identification for the
Utah Supreme Court Advisory Committee on the Rules of Evidence
Summary of Comments in Response to Proposed Rule 617

The subcommittee on eyewitness identification met on January 31st at 5:00pm to discuss the comments that were received in response to the proposed Rule 617.

We received comments from the following people and organizations:

1. Michael Zimmerman, former Utah Supreme Court justice and appellate attorney
2. Jennifer Thompson, sexual assault crime victim
3. Michelle Feldman, Rocky Mountain Innocence Center
4. Steven Penrod, et al., Scientists and academics who study perception and eyewitness identification
5. Jeff Gray, attorney in the Utah Attorney General's office
6. Sandi Johnson, Salt Lake County District Attorney's office
7. Mary Corporon, criminal defense attorney
8. Mark Ethington, former prosecutor and criminal defense attorney
9. Ann Taliaferro, board member with Utah Association of Criminal Defense Lawyers (UACDL)
10. Brandon Garrett, member of the Committee on Scientific Approaches to Understanding and Maximizing Validity and Reliability of Eyewitness Identification
11. Jessica Peterson, (??)

The comments can be broadly classified into the following general policy issues, with the authors adopting those views, corresponding to their number in the list above, in parenthesis:

<u>In Support:</u>

1. Insures the police use reliable, best practices in identification, consistent with current social science, which can be updated (1, 3, 4, 7, 8, 9, 10, 11
2. Safeguards against inaccurate evidence leading to wrongful convictions (1, 2, 3, 7, 9)
3. Too much weight given to eyewitness identification (7, 8, 9)

<u>In Opposition:</u>

1. Usurps the jury's role in weighing credibility (5)
2. Could lead to a hearing in every case (6)
3. Does not mirror the federal constitutional standard, with need for threshold showing of "unnecessarily suggestive" (5, 6)
4. Eyewitness ID should not be enshrined in a rule (5)

5. Requires law enforcement training (the need for this was raised by #10, but they believe it belongs somewhere other than in the rule)

Specific Textual Changes

1. Strike “the cross-race effect will depend on the circumstances” and instead replace with an acknowledgement that “no research has shown the elimination of the cross-race effect.” (4)
2. Strike “prior to collecting the certainty response” When documenting the witness responses, law enforcement should ask the witness how confident they were in the identification quickly, and once and only once. They should not make any suggestion or provide feedback at any time. (4)
3. Remove preference for simultaneous over sequential presentation. (4)

Rule 617. Eyewitness Identification

(a) Definitions

(1) "Eyewitness Identification" means witness testimony or conduct in a criminal trial that identifies the defendant as the person who committed a charged crime.

(2) "Identification Procedure" means a lineup, photo array, or showup.

(3) "Lineup" means a live presentation of multiple individuals, before an eyewitness, for the purpose of identifying or eliminating a suspect in a crime.

(4) "Photo Array" means the process of showing photographs to an eyewitness for the purpose of identifying or eliminating a suspect in a crime.

(5) "Showup" means the presentation of a single person to an eyewitness in a time frame and setting that is contemporaneous to the crime and is used to confirm or eliminate that person as the perceived perpetrator.

(b) Admissibility in General. In cases where eyewitness identification is contested, the court shall exclude the evidence if a factfinder, considering the factors in this subsection (b), could not reasonably rely on the eyewitness identification. In making this determination, the court may consider expert testimony and other evidence on the following:

(1) Whether the witness had an adequate opportunity to observe the suspect committing the crime;

(2) Whether the witness's level of attention to the suspect committing the crime was impaired because of a weapon or any other distraction;

(3) Whether the witness had the capacity to observe the suspect committing the crime, including the physical and mental acuity to make the observation;

(4) Whether the witness was aware a crime was taking place and whether that awareness affected the witness's ability to perceive, remember, and relate it correctly;

(5) Whether a difference in race or ethnicity between the witness and suspect affected the identification;

(6) The length of time that passed between the witness's original observation and the time the witness identified the suspect;

(7) Any instance in which the witness either identified or failed to identify the suspect and whether this remained consistent thereafter;

(8) Whether the witness was exposed to opinions, photographs, or any other information or influence that may have affected the independence of the witness in making the identification; and

(9) Whether any other aspect of the identification was shown to affect reliability.

(c) Identification Procedures. If an identification procedure was administered to the witness by law enforcement and the procedure is contested, the court must determine whether the identification procedure was unnecessarily suggestive or conducive to mistaken identification. If so, the eyewitness identification must be excluded unless the court, considering the factors in subsection (b) and this subsection (c), finds that there is not a substantial likelihood of misidentification.

(1) Photo Array or Lineup Procedures. To determine whether a photo array or lineup is unnecessarily suggestive or conducive to mistaken identification, the court should consider the following:

(A) Double Blind. Whether law enforcement used double blind procedures in organizing a lineup or photo array for the witness making the identification. If law enforcement did not use double blind procedures, the court should consider the degree to which the witness's identification was the product of another's verbal or physical cues.

(B) Instructions to Witness. Whether, at the beginning of the procedure, law enforcement provided instructions to the witness that

(i) the person who committed the crime may or may not be in the lineup or depicted in the photos;

(ii) it is as important to clear a person from suspicion as to identify a wrongdoer;

(iii) the person in the lineup or depicted in a photo may not appear exactly as he or she did on the date of the incident because features such as weight and head and facial hair may change; and

(iv) the investigation will continue regardless of whether an identification is made.

(C) Selecting Photos or Persons and Recording Procedures. Whether law enforcement selected persons or photos as follows:

(i) Law enforcement composed the photo array or lineup in a way to avoid making a suspect noticeably stand out, and it composed the photo array or lineup to include persons who match the witness's description of the perpetrator and who possess features and characteristics that are

reasonably similar to each other, such as gender, race, skin color, facial hair, age, and distinctive physical features;

(ii) Law enforcement composed the photo array or lineup to include the suspected perpetrator and at least five photo fillers or five additional persons;

(iii) Law enforcement presented individuals in the lineup or displayed photos in the array using the same or sufficiently similar process or formatting;

(iv) Law enforcement used computer generated arrays where possible; and

(v) Law enforcement recorded the lineup or photo array procedures.

(D) Documenting Witness Response. Whether law enforcement asked the witness how certain he or she was of any identification immediately after the identification and documented all responses, including initial responses; and whether law enforcement refrained from giving any feedback regarding the identification.

(E) Multiple Procedures or Witnesses. Whether or not law enforcement involved the witness in multiple identification procedures wherein the witness viewed the same suspect more than once and whether law enforcement conducted separate identification procedures for each witness, and the suspect was placed in different positions in each separate procedure.

(2) Showup Procedures. To determine whether a showup is unnecessarily suggestive or conducive to mistaken identification, the court should consider the following:

(A) Whether law enforcement documented the witness's description prior to the showup.

(B) Whether law enforcement conducted the showup at a neutral location as opposed to law enforcement headquarters or any other public safety building and whether the suspect was in a patrol car, handcuffed, or physically restrained by police officers.

(C) Whether law enforcement instructed the witness that the person may or may not be the suspect.

(D) Whether, if the showup was conducted with two or more witnesses, law enforcement took steps to ensure that the witnesses were not permitted to communicate with each other regarding the identification of the suspect.

(E) Whether the showup was reasonably necessary to establish probable cause.

(F) Whether law enforcement presented the same suspect to the witness more than once.

(G) Whether the suspect was required to wear clothing worn by the perpetrator or to conform his or her appearance in any way to the perpetrator.

(H) Whether the suspect was required to speak any words uttered by the perpetrator or perform any actions done by the perpetrator.

(I) Whether law enforcement suggested, by any words or actions, that the suspect is the perpetrator.

(J) Whether the witness demonstrated confidence in the identification immediately following the procedure and law enforcement recorded the confidence statement.

(3) Other Relevant Circumstances. In addition to the factors for the procedures described in parts (1) and (2) of this subsection (c), the court may evaluate an identification procedure using any other circumstance that the court determines is relevant.

(d) Admissibility of Photographs. Photographs used in an identification procedure may be admitted in evidence if:

(1) the prosecution has demonstrated a reasonable need for the use;

(2) the photographs are offered in a form that does not imply a prior criminal record; and

(3) the manner of their introduction does not call attention to their source.

(e) Expert Testimony. When the court admits eyewitness identification evidence, it may also receive related expert testimony upon request.

(f) Jury Instruction. When the court admits eyewitness identification evidence, the court may, and shall if requested, instruct the jury consistent with the factors in subsections (b) and (c) and other relevant considerations.

Committee Note: This rule ensures that when called upon, a trial court will perform a gatekeeping function and will exclude unreliable eyewitness identification evidence in a criminal case. Several organizations, including the Department of Justice and the ABA, have published best practices for eyewitness identification procedures when a witness is asked to identify a perpetrator who is a stranger to the witness.

Subsection (a) defines terms commonly used in the eyewitness identification process.

Subsection (b) addresses estimator variables (circumstances at the time of the crime). According to the National Research Council of the National Academies, the most-studied estimator variables include: weapon focus, stress and fear, race bias, exposure, duration, and retention. The literature talks about how stress, fear, and anxiety may affect memory storage and retrieval. The ABA recognizes that high and low levels of stress may harm performance in identifying suspects, while moderate levels may enhance memory performance. A stressed victim may encode information differently and be more affected by stress than a passerby, unless the passerby is unaware that a crime is taking place. In addition, the cross-race effect ~~will depend on the circumstances~~may impact the accuracy of identifications; and the participation of law enforcement and others may influence a witness's perceptions and memory retrieval. Expert evidence may be necessary to elucidate these factors for the court, and where the evidence is admissible, expert evidence and/or an instruction may further elaborate on the factors for the jury.

Subsection (c)(1) reflects some of the best practices in the context of photo array and lineup procedures, including use of double blind procedures; providing instructions to the witness at the beginning of the procedure; displaying photos or presenting a lineup with individuals who generally fit the witness's description of the suspect and who are sufficiently similar so as not to suggest the suspect to the witness; documenting the procedures, including the witness's responses; and guarding against influencing the witness through use of multiple procedures or when multiple witnesses are involved.

> **Use of double blind procedures**. The literature, including the National Academies of Science report, supports that whenever practical, the person who conducts a lineup or organizes a photo array and all those present (except defense counsel) should be unaware of which person is the suspect through use of double blind procedures. Use of double blind procedures provides assurance that an administrator who is not involved in the investigation does not know what the suspect looks like and is therefore less likely to suggest or confirm that the perpetrator is in the lineup or the photo array. At times, double blind procedures may not be practical. In such cases, the administrator should adopt blinded procedures, such as a "folder shuffle," to prevent him or her from knowing which photo a witness is viewing at a given time and to ensure that he or she cannot see the order or arrangement of the photographs viewed by the witness. Blinded procedures may be necessary to use in smaller agencies with limited resources or in high profile cases where all officers are aware of the suspect's identity. As a practical matter, blinded procedures work only for photo arrays and are not recommended for use in lineups. Lineups must be conducted using double blind procedures.

Providing instructions to the witness. The person conducting the lineup or photo array should not disclose or convey to the witness that a suspect is in custody. Rather, the person should read instructions to the witness that are neutral and detached and should allow the witness to ask questions about the instructions before the process begins. The witness should sign and date the instructions. Organizations have published instructions for use in lineup or photo array procedures that may be used by agencies. While a witness is viewing the photo array, the person conducting the procedure should not interrupt the witness or interject.

Displaying photos or presenting a lineup. In selecting fillers or individuals for the photo array or lineup procedure, at least five fillers—or non-suspects—should be used with the suspect photo. Fillers should generally fit the witness's description of the perpetrator as opposed to match a specific suspect's appearance. Fillers should not make the suspect noticeably stand out. Photos should be of similar size with similar background and formatting. They should be numbered sequentially or labeled in a manner that does not reveal identity or the source of the photo, and they should contain no other writing. ~~More recent literature supports that where practical, agencies should employ a simultaneous procedure, which allows the witness to observe at one time all of the photos in an array for a single suspect.~~

Documenting witness responses. Law enforcement should clearly document by video or audio recording a witness's level of confidence verbatim at the time of an initial identification. ~~New research shows that a witness's confidence at the time of an initial identification is a good indicator of accuracy. A recording will ensure that investigators and fact-finders fully understand a witness's level of confidence~~.

Multiple procedures and multiple witnesses. According to the literature, multiple identification procedures create a "commitment effect" in which the witness might recognize a lineup member or photo from a previous procedure, rather than from the crime scene. In addition, when multiple witnesses are involved, a procedure that ensures the suspect is not in the same position for each procedure guards against witnesses influencing one another.

[LMJ SUGGESTED EDITS to (c)(2)]
Subsection (c)(2) addresses showup procedures. While some jurisdictions consider ~~several organizations discourage~~ showup procedures to be highly~~as inherently~~ suggestive, the procedures may be necessary to law enforcement in assessing eyewitness identification. In that regard, the International Association of Chiefs of Police (IACP) and other organizations recommend that witnesses should not be shown suspects while they are in suggestive settings such as a patrol car, handcuffs, or other physical restraints. Such settings can lead to a prejudicial inference by the witness~~. Notwithstanding the suggestive nature of showups, s~~Subsection (c)(2) addresses factors to consider in ~~those circumstances~~showup procedures. Once law enforcement has probable cause to arrest a suspect, however, a witness should not be allowed to participate in showup proceedings but should participate only in lineup or photo array procedures.

Subsection (c)(3) addresses other factors that may be relevant to the analysis. Those factors may include whether there was no unreasonable delay between the events in question and the identification procedures, among other things.

Subsection (d) addresses the use of photographs at trial that were used by law enforcement in identification procedures.

Subsections (e) and (f) are included because the National Academies of Science (NAS) report recommends both expert testimony and jury instructions due to the fact that many scientifically established aspects of eyewitness identification memory are counterintuitive and jurors will need assistance in understanding the factors that may affect the accuracy of an identification.

Sources: National ~~Academies of Science~~Research Council, *Identifying the Culprit: Assessing Eyewitness Identification* (2014), available at https://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification; U.S. D.O.J., *Eyewitness Identification: Procedures for Conducting Photo Arrays* (2017); ABA Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures (2004); IACP National Law Enforcement Policy Center, *Eyewitness Identification: Model Policy* (2010).