SUPREME COURT'S ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

AGENDA

January 8, 2019
Matheson Courthouse
Council Room
450 S. State Street
Salt Lake City, Utah 84111
5:15 p.m. – 7:00 p.m.

John Lund, Presiding

1. Welcome & Approval of Minutes.....John Lund
   (Tab 1)

2. Victim Advocate Privilege.....Representative Lowry Snow
   (Tab 2)

3. Review of Comments to Proposed Rule 617 .....John Lund
   (Tab 3)

4. Rules 504 and 1101.....Cathy Dupont
   (Tab 4) John Lund

5. State v. Sanchez Discussion..... Teresa Welch

6. Next Meeting .....John Lund

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES

Tuesday– October 23, 2018
5:15 p.m.
Council Room

Mr. John Lund, Presiding

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

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

Mr. Lund welcomed everyone to the meeting.

Motion: ***Judge Jones moved to approve the minutes from the August 28, 2018 Evidence Advisory meeting. The motion was seconded the motion. The motion carried unanimously.***

2. Proposed Amendment to Rule 804:

William Haines from the Attorney General's Office and Ryan Peters, Juab County Attorney presented a proposed amendment to Rule 804, Exceptions to the Rule Against Hearsay. Their proposal would remove the "similar motive" requirement for testimony in preliminary hearings with criminal cases, and keep the same standard, in civil cases.

The Committee discussed the proposed change with Mr. Haines and Mr. Peters.

The Committee decided to put together a Subcommittee with the Committee for Rules of Criminal Procedure to study the proposed amendment to Rule 804 and preliminary hearings more broadly. Lacey Singleton, Adam Alba, Dallas Young, Matt Hansen and Judge Bates agreed to work on the Subcommittee. In addition, representatives from victim advocates will be asked to serve on the Subcommittee. The Subcommittee agreed to report on their progress at the next Evidence Advisory Committee meeting.

3. Report on Meeting with Supreme Court:

John Lund reported to the Committee that the Supreme Court approved Rule 617 for comment. The Committee Note for Rule 617, and the adoption of Rule 902. Mr. Schwermer noted that the Supreme Court made a note recognizing the excellent quality of the memo regarding Rule 902.

4. LPP Amendment Options:

Cathy Dupont and Adam Alba presented two proposed versions of a Rule 504 amendment to address LPPs. The Committee suggested moving the definition of Licensed Paralegal Practitioner to follow the definition of a lawyer. They agreed on the following language:

- Line 28 (6) "Legal Professional" means a lawyer and a licensed paralegal practitioner.
- Line 29, 30 (6) (a) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.
- Line 31-33 (6) (b) "Licensed Paralegal Practitioner" means a person authorized, or reasonably believed by the client to be authorized, by the Utah Supreme Court to provide legal representation under URGLPP Rule 15-701.
- Line 41 add end quotes after the word representative" and "p" in the title Legal professional's representative" should be lower case.
- Line 28 (6) "p" in professional should be lower case.

Ms. Dupont agreed to double check the punctuation throughout the proposed draft of Rule 504.

- In addition, the Committee suggested that (10) read, "Licensed Paralegal Practitioner" means a person authorized to provide legal representation under URGLPP Rule 15-701, or reasonably believed by the client to be authorized to provide legal representation."
- Line 63 the first professional should read "professionals'"
- Line 8 "Client's representative"

<u>Motion:</u> Chris Hogle made a motion to refer Cathy Dupont's amended version of Rule 504 to the Supreme Court. Adam Alba seconded the motion. The motion passed unanimously.

The Committee discussed the Committee Note and agreed on the following language, "The 2018 amendments expand the scope of the privilege to include a Licensed Paralegal Practitioner as well as lawyers."

Ms. Dupont agreed to make the changes to the rule and the note and circulate the changes to the Committee before it goes on the Supreme Court agenda.

5. Proposed Amendment to Rule 1101:

Judge Jones proposed a change to Rule 1101. In section (c) Rule Inapplicable. Judge Jones proposed striking (D) in order to address a conflict with the statute.

<u>Motion</u>: Matt Hansen made a motion to strike (D) in section (c) change (E) to (D) and (F) to (E) of Rule 1101. Judge Bates seconded the motion. The motion passed.

6. State vs Sanchez:

Teresa Welch reported on the interpretation of Rule 106 in footnote four of State v. Sanchez. Rule 106 causes a timing and a trumping function controversy. The decisions in case law across the nation are split. In State v. Sanchez the Court of Appeals takes the issue and decides in favor of the trumping function. The Supreme Court vacated the Court of Appeals decision and asked the Rules Committee to address the controversy.

After further discussion the Committee agreed to review the Court of Appeals decision in State vs Sanchez and familiarize themselves with the issue. Ms. Welch will circulate the appropriate materials to the Committee and they will decide which direction to go in at the next meeting.

7. Other Business:

Next Meeting: January 8, 2019
5:15 p.m.
AOC, Council Room

Tab 2

LEGISLATIVE GENERAL COUNSEL
₵ Approved for Filing: J. Carlton ₵
₵ 12-28-18 9:31 AM ₵

VICTIM COMMUNICATIONS AMENDMENTS

2019 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: V. Lowry Snow

Senate Sponsor: Todd Weiler

LONG TITLE

Committee Note:

The Victim Advocate Confidentiality Task Force recommended this bill.

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 for privilege for communications;
  - addressing government records; and
  - requiring certain notices;
- addresses examination of victim advocate; and
- makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

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

77-38-406, Utah Code Annotated 1953

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

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

Part 4. Privileged Communications with Victim Advocates Act.

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 communications 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) (a) "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.

(b) "Advocacy services" do not include the practice of mental health therapy as defined in Section 58-60-102.

(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) "Communication" means the giving of information by a victim to a victim advocate, and includes a record created or maintained as a result of providing the information.

(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 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) "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 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.

(6) "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.

(7) "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.

(8) "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 that entity.

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

77-38-404. Scope of part.

This part governs the disclosure of communications 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 communication given to a nongovernment organization victim advocate.

In accordance with the Utah Rules of Evidence, a nongovernment organization victim advocate may not disclose communications with a victim, including communications in a group therapy session, except to the extent allowed by the Utah Rules of Evidence.

Section 6. Section **77-38-406** is enacted to read:

77-38-406. Disclosure of communications given to a criminal justice system victim advocate.

(1) (a) In accordance with the Utah Rules of Evidence, a criminal justice system victim advocate may not disclose communications with a victim, including communications in a group therapy session, except:

(i) that the criminal justice system victim advocate shall provide the communications to a prosecutor who is responsible for determining whether the communications are

exculpatory or go to the credibility of a witness; or

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

(b) If a prosecutor determines that the communication is exculpatory or goes to the credibility of a witness, after giving notice to the victim and the defense attorney and an opportunity to be heard as part of the in camera process, the prosecutor will present the communication to the court for in camera review pursuant to the Utah Rules of Evidence.

(2) A record that contains information from a communication between a criminal justice system 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 communication.

(3) A criminal justice system victim advocate, as soon as reasonably possible, shall notify a victim:

(a) in writing that communications with the criminal justice system victim advocate may be disclosed to a prosecutor and that a statement relating to the incident that forms the basis for criminal charges or goes to the credibility of a witness may 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 7. 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 cannot, without the consent of the victim, be examined in a civil or criminal proceeding as to a communication that is a privileged communication under the Utah Rules of Evidence, unless the victim advocate is examined in camera to determine whether a communication is privileged under the Utah Rules of Evidence.

LEGISLATIVE GENERAL COUNSEL
₵ Approved for Filing: J. Carlton ₵
₵ 12-27-18 3:52 PM ₵

H.J.R. 3

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

Committee Note:

The Victim Advocate Confidentiality Task Force recommended this bill.

General Description:

This joint resolution adopts a privilege under the rules of evidence related to 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:

None

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

H.J.R. 3

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) "Communication" means the same as that term is defined in UCA § 77-38-403.

(a) (2) "Criminal justice system victim advocate" means the same as that term is defined in UCA § 77-38-403.

(a) (3) "Non-government organization victim advocate" means the same as that term is defined in UCA § 77-38-403.

(a) (4) "Victim" means an individual defined as a victim in UCA § 77-38-403.

(a) (5) "Victim advocate communications" means communications between a victim and a victim advocate.

(a) (6) "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 victim advocate communications.

(c) **Who May Claim the Privilege.** The privilege may be claimed by the victim engaged in victim advocate communications, or the guardian or conservator of the victim engaged in victim advocate communications. An individual who is a victim advocate at the time of the victim advocate communications is presumed to have authority during the life of the victim to claim the privilege on behalf of the victim.

(d) **Exceptions.** A privilege does not exist under paragraph (b):

(d) (1) when the victim provides written, informed, and voluntary consent that is:

(d) (1) (A) reasonably time limited;

(d) (1) (B) discussed with the victim regarding why the information might be shared, who would have access to the information, and what information could be shared under the release;

(d) (1) (C) descriptive of the information that the victim authorizes to be shared and with whom; and

(d) (1) (D) specifies the duration for which the information may be shared;

(d) (2) when the victim is a minor and the nongovernment organization victim advocate believes it is in the best interest of the victim to disclose the confidential communication to the victim's parents or legal guardians;

(d) (3) when the victim is a minor and the minor's parents or guardians have consented to disclosure of the victim advocate communication and provided the written consent outlined in Subsection (d)(1);

(d) (4) for victim advocate communication that is required to be disclosed under Title 62A, Chapter 4a, Child and Family Services, or Section 62A-3-305;

(d) (5) for victim advocate communication that is evidence of a victim being in clear and immediate danger to the victim's self or others;

(d) (6) for victim advocate communication that is evidence that the victim has committed a crime, plans to commit a crime, or intends to conceal a crime;

(d) (7) if the victim advocate communication is with a criminal justice system victim advocate, the third person to which the victim advocate communication is provided is a government entity that possesses a role or responsibility within the criminal justice system;

(d) (8) if the victim advocate communication is with a criminal justice system victim advocate, when a court determines, after notice to the victim and the right to be heard as to the prejudical effect as part of the in camera review, that the probative value of the victim advocate communication outweighs the prejudicial effect on the victim or the relationship between the criminal justice system victim advocate; or

(d) (9) if the victim advocate communication is with a criminal justice system victim advocate, when a court determines, after in camera review, that the communication is exculpatory evidence, including impeachment evidence.

Article I, Section 28. [Declaration of the rights of crime victims.]

(1) To preserve and protect victims' rights to justice and due process, victims of crimes have these rights, as defined by law:

(a) To be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process;

(b) Upon request, to be informed of, be present at, and to be heard at important criminal justice hearings related to the victim, either in person or through a lawful representative, once a criminal information or indictment charging a crime has been publicly filed in court; and

(c) To have a sentencing judge, for the purpose of imposing an appropriate sentence, receive and consider, without evidentiary limitation, reliable information concerning the background, character, and conduct of a person convicted of an offense except that this subsection does not apply to capital cases or situations involving privileges.

(2) Nothing in this section shall be construed as creating a cause of action for money damages, costs, or attorney's fees, or for dismissing any criminal charge, or relief from any criminal judgment.

(3) The provisions of this section shall extend to all felony crimes and such other crimes or acts, including juvenile offenses, as the Legislature may provide.

(4) The Legislature shall have the power to enforce and define this section by statute.

77-38-203. Definitions.

As used in this part:

(1) "Confidential communication" means information given to a sexual assault counselor by a victim and includes reports or working papers made in the course of the counseling relationship.

(2) "Rape crisis center" means any office, institution, or center assisting victims of sexual assault and their families which offers crisis intervention, medical, and legal services, and counseling.

(3) "Sexual assault counselor" means a person who is employed by or volunteers at a rape crisis center who has a minimum of 40 hours of training in counseling and assisting victims of sexual assault and who is under the supervision of the director or designee of a rape crisis center.

(4) "Victim" means a person who has experienced a sexual assault of whatever nature including incest and rape and requests counseling or assistance regarding the mental, physical, and emotional consequences of the sexual assault.

Effective 5/9/2017

77-38-204. Disclosure of confidential communications.

Notwithstanding Title 53B, Chapter 28, Part 2, Confidential Communications for Institutional Advocacy Services Act, the confidential communication between a victim and a sexual assault counselor is available to a third person only when:

(1) the victim is a minor and the counselor believes it is in the best interest of the victim to disclose the confidential communication to the victim's parents;

(2) the victim is a minor and the minor's parents or guardian have consented to disclosure of the confidential communication to a third party based upon representations made by the counselor that it is in the best interest of the minor victim to make such disclosure;

(3) the victim is not a minor, has given consent, and the counselor believes the disclosure is necessary to accomplish the desired result of counseling; or

(4) the counselor has an obligation under Title 62A, Chapter 4a, Child and Family Services, to report information transmitted in the confidential communication.

Tab 3

UTAH COURT RULES – PUBLISHED FOR COMMENT

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

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

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

Posted: September 26, 2018

Utah Courts

Utah Rules of Evidence – Comment Period Closed November 10, 2018

URE0617. Eyewitness Identification. This new rule provides criteria and procedures to be used by a factfinder to evaluate a contested eyewitness identification.

URE0902. Evidence That Is Self-Authenticating. Amend. Adopts provisions similar to the recently adopted FRE 902(13) and (14) regarding electronic records.

This entry was posted in **-Rules of Evidence, -Rules of Evidence, URE0617, -Rules of Evidence, URE0902.**

« Rules Governing the State Bar – Comment Period Closed November 10, 2018

Rules of Appellate Procedure – Comment Period Closed October 13, 2018 »

CATEGORIES

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

UTAH COURTS

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- CJA03-0115
- CJA03-0116
- CJA03-0117

17 thoughts on "Utah Rules of Evidence – Comment Period Closed November 10, 2018"

Sandi Johnson
November 5, 2018 at 5:40 pm

Regarding Proposed Rule 617

I believe the enactment of this rule is contrary to both case law and recent practice by the United States Supreme Court and the Utah Supreme Court, and will have the unintended consequence that in practice, every case that has an eyewitness identification will have a hearing, regardless of whether that identification was suggestive by law enforcement or not.
First, this rule expands the suppression of evidence beyond any constitutional requirements. The United States Supreme Court, addressing the same concerns raised by the committee note to this proposed rule, rejected expanding exclusion of eyewitness identification in the constitutional context in Perry v. New Hampshire, 565 U.S. 228 (2012). The Court noted that "[t]he Constitution, our decisions indicate, protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." Perry v. New Hampshire, 565 U.S. 228, 237 (2012). The court noted that evidence should be excluded under the Due Process Clause "[o]nly when evidence is so extremely unfair that its admission violates fundamental conceptions of justice ..." Perry v. New Hampshire, 565 U.S. 228, 237 (2012) The Court reviewed their jurisprudence and noted that when it came to eyewitness identification, "due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary. Perry v. New Hampshire, 565 U.S. 238-239 (2012). The Court observed that even if the procedure were suggestive, "[i]nstead of mandating a per se exclusionary rule, the Court held that the Due Process Clause requires courts to assess, on a case-by-case basis, whether improper police conduct created a "substantial likelihood of misidentification." Id. at 239. The Court held that this was a "totality of the circumstances approach." Id. at 239. The Court limited Due Process claims only when the "suggestive circumstances [were] arranged by law enforcement." Id. at 248. One of the Court's reasons to reject expanding Due Process claims to any "suggestive" identifications was the fact that this "position would open the door to judicial preview, under the banner of due process, of most, if not all, eyewitness

identifications." Id. at 243. Moreover, the Court observed "that the jury, not the judge, traditionally determines the reliability of evidence." Id. at 245. Finally, the Court noted the safeguards that were already in place: "the defendant's Sixth Amendment right to confront the eyewitness," "the defendant's right to the effective assistance of an attorney, who can expose the flaws in the eyewitness' testimony during cross-examination and focus the jury's attention on the fallibility of such testimony during opening and closing arguments," "[e]yewitness-specific jury instructions," and "[t]he constitutional requirement that the government prove the defendant's guilt beyond a reasonable doubt also impedes convictions based on dubious identification evidence." Id. at 246-247. Finally, they even acknowledged the steps that Utah took to allow defendants to "present expert testimony on the hazards of eyewitness identification evidence. See, e.g., State v. Clopten, 2009 UT 84."
Second, our own Supreme Court has recently moved away from the use of lists and factors when assessing the admissibility of evidence. While many of these "tests" started out with good intentions, practitioners and district courts started to strictly adhere to the factors instead of focusing on the totality of the circumstances. This year in State v. Fullerton, the Utah Supreme Court rejected strict reliance on factors judicially created to determine whether a person was in custody for purposes of Miranda, because "[s]trict or sole reliance on the Carner factors is inconsistent with the totality of the circumstances analysis prescribed by federal law." 2018 UT 49. Last year, the Utah Supreme Court, when discussing the "Shickles" factors in a Rule 403 analysis, "reemphasize that courts are bound by the text of rule 403, and it is unnecessary for courts to evaluate each and every . . . factor in every context." State v. Lowther, 2017 UT 24, ¶41

Third, this rule will result in a hearing being held in every case, which is exactly what the United States Supreme Court felt was unnecessary. As an example, in 2010, the Utah Rules of Criminal Procedure enacted Rule 15A, which sought to "streamline" the process involving chain of custody issues. It provided a process by which a defendant could demand the documentation regarding chain of custody. However, that rule was repealed a year later, because a demand was quickly filed in every case, regardless of whether chain of custody was a central issue. As was noted, "[t]he rule has had the opposite effect, creating additional and unnecessary work for both prosecutors and defense attorneys." Enacting this rule will have the same effect. Every defendant will file a motion pursuant to this rule, regardless of how the identification occurred.

This rule has essentially taken the "best practices" of police procedure, and copied them into a rule of evidence. Enacting this rule is both unnecessary as safeguards exist both procedurally and in other rules of evidence, and it expands the suppression of evidence beyond the Constitution.

- CJA03-0201
- CJA03-0201.02
- CJA03-0202
- CJA03-0301
- CJA03-0302
- CJA03-0304
- CJA03-0304.01
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Layton City Attorney's Office
November 7, 2018 at 8:58 pm

Layton City opposes the adoption of proposed rule 617 which gives judges the authority to make factual findings regarding eyewitness testimony. First, this rule would give the court a fact-finding function more appropriately carried out by the jury. Second, the rule is unnecessary as motions to suppress – where appropriate – cross-examination, expert witness testimony, and jury instructions already provide more than adequate procedure for testing the reliability of eyewitness testimony. Finally, the science behind eyewitness testimony is constantly evolving, making the institution of a rule likely to be obsolete in the coming years.

In criminal trials, the judge and the jury have distinct – but equally important – duties regarding evidence. The judge's role is to determine if evidence is admissible; the jury determines if the evidence is reliable and to what extent. Not only would proposed rule 617 diminish the evidence available to juries to determine innocence or guilt, it would also diminish the juries role as the fact finder of the case. It is the jury's role to determine credibility and reliability of any given witness, including eyewitnesses. By requiring judges to make factual findings about the reliability of eyewitness testimony, this proposed rule would violate the jury's right and responsibility to determine guilt or innocence. The role of the jury in our criminal justice system is sacrosanct, and it would be error to lessen its role.

In addition, this rule is unnecessary because existing procedural protections are in place for protecting defendants against unreliable eyewitness testimony. If a defendant has legal grounds to believe the admission of eyewitness testimony would violate due process rights, he or she may file a motion to suppress. The judge would then exercise his or her proper duties and determine if the evidence is constitutionally admissible. State v. Ramirez, 817 P.2d 774, 778 (Utah 1991).

Even where a judge finds the eyewitness testimony to be constitutionally admissible, the defendant still has additional procedural protections. A defendant has a right to cross-examine an eyewitness. Defendants may also call an expert witness to support their theory of the case and argue about the possibility of unreliable eyewitness testimony. Finally, defendants are entitled to cautionary jury instructions when eyewitness testimony is used. In fact, the Model Utah Jury Instructions, Second Edition, currently has a model instruction explaining to juries that it is up to each juror to determine if they believe the eyewitness testimony and listing certain criteria they should consider when determining if the eyewitness identification was accurate. See MUJI 2d, CR404. These current protections are the appropriate avenue for a defendant to counter eyewitness testimony. "The Constitution . . . protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the

evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." Perry v. New Hampshire, 565 U.S. 228, 237 (2012)
As noted by the Utah Supreme Court in State v. Clopten (2015 UT 82) the scientific findings relating to eyewitness testimony are constantly evolving. Clopten ¶ 53. Recognizing this constant evolution, the Supreme Court refused to bind itself or the lower courts to a single assessment of the state of science. Id. ¶ 54. In addition, there is still disagreement about the reliability or unreliability of eyewitness testimony in the scientific community. For instance, in a recent issue of Perspectives on Psychological Science, two articles take opposing views on the reliability of eyewitness reports. See Wade, K. A., Nash, R. A., & Stephen Lindsay, D. (2018). Reasons to Doubt the Reliability of Eyewitness Memory: Commentary on Wixted, Mickes, and Fisher (2018). Perspectives on Psychological Science, 13(3), 339–342. As noted in Clopten, it would be error to tie courts to an assessment of the science available in 2018. The decision on whether eyewitness testimony is reliable is best left to experts and the factfinders – juries.
"The judiciary likewise must take care not to step into the jury's fact-finding shoes. While it is the role of the judge to instruct the jury on the law, it is the jury's constitutional prerogative to determine the facts and to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." State v. Walker, 2017 UT App 2, ¶ 23 (internal citations omitted). Proposed rule 617 would require the judiciary to step into the jury's fact-finding shoes. For this reason, and the reasons articulated above, Layton City opposes the adoption of this rule.

Utah County Attorney's Office
November 8, 2018 at 5:57 pm

Regarding Proposed Rule 617

Eyewitness identifications possess a unique combination of features: [1] they have extraordinary impact on juries[2] yet are subject to counter-intuitive factors affecting their reliability.[3] As a result, "[e]yewitness identifications play an important role in the investigation and prosecution of crimes, but they have also led to erroneous convictions."[4]

The Utah County Attorney's Office supports efforts to improve the truth-seeking function of our justice system, include efforts related to eyewitness identification. However, the Office opposes proposed Rule 617 in its current form.

Proposed Rule 617's current language strikes an improper balance between a defendant's right to due process, a victim's right to be heard, and the peoples' right to present relevant evidence against the accused. Furthermore, the rule's current

form strikes an improper balance between a court's gate-keeping function and a jury's fact-finding function.

The office's main objections involve proposed subsections (b) and (e). Each subsection will be discussed in turn.

Admissibility in General

Subsection (b) discusses admissibility of eyewitness identifications in general. In any case where a defendant contests an eyewitness identification, the rule permits a pretrial hearing where the trial court is directed to consider a list of factors and to exclude the identification if the jury could not reasonably rely on the identification. The proposed subsection is inadequate because it fails to take account of applicable due process requirements, fails to properly balance the role of judge as gate-keeper and jury as fact finder, and fails adequately to advise the trial court what it should do vis-à-vis contested eyewitness identifications.

The federal constitution "protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit."[5] As Utah's Justice Lee argued, historically due process has been a limitation on government action, "not a sweeping charter for judges to assure fairness by excluding evidence that may be of questionable reliability in light of emerging principles of social science."[6] Instead, as Justice Ginsburg notes, "juries are assigned the task of determining the reliability of the evidence presented at trial."[7] In other words, there is a strong presumption that juries should see even questionable eyewitness identification evidence.[8]

Because of this, the United States Supreme Court has found that even "tainted" eyewitness identifications are not per se excluded from trial.[9] Rather, on a case-by-case basis, courts determine whether "improper police conduct" created a "substantial likelihood of misidentification."[10] In evaluating that likelihood, reliability is the "linchpin."[11] However, this check was created not with an eye to excluding the evidence but "to avoid depriving the jury of identification evidence that is reliable, notwithstanding improper police conduct."[12]

Proposed Rule 617 stands in contrast to these due process concerns. The committee notes to the proposed rule seemingly indicate that the rule encapsulates due process requirements. The proposed rule, however, does not do so. As noted, the United States Supreme Court has concluded that due process only concerns itself with improper police conduct and only excludes identifications where the improper conduct resulted in a substantial likelihood of misidentification. The proposed rule, however, directs the trial courts to consider a number of factors which have nothing to do with improper police conduct. And it directs the trial courts to apply a standard of reasonable reliability instead of a standard of substantial likelihood of misidentification.

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Additionally, unlike the due process clauses, the proposed rule subjects all contested eyewitness identifications to judicial oversight. The Supreme Court of the United States has explicitly rejected arguments which would "open the door to judicial preview, under the banner of due process, of most, if not all, eyewitness identifications."[13] And a recent concurring opinion of the Utah Supreme Court stated: "I see no basis for extending th[e] longstanding view of due process to establish an omnibus guarantee of evidentiary reliability. Nor do I see a limiting principle on such a slippery slope."[14] Rather, "preliminary judicial inquiry into the reliability of an eyewitness identification" should only occur when the identification was "procured under unnecessarily suggestive circumstances arranged by law enforcement."[15]

In short, the proposed rule fails to take account of applicable due process norms set out by the federal and state Supreme Courts.

The Utah County Attorney's Office recognizes, however, these statements represent the constitutional floor of the state and federal due process clauses. There are valid policy reasons to take Utah beyond constitutional floors. Doing so should be done with sensitivity to ensure that any new rule promotes, rather than, frustrates justice.[16] The Office suggests that Utah looks to her sister-states, which have led on this issue to construct a rule.

New Jersey, for example, has supplemented federal considerations with separate state law standards. In 2011, the New Jersey Supreme Court issued a unanimous decision creating a new framework for admitting eyewitness identification evidence. The framework permits pretrial hearings to review the admissibility of eyewitness identification. Unlike proposed Rule 617, the New Jersey standard articulates important limits, including the role of the court and the burdens on the parties. First, to even obtain a pretrial hearing, a defendant cannot merely contest the identification but must show some evidence of suggestiveness related to either estimator or system variables that could lead to mistaken identification. Then, at a hearing the prosecution must offer some proof that the eyewitness identification is reliable. Finally, if the prosecution makes that showing, the ultimate burden of proving a "very substantial likelihood of irreparable misidentification" falls on the defendant. Such a rule attempts to (1) mitigate judicial intrusion into every eyewitness identification, (2) preserve a proper balance between the gate-keeper and the finder of fact, and (3) strike a proper balance between due process concerns, victim rights, and the ability to present relevant, truthful evidence.

By contrast, Massachusetts has considered a different approach to the issue. In 2013, a Massachusetts Supreme Judicial Court Study Group on Eyewitness Identification recommended that the state adopt a set of best practices, model jury instructions, and additional flexibility for trial courts to address problematic identifications.[17] The report specifically identified problems with the New Jersey approach.[18] For example, the study

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- Petition to Increase Bar Admission Fees
- Petition to Increase Licensing Fees.
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- RGLPP15-0405

group believed that New Jersey's opportunity for pretrial hearings where a defendant produce "some showing of suggestiveness" was too broad.[19] Instead, they recommended that a pretrial evidentiary hearing be permitted in one of four scenarios: (1) the defendant makes a preliminary showing of an unnecessarily suggestive identification procedure; (2) the defendant makes a showing that a witness was involved in a highly suggestive confrontation with the defendant independent of any police involvement; (3) that the police failed to follow certain specific best police practices on eyewitness identification in a substantial way in conducting or arranging a pretrial identification procedure; or (4) when the pretrial eyewitness identification is uncorroborated and the defendant makes a showing of the presence of estimator variables[20] casting doubt on the reliability of the identification.[21] At the hearing, the defendant must then show by the preponderance of evidence that (1) the identification was "so unnecessarily suggestive that it was conducive to irreparable misidentification," (2) the identification was unreliable under the totality of circumstances, or (3) that the police "failed in a substantial way to follow certain specific Best Police Practices."[22] Lastly, the study group recommended that courts have a variety of intermediate remedies available to deal with problematic eyewitness identifications short of exclusion of the evidence.[23] For example, a court could permit expert testimony or incorporate cautionary jury instructions.[24]

Both the New Jersey framework and the Massachusetts recommendations, while mutual exclusive, provide possible routes for Utah moving forward. Both are far superior to proposed Rule 617. Unlike those avenues, the proposed rule allows for challenges to every identification and fails to establish which party carries what burden at the hearing. Furthermore, unlike the Massachusetts proposal, which would permit a variety of intermediate remedies, the proposed rule offers only the option of exclusion for a problematic identification.

Due to the significant problems with the proposed rule, including its deviation from due process norms without clear, articulated standards, the Utah County Attorney's Office urges that Proposed Rule 617 not be made final. Instead other options should be considered to create a rule which fairly balances the competing concerns present in the criminal justice system.

Expert Testimony

Proposed Rule 617(e) governs expert testimony: "When the court admits eyewitness identification evidence, it may also receive related expert testimony upon request." According to the committee note, this rule was "included because the National Academies of Science (NAS) report recommends ... expert testimony."

Unfortunately, the committee failed to craft a rule which was true to the NAS report and the explicit limitations it noted in regards to expert testimony.

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- RGLPP15-0416
- RGLPP15-0417
- RGLPP15-0705
- RGLPP15-0714
- RGLPP15-0908
- RPC Preamble
- RPC Terminology
- RPC01.00
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The report noted that contrary to the practice of many courts, judges should "have the discretion to allow expert testimony on relevant precepts of eyewitness memory and identifications."[25] But this recommendation came with an important caveat: "Expert witnesses should not be permitted to testify without limits."[26]

An expert "explaining the relevant scientific framework can describe the state of the research and focus on the factors that are particularly relevant in a given case,"[27] but, "an expert must not be allowed to testify beyond the limits of his or her expertise."[28] Thus, while "current scientific knowledge would allow an expert to inform the jury of factors bearing on their evaluation of an eyewitness' identification" there is "no evidence that the scientific research has reached the point that would properly permit an expert to opine, directly or through an equivalent hypothetical question, on the accuracy of an identification by an eyewitness in a specific case."[29]

This important limitation that expert witnesses must not opine, directly or through hypotheticals, on a specific case is nowhere to be found in the rule or the committee notes. While science may eventually advance to the point of allowing such testimony, the failure to note this current limitation either in the rule text or the committee note shows that proposed Rule 617 is not yet ready for use by courts or practitioners.

Additionally, it is unclear why current Rules 702 and 703 are inadequate to address eyewitness identification experts. If proposed rule 617 is to provide specific instructions related to experts in this context, it has utterly failed to do so. If specific instructions beyond those applied to other experts are unnecessary, then proposed rule 617(e) is not only unnecessary but likely to confuse courts and practitioners.

It is the opinion of the Utah County Attorney's Office that proposed Rule 617 should not be adopted until these considerations, as well as any other problems identified by other commenters on the proposed rule, are adequately addressed.

Respectfully,

Utah County Attorney's Office
Jeffrey R. Buhman, Utah County Attorney
Chad E. Grunander, Criminal Division Chief
Adam R. Pomeroy, Deputy County Attorney

[1] Perry v. New Hampshire, 565 U.S. 228, 249 (2011) (Sotomayor, J., dissenting) ("This Court has long recognized that eyewitness identifications' unique confluence of features–their unreliability, susceptibility to suggestion, powerful impact on the jury, and resistance to the ordinary tests of the adversarial process–can undermine the fairness of a trial.").
[2] Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) ("[T]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'") (quoting Elizabeth F. Loftus, Eyewitness Testimony 19 (1979)).

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- RPP011.0401
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- StandingOrder08
- Uncategorized
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- URAP025
- URAP025A
- URAP027
- URAP028A
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- URAP035
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[3] National Academies of Science, Identifying the Culprit: Assessing Eyewitness Identification 111 (2014) ("NAS Report"), available at **https://www.nap.edu/catalog/18891/identifying-the-culpritassessing-eyewitness-identification**.
[4] Id. at xiii.
[5] Perry, 565 U.S. at 237.
[6] State v. Clopten, 2015 UT 82 ¶77 (2015) (Lee, J., concurring).
[7] Perry, 565 U.S. at 237.
[8] Id. at 245 ("[T]he jury, not the judge, traditionally determines the reliability of evidence.")
[9] Id. at 239.
[10] Id.
[11] Id. at 239-241.
[12] Id. at 241.
[13] Id. at 243.
[14] Clopten, 2015 UT 82 at ¶78 (Lee, J., concurring).
[15] Perry, 565 U.S. at 248.
[16] As the United States Supreme Court has noted, a rule requiring automatic exclusion would "g[o] too far" by "keep[ing] evidence from the jury that is reliable and relevant" and "may result, on occasion, in the guilty going free." Manson v. Brathwaite, 432 U.S. 98, 112 (1977); see also id. at 113 (when an "identification is reliable despite an unnecessarily suggestive [police] identification procedure," automatic exclusion "is a Draconian sanction ... that may frustrate rather than promote justice").
[17] Supreme Judicial Court Study Group on Eyewitness Evidence, Report and Recommendations to the Justices (July 25, 2013) ("Massachusetts Report"), available at **https://www.mass.gov/files/documents/2016/08/ql/eyewitness-evidence-report-2013.pdf**.
[18] Id. at 42.
[19] Id. at 43; cf id. at 46 (in discussing the Oregon approach to the issue, some members of the study group were "concerned about the toll that [the Oregon] approach would exact on our already overburdened criminal justice system; we heard reports from Oregon that defense counsel were being advised, pursuant to [Oregon case law], to raise evidentiary challenges any time eyewitness identification was likely to be an issue at trial")
[20] The accuracy and reliability of eyewitnesses' identifications are modulated by several variables. NAS Report at 16. These variables can be divided into those which reflect a witnesses' situational and cognitive state at the time of the crime and those variables which reflect controllable conditions and internal states following the crime. Id. The former are called estimator variables while the later are termed system variables. Id. In other words, system variables describe specific procedures and practices – for example, lineup identification protocols – while estimator variables associated are with characteristics of the witness at the time of the crime – for example, race and gender or stress and environmental conditions.
[21] Massachusetts Report at 47.
[22] Id. at 110-111.
[23] Id. at 3, 10, 48, 112-113.
[24] Id. at 112-113.
[25] NAS Report at 111.

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- **URCP045**

[26] Id.
[27] Id. at 111-12.
[28] Id. at 112.
[29] Id.

Brandon Garrett
November 9, 2018 at 8:59 am

The undersigned members of the Committee on Scientific Approaches to Understanding and Maximizing the Validity and Reliability of Eyewitness Identification in Law Enforcement and the Courts and authors of the 2014 report by the National Research Council, "Identifying the Culprit: Assessing Eyewitness Identification," (the "NRC Eyewitness Report") write to express our support for the proposed Utah Rule of Evidence Rule 617: Eyewitness Identification (the "Proposed Rule") and encourage its adoption by the Judicial Council.

As you are aware, the NRC Eyewitness Report contained nine recommendations that establish best practices for the law enforcement community and strengthen the value of eyewitness identification evidence in court. We are pleased that the Proposed Rule embraces eight of these recommendations: double-blind administration of photo arrays and lineups; standardized pre-procedure instructions; documentation of witness confidence judgments; video recording of eyewitness identification procedures; pretrial judicial inquiry, expert testimony, and jury instructions, including making juries aware of prior identifications. (While we believe that the ninth recommendation – training all law enforcement officers in eyewitness identification – is critical, we recognize that the Proposed Rule likely is not the right vehicle for it.)

We commend the Utah Supreme Court's Advisory Committee on the Rules of Evidence for proposing Rule 617 and encourage its adoption by the Judicial Council.

Sincerely yours,

Thomas D. Albright, Ph.D., Professor, Salk Institute for Biological Studies and Director, Salk Institute Center for the Neurobiology of Vision

William G. Brooks III, Chief, Norwood, Massachusetts Police Department

Brandon L. Garrett, Esq., Professor, Duke University School of Law

Karen Kafadar, Ph.D., Professor, University of Virginia

Joanne Yaffe, Ph.D., Professor, University of Utah

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Michelle Feldman
November 9, 2018 at 3:25 pm

The Innocence Project is a national organization dedicated to exonerating the wrongfully convicted and to pursuing legislative, judicial and administrative reforms that prevent and address wrongful convictions of the innocent. The Rocky Mountain Innocence Center (RMIC) works to exonerate the wrongfully convicted in Utah, Nevada and Wyoming.

Our organizations commend the Utah Supreme Court's Advisory Committee on the Rules of Evidence for proposing Rule 617 (the "Proposed Rule") and encourage its adoption by the Judicial Council. Based on exonerations of the innocent and nearly four decades of robust social science, we believe that the Proposed Rule will prevent wrongful convictions involving eyewitness misidentification in the state of Utah.

I. Wrongful Convictions Involving Eyewitness Misidentification

Eyewitness misidentification is a leading contributor to the wrongful convictions of innocent Americans, playing a role in 70 percent of the nation's 364 DNA exonerations. In about 50 percent of our cases, our work exonerating innocent people has led to the identification of the true perpetrators. In the eyewitness misidentification cases, the actual perpetrators in these wrongful convictions went on to commit and be convicted of 24 additional violent crimes, including 16 rapes and two murders.

Mistaken eyewitnesses – particularly crime victims – suffer doubly when DNA demonstrates that the real perpetrator was not the person they identified. Wrongful convictions destroy lives and represent a serious threat to public safety. Science-based fixes designed to address the leading contributing causes of wrongful conviction – like the Proposed Rule – are crucial to preventing future wrongful convictions and ensuring public safety.

In Utah, mistaken eyewitness identification contributed to the wrongful convictions of Bruce Goodman and Harry Miller. Both men lost a combined 25 years in prison for crimes they did not commit until they were exonerated with representation from the Rocky Mountain Innocence Center. Maurice Possley, Bruce Dallas Goodman, Innocence Project, **https://www.innocenceproject.org/cases/bruce-dallas-goodman/**. Their wrongful convictions had a ripple effect of harming the innocent and their families, allowing the actual assailants to remain undetected, and costing taxpayer dollars to fund state compensation for their wrongful convictions.

In 1986 Goodman was convicted of murdering Sherry Ann Fales Williams in Beaver, Utah. Two eyewitnesses claimed that they saw Goodman and Williams together within 24 hours of the

discovery of her body and jurors were told that the rope used to bind Williams was the same rope used where Goodman worked. Goodman was sentenced to five years to life in prison. In 2002, DNA testing was conducted on the rape kit and fluids found in the snow at the crime scene and the results excluded him. In 2004, upon the recommendation of the Utah Attorney General's Office, Goodman's conviction was vacated and the case was dismissed. Possley, supra. (In 2015, the State of Utah stipulated to a posthumous finding of actual innocence for Mr. Goodman as well as compensation for the time he spent wrongfully incarcerated). Our Exonerees: Bruce Dallas Goodman, Rocky Mountain Innocence Project, **http://rminnocence.org/our-exonerees/bruce-dallas-goodman.html**.

Harry Miller spent four years in prison for aggravated robbery. In 2000, a white woman was robbed at knifepoint at a store in Salt Lake City, and three years later she saw Miller, who is African-American, in a photo lineup and identified him to police as the robber. The victim again identified him in a live lineup and in court. Miller told police that he had lived in Louisiana since 2000 and suffered a stroke two weeks before the crime that made him unable to drive. His in-home nurse said she had visited him in Louisiana the day before the crime. Miller's attorney failed to call any of his alibi witnesses. In 2007 Miller was granted a motion for a reversal of his conviction, and the district attorney dismissed all charges before retrial. Stephanie Denzel, Harry Miller, The National Registry of Exonerations, **https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3468**. On September 11, 2011, the State stipulated to Mr. Miller's factual innocence and provided compensation for the time he was wrongfully incarcerated. Our Exonerees: Harry Miller, Rocky Mountain Innocence Project, **http://rminnocence.org/our-exonerees/harry-miller.html**.

II. Rule 617 Enhances the Accuracy & Value of Eyewitness Identification Evidence

Proposed Rule 617 reflects decades of peer-reviewed social science research and is based on recommendations by the National Research Counsel, the U.S. Department of Justice, the International Association of Chiefs of Police, the American Bar Association and other organizations. In addition to ensuring the admissibility of eyewitness identification evidence that is reliable, the Proposed Rule would facilitate the use of evidence-based practices by law enforcement. If adopted, Rule 617 would be one of the nation's strongest measures to improve the accuracy and value of eyewitness identification evidence.

Improving the value of eyewitness identification evidence in court. Rule 617 offers protections against unreliable eyewitness identification evidence at the trial court level.

The Utah Supreme Court has long been a leader in addressing the risk of eyewitness misidentification by incorporating this scientific research into its decisions addressing the evaluation and treatment of eyewitness identification evidence and ensuring that jurors have sufficient context—whether through

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expert testimony or jury instructions or both—to evaluate eyewitness identification evidence. See, e.g., State v. Long, 721 P.2d 483, 487-95 (Utah 1986); State v. Ramirez, 817 P.2d 774 (Utah 1991); State v. Clopten, 223 P.3d 1103 (Utah 2009).

Rule 617 provides an important new tool that will ensure that factfinders evaluate identification evidence in light of established social science findings. It would implement an evidentiary framework for the treatment of challenged identification evidence that is based on a modern scientific understanding of visual perception and memory and that reflects the many factors science has shown can affect the reliability of an identification. In addition, the rule adopts nearly all of the National Research Council's recommendations for best practices for law enforcement and for strengthening the value of eyewitness evidence in court including, critically, allowing expert testimony and jury instructions, if requested, to assist triers of fact in understanding the variables that may influence a witness' visual experience of an event and the factors that underlie the formation, storage and recall of memory.

With the adoption of Rule 617, Utah will join a growing number of states that have incorporated scientific research into the judicial review and treatment of eyewitness identification evidence. The supreme courts of New Jersey, State v. Henderson, 208 N.J. 208, 27 A.3d 872 (2011); Oregon, State v. Lawson, 352 Or. 724, 291 P.3d 673 (2012); Alaska, Young v. State, 374 P.3d 395 (Alaska 2016); Massachusetts, Com. v. Thomas, 68 N.E.3d 1161 (Mass. 2017); and Connecticut, State v. Harris, 191 A.3d 119 (Conn. 2018), have each issued landmark decisions that modify existing legal standards for the evaluation of identification evidence to make them consistent with scientific research. Other state supreme courts have reviewed and accepted the scientific research on a range of issues, including system and estimator variables that can affect the reliability of a witness's memory and the accuracy of a witness's identification. See Com. v. Walker, 92 A.3d 766, 782-83 (2014) (collecting cases from 44 states, the District of Columbia, and 10 federal circuit courts permitting expert testimony); State v. Guilbert, 49 A.3d 705, 721–25 (Conn. 2012) (collecting cases and studies demonstrating that the scientific research is well-settled and largely unknown to fact finders). In addition to making expert testimony available in many cases, id., some courts have issued substantially more robust, science-based identification instructions that offer jurors clear guidance for evaluating identification evidence, see New Jersey Identification Instruction (July 19, 2012), **http://www.judiciary.state.nj.us/pressrel/2012/jury_instruction.pdf**; Massachusetts Model Eyewitness Identification Instruction (Nov. 2015), **http://www.mass.gov/courts/docs/courts-and-judges/courts/district-court/jury-instructions-criminal/6000-9999/9160-defenses-identification.pdf**, while others have strictly limited in-court identifications or other aspects of a witness's testimony. See State v. Dickson, 141 A.3d 810 (Conn. 2016); Com. v. Crayton, 21 N.E.3d 157 (Mass. 2014); Com. v. Collins, 21 N.E.3d 528 (Mass. 2014); State v. Lawson, 291 P.3d 673 (Or. 2012). These decisions, like Rule 617, reflect decades

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of scientific research and improve both the reliability of eyewitness identification admitted at trial and factfinders' evaluation of that evidence.

Incentivizing law enforcement to use evidence-based procedures: Like Rule 616 on recording custodial interrogations, adopted by the Utah Judicial Council in 2016, the Proposed Rule strongly incentivizes statewide adoption of best practices by law enforcement. This will help to facilitate more accurate eyewitness identifications, preventing wrongful convictions and enhancing law enforcement investigations.

The evidence-based identification practices for lineups and show-ups listed in the proposed rule are supported by decades of social science research and include: double-blind administration of the procedure; prophylactic pre-procedure instructions to the eyewitness that the perpetrator may or may not be present and the investigation will continue regardless of whether or not an identification is made; selection of fillers that match the eyewitness's description of the perpetrator and do not make the suspect noticeably stand out; documenting the eyewitness's level of confidence in his or her identification and any other responses; ensuring separate procedures for different eyewitnesses; avoiding involving the same witness to multiple procedures; and recording eyewitness identification procedures to preserve a permanent record of the conditions associated with the initial identification

Four of these evidence-based procedures – double-blind administration; prophylactic pre-procedure instructions; selection of fillers that match the eyewitness's description of the perpetrator and do not make the suspect noticeably stand out; and documenting the eyewitness's level of confidence in his or her identification – have been successfully implemented by 22 states through a high court decision or rule, statute or voluntary adoption of written policies by the majority of law enforcement agencies. (States that have adopted four key evidence-based practices: California, Colorado, Connecticut, Georgia, Hawaii, Louisiana, Maryland, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Jersey North Carolina, Ohio, Oregon, Rhode Island, Texas, Vermont, West Virginia, Wisconsin). Recording the identification procedures is required by statute in California, Georgia, Illinois Louisiana, and North Carolina. CA Chap 977 (2018); Ga. Code Ann. §17-20-1, et seq (2015); IL ST CH 725 § 5/107A-0.1 (eff. 2014, amend. 2015); LSA-C.Cr.P. Art. 251; N.C. Gen Stat. § 15A-284.52 (2008, amend. 2015)

Utah law enforcement agencies have already been exposed to best practices for administering eyewitness identification procedures. The Innocence Project and RMIC provided the Salt Lake Sheriff's Unified Police Department and the Salt Lake City Police Department with in-person training in 2015. In addition, the Innocence Project offers free tools that can assist Utah law enforcement agencies with implementation including training videos produced with the International Association of Chiefs of Police, policy-writing guides and model policies from other jurisdictions.

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Proposed Rule 617 would provide an excellent legal framework for improving the evidentiary value of eyewitness identification evidence and, if a misidentification does occur, preventing a wrongful conviction. The potential benefits of this rule have been demonstrated in other states that have adopted similar reforms: the innocent and crime victims would be protected, law enforcement would have more accurate and reliable evidence to assist in investigations and keep communities safe, and taxpayer funds would be spared from state compensation and civil payments stemming from wrongful convictions. The Innocence Project and Rocky Mountain Innocence Center strongly encourages the Utah Judicial Council to adopt the Proposed Rule.

Steven D Penrod
November 9, 2018 at 3:48 pm

The undersigned, scientists and professors who study eyewitness memory and perception, write to express our support for the proposed Utah Rule of Evidence Rule 617: Eyewitness Identification (the "Proposed Rule").

We are scientists and academics, and our professional activities include: conducting research on eyewitness memory and perception, conducting peer review of studies on eyewitness memory and perception, teaching and advising undergraduate and graduate students, testifying as experts in court, serving on judicially- and administratively-created task forces and study groups examining eyewitness identification research and practice, and advising and training law enforcement about best practices in conducting eyewitness identification procedures.

We commend you for creating a comprehensive rule that generally reflects the scientific findings concerning eyewitness memory, perception, and identifications. We believe the Proposed Rule will serve the goal of ensuring the admission of reliable identifications. We are particularly pleased that the Proposed Rule contemplates the use of expert testimony to guide courts in making admissibility determinations and juries in evaluating admitted identification evidence. (Proposed Rule 617(b) & (e)). A substantial body of research has established that jurors are unfamiliar with many of the scientific findings relevant to evaluating eyewitness identification, hold beliefs that are contrary to the research findings, and tend to overvalue eyewitness identification evidence. Research has also shown that many judges are similarly unfamiliar with the factors that can affect the reliability of eyewitness identification evidence. Expert testimony will ensure that factfinders are able to make scientifically sound assessments of identification evidence and that changes in science can be considered as they achieve general acceptance in the scientific community. We believe that Committee Notes that explicitly reflect the relevant findings of

science could also provide necessary guidance to factfinders evaluating identification evidence.

We would like to call your attention to several small areas of divergence between the Proposed Rule and the settled scientific research findings.

• Cross-Race Effect: The Committee Note concerning subsection (b) ("the cross-race effect will depend on the circumstances") is vague and potentially misleading. While some research has shown that the cross-race effect can be mitigated by an individual's contact with members of the target race, the research has not yet identified the amount or type of contact that mitigates the cross-race effect, nor has it shown the degree of mitigation. No research has shown the elimination of the cross-race effect. This note should be deleted or clarified to reflect these research findings.
• Fair Composition: The scientific research about the best way to choose fillers – match to witness description and/or match to suspect appearance – is ongoing. We endorse the requirement that the suspect not stand out from lineup members, including standing out on the basis of the witness's description of the culprit.
• Documenting Witness Response: An administrator should seek from a witness and immediately document, verbatim, a witness's certainty in his or her identification. This should occur immediately after the identification and with care taken to ensure that no feedback is given prior to collecting the certainty statement. An administrator should not ask the witness more than once about his or her certainty. The Proposed Rule should be clarified to reflect these practices. The relationship between certainty and accuracy has been well-studied and is important. The most recent research shows that where "pristine" identification procedures have been employed and there has been no suggestion, feedback, or external influence, certainty and accuracy of the eyewitness's decision during the first identification procedure with a given suspect can be strongly related. A "pristine" procedure is one that is: (1) the first identification procedure for the witness with this suspect; (2) with one suspect per procedure; (3) where the suspect does not stand out; (4) the witness receives unbiased pre-procedure instructions; (5) administration is double-blind; and (6) a witness confidence statement is recorded immediately at the time of identification. In cases involving procedures that are not "pristine" – such as showups or lineups in which the suspect stands out from the fillers – or where a witness has been subject to external influence or after-the-fact information, a witness's certainty should not be considered as a reliable indicator of accuracy because the suggestiveness of the procedure or the external influence or information can inflate confidence. Finally, because a person's memory for their past certainty is unreliable, the only measure of certainty that courts should consider is where a witness's certainty is documented verbatim or recorded at the time of the identification from a "pristine" procedure. The Committee Note that "[n]ew research shows that a witness's confidence at the time of an initial identification is a good indicator of accuracy" should be clarified to reflect these findings.

• Presentation Method: The research evaluating presentation method – sequential vs. simultaneous – is ongoing. The Proposed Rule's Committee Note for Section (c)(1) on displaying photos or presenting a lineup that indicates a preference for simultaneous over sequential presentation is not supported by scientific research. This preference should be deleted.

We thank you for your consideration and encourage the Judicial Council to adopt the Proposed Rule.

Sincerely yours,

Neil Brewer, Ph.D., Matthew Flinders Distinguished Professor, Flinders University
Brian L. Cutler, Ph.D., Professor and Interim Dean of the Faculty of Social Science and Humanities, University of Ontario Institute of Technology
Nancy Franklin, Ph.D., Associate Professor of Psychology, Stony Brook University
Margaret Kovera, Ph.D., Presidential Scholar and Professor of Psychology, John Jay College of Criminal Justice
Michael R. Leippe, Ph.D., Professor of Psychology, John Jay College of Criminal Justice and The Graduate Center of the City University of New York
Elizabeth Loftus, Ph.D., Distinguished Professor, University of California, Irvine
Steven Penrod, Ph.D., J.D., Distinguished Professor of Psychology, John Jay College of Criminal Justice
Graham Pike, Ph.D., Professor of Forensic Cognition, The Open University
Daniel Reisberg, Ph.D., Patricia & Clifford Lunneborg Professor of Psychology, Reed College
Siegfried Ludwig Sporer, Ph.D., Professor for Social Psychology and Psychology and Law, University of Giessen
Nancy K. Steblay, Ph.D., Professor of Psychology, Augsburg College
Timothy Valentine, Ph.D., Emeritus Professor, Goldsmiths, University of London
Gary L. Wells, Ph.D., Distinguished Professor of Psychology and Stavish Chair in the Social Sciences, Iowa State University

Mary Corporon
November 9, 2018 at 8:58 pm

I fully support the new proposed Rule 617. Eyewitness identification is one of the most unreliable forms of evidence regularly used in criminal cases. With the advent of the use of highly reliable DNA evidence, it has become clear in post-conviction litigation just how unreliable stranger identifications by eyewitnesses are. In a huge percentage of post-conviction exonerations in rape or murder cases, it is unreliable eyewitness identification that was the culprit resulting in an innocent person being convicted (and therefore in an actual violent

criminal being allowed to roam the streets). If mistaken eyewitnesses are responsible for such a high rate of unjust convictions in the kinds of cases where DNA science is later available eventually to clear the record, imagine how many innocent persons have been convicted in other kinds of criminal cases, such as burglaries or robberies, where no DNA was available to make things clear. Yet, to the lay public, this is very counterintuitive. Eyewitnesses are very compelling to the jury. I strongly support this Rule that will force caution in the use of eyewitness identifications. It is suggested in comments above that this Rule will result in the admissability of these witnesses' testimony being considered carefully, including at a hearing, in many cases. If that is the outcome, then good. The objective of our system is to achieve justice, and afford due process—not to do things quickly and on the cheap.

Mark Ethington
November 9, 2018 at 9:34 pm

I am a criminal defense attorney, and I used to be a prosecuting attorney. I am in support of proposed rule of evidence 617. Based on my 32 years of experience, I know how difficult it is for an eyewitness to make an accurate identification. The factors listed in subsection B will help the judge make a more accurate determination as to whether the proposed identification should be submitted to the jury. However, I would add one more factor, which is "any other factor that the fact finder deems appropriate to consider." Without this additional factor, the judge may interpret rule 617 as prohibiting him from considering any other factors that may be relevant.

Michael D. Zimmerman
November 9, 2018 at 11:15 pm

Regarding Rule 617. I write to support the proposed rule.

• As a member of Utah's Supreme Court for 16 years, including four as Chief Justice, I became deeply concerned about the proven power of eyewitness identification to convict defendants even when the circumstances surrounding the identification may have been highly suggestive. The court as a whole was also concerned that this powerful evidence be admitted only when its procurement occurred in circumstances that made its reliability likely, and that reliability was also exposed to critical testing before the tribunal.

• The proposed rule is a superior approach to addressing the problems of eyewitness identification. The case by case approach is limited by the fact that it often has been based on

constitutional analysis not specific to the issues appropriate to this narrow evidentiary area, is handicapped by reliance on the briefing of the parties in specific cases, with a resultant possible lack of scientific expertise, and by a reliance on other courts' decisions, which may be grounded not on science but on jurisprudential considerations. Often, the earlier decisions relied upon, particularly if from the U.S. Supreme Court, are old and make no pretense of looking closely at the relevant science particular to eyewitness identifications. A rule has the advantage of being readily amendable, and also of being crafted by those with scientific expertise after debate and compromise. That appears to be the case with this rule, which strikes me as a carefully drawn list of considerations consistent with what the literature and better case law outline as pertinent to assuring that eyewitness evidence is worthy of the extraordinary weight it is given by finders of fact. It appears to represent a broad consensus of those expert in the area, and would build upon the steps the Utah Supreme Court has taken over the years to incorporate science into the evaluation of eyewitness identification evidence by factfinders through expert testimony and jury instructions. . See, e.g., State v. Long, 721 P.2d 483, 487-95 (Utah 1986); State v. Ramirez, 817 P.2d 774 (Utah 1991); State v. Clopten, 223 P.3d 1103 (Utah 2009).

• The proposed rule would permit trial judges to exercise a gatekeeping function to prevent unreliable eyewitness identification evidence from tainting a criminal proceeding and contributing to the conviction of an innocent person.

• The U.S. Supreme Court established the current requirements for judicial review of eyewitness identification evidence under the Due Process Clause in the1977 Manson v. Brathwaite ruling. The Manson test for evaluating reliability is based, in turn, on prior rulings and does not reflect nearly 40 years of applied research findings that have occurred since the decision was issued.

• While the U.S. Supreme Court has yet to revise the Due Process test under Manson, it has recognized the role of state rules of evidence and trial courts in excluding evidence "if its probative value is substantially outweighed by its prejudicial impact or potential for misleading the jury (Perry v. New Hampshire, 565 U.S. 228 (2012))."

• Proposed Rule 617 would do exactly that by allowing trial judges to exclude eyewitness identification evidence that is suggestive and unreliable based on established scientific research. That the proposed rule may go beyond what the U.S. Supreme Court has suggested long ago as a constitutionally acceptable standard says nothing about whether it is a wise step to take. I would note that in the period when Manson was decided, the FBI was of the view that human memory was like a tape recorder. It could be replayed faithfully. (See State v.Long.) That view has long since been abandoned as scientifically unsound. There is no reason that the standard in Utah for the admission of eyewitness testimony that is almost certainly the most powerful evidence in any criminal case should be

grounded on standards that are out of date scientifically, no matter who set those standards.

• By adopting this rule, the Utah Supreme Court would follow the lead of state high courts in New Jersey, State v. Henderson, 208 N.J. 208, 27 A.3d 872 (2011); Oregon, State v. Lawson, 352 Or. 724, 291 P.3d 673 (2012) and Alaska, Young v. State, 374 P.3d 395 (Alaska 2016) that have established scientifically-based frameworks for the admissibility of eyewitness identification evidence.

• In addition, adoption of the rule would comply with the National Research Council's recommendation that trial judges hold pre-trial judicial inquiries on eyewitness testimony, regardless of whether an objection was raised. "Judges rarely make pre-trial inquiries about evidence in criminal cases without one of the parties first raising an objection. In cases involving eyewitness evidence, however, parties may not be sufficiently knowledgeable about the relevant scientific research to raise concerns.... Judges have an affirmative obligation to insure the reliability of evidence presented at trial." (National Research Council. 2014. Identifying the Culprit: Assessing Eyewitness Identification. Washington, DC: The National Academies Press. **https://doi.org/10.17226/18891**.)

• The Utah Supreme Court has already recognized the role of judges excluding unreliable evidence with the adoption of Rule 616 in 2015, which makes defendant statements during custodial interrogations inadmissible unless the interrogation is recorded in its entirety.

• Proposed Rule 617 similarly facilitates the use of best practices by law enforcement and safeguards against inaccurate evidence that could result in a wrongful conviction.

Jennifer Thompson
November 9, 2018 at 11:25 pm

Regarding Proposed Rule 617

Dear Members of the Utah Judicial Council:

I am a crime victim whose case resulted in a wrongful conviction due to flawed eyewitness identification procedures. I can personally attest to the trauma and suffering caused to crime victims when the wrong person gets convicted and the true perpetrator goes free. Based on my experience, I urge the Utah Judicial Council to adopt Proposed Rule 617, which will improve the accuracy of our criminal justice system and protect everyone – the innocent and their families, the original crime victims and their families, and the general public – from failed justice.

My experience and advocacy stem from a brutal sexual assault that I survived when I was in college in North Carolina. During the attack, I focused on staying alive and attempted to memorize the features of my attacker so that I might be able to identify him if I lived. I would only learn later that memory is often compromised by the violence and trauma of such an attack. I would also learn that the traditional eyewitness identification procedures used by police following my attack, which were aimed at helping me identify the perpetrator, often unwittingly cause victims and other witnesses to mistakenly choose the wrong person.

Specifically, following my attack police investigators asked me to create a composite sketch of my attacker. Unknown to me, someone reported an individual who resembled the sketch, a man named Ronald Cotton. Police then included that man in both the photo line-up and live line-up I was asked to view. I did my best under the circumstances to choose the person who most resembled the composite sketch that had been created from my memory. The eyewitness identification process through which I was led convinced me that I had succeeded in identifying my attacker. A decade later, I was devastated to learn that DNA testing proved that someone else had committed the crime against me – and that person, Bobby Poole, had gone on to commit additional rapes while the innocent man, Ronald Cotton, languished in prison. The criminal justice system had failed both Ronald and me, as well as the other victims of Bobby Poole.

For many years now, Ronald and I have worked together around the country to advocate for implementation of evidence-based practices to improve the accuracy of identification evidence. Rule 617 would address many of the faulty investigative procedures that led to failed justice in our case and would, thereby, help to ensure that crime victims are served true justice and the public kept safe. As such, I applaud the Utah Supreme Court's Advisory Committee on the Rules of Evidence for proposing this excellent measure, and I urge that it be adopted.

Thank you for your time and consideration.

Jennifer Thompson
Founder, Healing Justice
Co-Author, Picking Cotton
Commissioner, North Carolina Innocence Inquiry Commission

Ann Taliaferro, Board Member
November 9, 2018 at 11:53 pm

The Utah Association of Criminal Defense Lawyers supports Proposed Rule 617 and urges the Utah Judicial Council to adopt it as written.

All of our rules and court processes seek to ensure the reliability and fairness of judicial proceedings for all parties. At the outset, it must be made clear that "reliability" is a legal matter and one of constitutional due process significance. Due process requires the admission and consideration of "reliable" evidence. Accord Utah Const. art, I, section 7; U.S. Const. amend. XIV. Both federal and state law has consistently advanced the fundamental principle that "reliability is the linchpin of due process" and that convictions based upon unreliable evidence cannot stand. Cf. Maryland v. Craig, 497 U.S. 836, 837, 110 S. Ct. 3157, 3159, 111 L. Ed. 2d 666 (1990) (Confrontation Clause's central purpose is "to ensure the reliability of the evidence against a defendant"); Lee v. Illinois, 476 U.S. 530, 539, 106 S. Ct. 2056, 2061, 90 L. Ed. 2d 514 (1986) (confession of an accomplice presumptively unreliable); Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140 (1977) ("reliability is the linchpin in determining the admissibility of identification testimony"); Foster v. California, 394 U.S. 440, 443, 89 S. Ct. 1127, 1129, 22 L. Ed. 2d 402 (1969) (the suggestive elements of the law enforcement procedure "so undermined the reliability of the eyewitness identification as to violate due process"); State v. Glasscock, 2014 UT App 221, ¶ 26, 336 P.3d 46 (Due Process Clause of the Utah Constitution bars admission of unreliable eyewitness identifications into evidence); State v. Guzman, 2004 UT App 211, ¶ 15, 95 P.3d 302, 307, aff'd, 2006 UT 12, ¶ 15, 133 P.3d 363 (in context of eyewitness identification evidence, "judge must preliminarily determine whether [evidence] is sufficiently reliable that its admission and consideration by the jury will not deny the defendant due process" and then, "if reliable and therefore admissible, the jury determines the credibility of that [evidence]."); State v. Johnson, 856 P.2d 1064, 1072-73 (Utah 1993), superceded by statute on other grounds (trial court erred in considering unreliable evidence for sentencing purposes and "[t]o require a defendant to assume the burden of disproving highly unreliable evidence might well violate due process."); State v. Rimmasch, 775 P.2d 388, 397-99 (Utah 1989) (discussing need for threshold reliability examination by trial court prior to admission of scientific evidence).

Also, the determination as to whether evidence is "reliable" is a matter decided by the judge before presented to a jury. The burden of demonstrating the reliability, and thus, the admissibility, of proffered evidence is on the proponent of the questioned evidence – here, the proponent of the identification testimony. See State v. Ramirez, 817 P.2d 774, 778 (Utah 1991), holding modified by State v. Thurman, 846 P.2d 1256 (Utah 1993). The Utah Supreme Court has also recognized that there is a strong correlation between reliability and importance, and finds "[t]he greater the importance of the testimony, the greater should be its guarantees of reliability in order to gain admission" and crucially, "[t]estimony which is dispositive, or virtually dispositive of a case if believed, should have strong guarantees of reliability." State v. Rimmasch, 775 P.2d 388, 412 (Utah 1989) (Durham, J., concurring). Simply, the importance of the testimony heightens the need for its reliability.

Courts have consequently excluded several types of testimony that have been deemed "unreliable". In fact, the exclusion of unreliable evidence is a principal objective of many evidentiary rules. See, e.g., United States v. Scheffer, 523 U.S. 303, 309, 118 S. Ct. 1261, 1265, 140 L. Ed. 2d 413 (1998). For example, under Utah law, the proponent of the evidence must establish that testimony from a witness is a "real memory" of an event, rather than a dream; a witness' dreams are not admissible because it is not an accurate representation of a true event. If the proponent cannot show a "real memory" of the event, then the witness is not competent to testify about it. See Ladd v. Bowers Trucking, Inc., 2011 UT App 355, 264 P.3d 752. Likewise, hypnotically enhanced memories or other memories enhanced by other therapeutic techniques are not admissible; again, because there is no way to know if the witness' testimony is a true and accurate representation of an actual event, or was instead the product of suggestion by others. See, e.g., Olsen v. Hooley, 865 P.2d 1345, 1349-50 (Utah 1993); State v. Mitchell, 779 P.2d 1116, 1118-1119 (Utah 1989); State v. Tuttle, 780 P.2d 1203 (Utah 1989). Indeed, the purpose of the witness exclusion rule in court proceedings is "to prevent witnesses from being influenced or tainted by the testimony of other witnesses, or other evidence adduced at trial." Pope v. Pope, 2017 UT App 24, ¶ 19, 392 P.3d 886, 892. See also, Utah R. Evid. 615; State v. Billsie, 2006 UT 13, ¶ 10, 131 P.3d 239, 241 ("purpose behind rule 615 is 'directed toward preventing witnesses from changing their testimony based on other evidence adduced'"); State v. Cramer, 2002 UT 9, ¶ 31, 44 P.3d 690 (same); Astill v. Clark, 956 P.2d 1081, 1087 (Utah App.1998) ("The purpose behind excluding witnesses ... is to prevent witnesses from being influenced or tainted ...."). In such circumstances, courts abuse their discretion in allowing a witness to testify despite a violation of the exclusionary rule when it is demonstrated that the witness changed his or her testimony in some material way because of what he or she heard. See id. (quoting and citing authority).

Overall, the exclusion of unreliable testimony is required because a defendant is unable to rely on cross-examination. The admission of unreliable memories or perceptions are particularly dangerous because they are not susceptible to usual cross-examination techniques since a witness whose memories or perceptions have been tainted in some way either harbors a false memory and is unaware of its false nature and actually believes it is an accurate and true experience, or has been tainted in such a way that allows the witness to be able to convincingly "explain away" any inconsistencies.

Although the requirements of due process are "the floor," courts can and should use the Rules of Evidence to make trials as fair and clear as possible. Even if it may be argued that this Proposed Rule goes beyond current constitutional requirements, it is based upon the most current scientific consensus about eyewitnesses and best practices. The courts can and should use the best information it has access to in making the rules that govern what and how evidence is admitted. With this in mind, the Proposed Rule would enhance the accuracy and value of eyewitness identification evidence at

the trial court level, and at least try to ensure fealty to due process guarantees that only reliable evidence is presented to a jury. Much like Rule 616 on recording custodial interrogations, the proposed rule would encourage the use of best practices by law enforcement to reduce the likelihood of misidentification and enable proper judicial gate-keeping to prevent the admissibility of unreliable evidence.

Other state supreme courts have also moved beyond the "Manson reliability test" established by the U.S. Supreme Court in 1977 to adopt a scientifically based legal framework for assessing and treating eyewitness identification evidence. See, e.g., Com. v. Johnson, 420 Mass. 458, 471, 650 N.E.2d 1257, 1264 (1995) ("The [Manson] reliability test hinders, rather than aids, the fair and just administration of justice by permitting largely unreliable evidence to be admitted directly on the issue of the defendant's guilt or innocence."); State v. Henderson, 208 N.J. 208, 285, 27 A.3d 872, 918 (2011) (concluding, following an extensive evidentiary hearing, that "assumptions and other factors reflected in the . . . Manson test" are no longer valid); State v. Lawson, 291 P.3d 673, 690 (Or. 2012) (concluding, "[i]n light of the scientific findings" that the state law version of the Manson test "is not adequate to the task of ensuring the reliability of eyewitness identification evidence that has been subjected to suggestive police procedures" and must be revised); Young v. State, 374 P.3d 395, 412 (Alaska 2016) ("Because the [Manson] test does not adequately protect the right to due process under the Alaska Constitution, we adopt a new approach to deciding the admissibility of eyewitness identification evidence in future cases."); State v. Harris, 330 Conn. 91, 115, 191 A.3d 119, 134 (2018) (concluding, as a matter of state constitutional law and in light of social science research, that the factors used to test reliability in the Manson test are insufficient to protect a defendant's due process rights).

The Proposed Rule would ensure that fact-finders assess both estimator variables (circumstances associated with the crime such as lighting, distance, cross-racial factors that cannot be controlled by law enforcement) and system variables (factors under the control of law enforcement such as the identification procedures) that affect eyewitness perception, memory and identification. While science evolves over time, the rule incorporates over three decades of applied research findings that were confirmed in the landmark report issued in 2014 by the National Research Council, the nation's leading independent scientific-entity. By enhancing the reliability and value of eyewitness identification evidence, the Proposed Rule will protect innocent defendants against wrongful conviction and avoid appeals and other litigation based on claims of erroneous eyewitness identification.

The Utah Rules of Evidence Committee did an excellent job of drafting Proposed Rule 617 and we hope it will be fully adopted.

Utah Association of Criminal Defense Lawyers
Board of Directors

Jeffrey S. Gray
November 10, 2018 at 12:36 am

The Attorney General's Office opposes adopting the proposed rule for four primary reasons:

• subparagraph (b) usurps the jury's traditional role to weigh witness reliability by creating a general reliability requirement for all contested eyewitness identifications;

• subparagraph (c) misstates the federal due process standard for cases involving an unnecessarily suggestive identification procedure, but constitutional standards should be defined in case law after full adversarial vetting with all interested parties participating, not in the more limited rule-making process;

• because the proposed factors for determining when to admit an eyewitness identification are based on social science research that is not static, but ever evolving, they should not be fixed by rule, but elicited in the trial court; and

• by demarcating a list of factors for determining admissibility, the rule risks the sort of rigid, mechanical analysis which this Court has wisely rejected in other contexts.

(1) SUBPARAGRAPH (b) USURPS THE JURY'S ROLE TO WEIGH THE RELIABILITY OF AN EYEWITNESS IDENTIFICATION.

Subparagraph (b) charges trial courts with making a threshold "reliability" determination for contested eyewitness identifications, requiring outright exclusion if a court determines—based on nine listed factors—that a factfinder "could not reasonably rely on the eyewitness identification." This represents an unwarranted intrusion into the jury's long-established role to "weigh the evidence, determine the credibility of witnesses, consider their opportunity and means of observation, and the reliability and worthiness of their testimony." State v. Hillstrom, 46 Utah 341, 150 P. 935, 942 (1915) (emphasis added).

Courts are properly charged with ensuring that eyewitness identification testimony is not constitutionally defective. State v. Ramirez, 817 P.2d 774, 778 (Utah 1991). But evidence is not constitutionally defective merely because its reliability may be suspect. Witnesses are routinely allowed to testify despite the presence of clear bias or severe limitations to their observations. Eyewitness identification testimony should not be treated differently.

A defendant's right to a fair trial is not protected by the exclusion of relevant evidence, however limited, but by the constitutional safeguards of effective counsel, compulsory process, cross-examination, and the requirement of proof beyond a reasonable doubt. In the context of eyewitness

identification testimony, a defendant's right to a fair trial is further protected by the right to call expert witnesses to testify on the factors that laboratory research suggests might affect reliability. See State v. Clopten, 2009 UT 84, 223 P.3d 1103. And rule 403 is more than sufficient to protect defendants from evidence, including eyewitness identification testimony, whose probative value is substantially outweighed by unfair prejudice.

(2) SUBPARAGRAPH (c) MISSTATES THE FEDERAL DUE PROCESS STANDARD; THAT STANDARD IS PROPERLY DECIDED AND DEVELOPED IN THE COURTS THROUGH THE ADVERSARIAL PROCESS, NOT BY RULE.

Under federal jurisprudence, a defendant's due process rights are violated, and exclusion required, only upon a showing that (1) the eyewitness identification was the product of an "unnecessarily suggestive" identification procedure administered by the police; and (2) the corrupting effect of the suggestive identification procedure created "a very substantial likelihood of irreparable misidentification." Neil v. Biggers, 409 U.S. 188, 196-97 (1972) (cleaned up) (emphasis added); accord Manson v. Brathwaite, 432 U.S. 89, 114,116 (1977).

Subparagraph (c) loosely resembles the federal due process standard, but is not a perfect match. As a result, it will breed only confusion.

Unlike the federal standard, the rule appears to create a presumption of inadmissibility whenever an unnecessarily suggestive identification procedure is used—it prohibits admitting an identification from an unnecessarily suggestive identification procedure "unless the court, considering [the subparagraph (b) factors and additionally listed 'best practice' factors] finds that there is not a substantial likelihood of misidentification." Moreover, the rule identifies the standard as a "substantial likelihood of misidentification," rather than a "very substantial likelihood of irreparable misidentification" as required under federal jurisprudence.

To the extent the proposed rule purports to identify a state constitutional standard, that question is currently being litigated in the Utah Supreme Court.

The rules should not restate constitutional standards, which are identified and refined through the adversarial process—a system that allows for the introduction of relevant evidence and full briefing by all interested parties.

(3) BECAUSE THE RESEARCH ON FACTORS THAT MIGHT AFFECT AN IDENTIFICATION'S RELIABILITY IS EVER EVOLVING, THE COURT SHOULD NOT ATTEMPT TO IDENTIFY THEM IN A RULE OR CASE; THAT FUNCTION IS BEST LEFT TO THE TRIAL COURTS THROUGH THE EVIDENTIARY PROCESS.

The factors listed in subparagraph (b) are based on the results of laboratory research that studies the effect of isolated variables

on the performance of volunteers (usually college students) when witnessing staged events. The factors listed in subparagraph (c) reflect some of the "best practices" adopted by other governmental agencies, presumably based on that same research.

But the research on eyewitness identification is ongoing and the conclusions from it are nuanced and ever evolving. For this reason, fixing a specified list of factors based on the state of existing research—either by rule or case law—is unwise. It "will always lag behind the sciences." State v. Long, 721 P.2d 483, 492 (Utah 1986).

The eyewitness "confidence" or "certainty" factor—identified in subparagraphs (c)(1)(D) and (c)(2)(J)—is a good example of how written law cannot keep up with the science. This Court once accepted witness confidence as a relevant factor in determining the likelihood of misidentification (following Neil v. Biggers, 409 U.S. 188, 199-200 (1972)), but then rejected its relevance as "flatly contradicted by well-respected and essentially unchallenged empirical studies." State v. Ramirez, 817 P.2d 774, 781 (1991). Now, coming full circle, the proposed rule includes witness confidence as a relevant factor, presumably based on more recent research.

As another example, the proposed rule identifies cross-racial identification as an additional factor that may affect the reliability of an identification (subparagraph (b)(5)). But research also suggests that people who have more experience with members of a different race are less susceptible to the cross-recognition effect. Yet, familiarity is not a factor included in the proposed rule.

The State does not suggest that trial courts shouldn't consider scientifically relevant factors that may affect eyewitness reliability. They should. But attempting to identify those factors in a rule or case is not the way to go. That should be left to experts in the field via the introduction of affidavits, literature reporting the research, and where appropriate, the testimony of the experts themselves. Only this latter approach will accommodate the flexibility necessitated by changes and refinements in eyewitness identification research.

(4) BY DEMARCATING A LIST OF FACTORS FOR DETERMINING ADMISSIBILITY, THE RULE RISKS THE SORT OF RIGID, MECHANICAL ANALYSIS WHICH THIS COURT HAS WISELY REJECTED IN OTHER CONTEXTS.

There is another problem with demarcating factors to be considered in determining reliability. Despite the catchall provision, the listing of specific factors creates a real risk that courts will (1) focus more on the set list of factors than on the question at issue—whether the identification in a particular case is so unreliable that we cannot trust a jury to consider it, and (2) ignore those factors that are relevant in the particular case and supported by the most current research. This Court has moved away from rigid, factor-based tests. See, e.g., State v. Lucero,

2014 UT 15, ¶32, 328 P.3d 841 (rejecting rigid application of Shickles factors when assessing rule 403 prejudice), and State v. Fullerton, 2018 UT 49, ¶23, 873 Utah Adv. Rep. 23 (rejecting strict reliance on Carner factors when determining whether suspect is in custody for Miranda purposes). It should not embrace one here.

Salt Lake County District Attorney's Office
November 10, 2018 at 12:51 am

"let them bring forth their witnesses, that they may be justified: or let them hear, and say, It is truth." Isaiah 43:9, Old Testament, King James Version

This comment on behalf of the Salt Lake County District Attorney's Office is in response to the Utah Supreme Court invitation regarding proposed URE0617 to the Utah Rules of Evidence, Eyewitness Identification. The proposed rule will stack fact-dependent concepts that parties have and should litigate on case-by-case bases into a wall that will prevent accurate eyewitness testimony from being heard by juries in some cases.

Due process requires the State to shun practices that taint the investigatory process. Rules that exclude evidence of guilt deter government actors from adulterating evidence or violating the fundamental rights of people under investigation. At the same time, exclusionary rules also prevent fact finders from receiving evidence that the defendant is guilty. Since exclusionary rules interfere with the truth-seeking purpose of the criminal justice system, they must be narrowly tailored to incentivize appropriate government conduct and minimize the detrimental impact on public safety.

Proposed URE0617 is too broad because it forces judges to prevent juries from ever receiving eyewitness testimony, regardless of government conduct, if the judge decides the jury "could not reasonably rely on the eyewitness identification." It also requires judges to exclude every identification procedure by the state deemed to be "unnecessarily suggestive or conducive to mistaken identification" unless the court explicitly finds "there is not a substantial likelihood of misidentification." This new barrier to prevent juries from receiving evidence may be intended to guide police department practices but it will also have the consequence of decreasing public confidence in criminal justice by directing courts to exclude relevant and probative evidence identifying perpetrators. For over fifty years Utah's law regarding hearsay has permitted juries to consider statements identifying a person as someone the declarant perceived earlier. See URE 801(d)(1)(C), State v. Owens 15 Utah 2d 123 (1964). This proposed rule will thrust a half-century of law into doubt. The rest of this comment identifies specific concerns about the rule in chronological order.

A. The definitions in proposed Rule 617(a) are inconsistent with terminology in current research, case law, statutes, and rules.

1. The proposed definition of "eyewitness identification" is that it "means witness testimony or conduct in a criminal trial that identifies the defendant as the person who committed a charged crime." There are two problems with this definition. First, it is so broad it includes any evidence offered by a witness identifying the defendant as the offender regardless of the way that witness came to identify the offender. The definition conflates two distinct concepts: visual recognition of an offender whether in or out of court and what the United States Supreme Court has referred to as "in-court identification." Gilbert v. Cal. 388 US 263 (1967). Witnesses may base in-court identification on visual recognition of an offender, but they could also base identification on audio recognition, forensic evidence, or a variety of other methods. This proposed definition wrongly treats visual recognition of an offender and in-court identifications as the same. Second, the definition restricts the term to applying only "in a criminal trial." If courts interpret this phrase as meaning during a criminal trial, every challenge under proposed Rule 617(b) will not be ripe until the trial has begun. The result will be longer trials and potentially result in jeopardy attaching to prosecutions before a judge rules on the admissibility of key evidence of a defendant's guilt even if prosecutors could address the issue by collecting or introducing alternative evidence if they had sufficient notice.

B. Rule 617(b) should not mandate excluding evidence.

1. Proposed Rule 617(b) directs that "In cases where eyewitness identification is contested, the court shall exclude evidence if a factfinder...could not reasonably rely on the eyewitness identification." The mandatory "shall" mutates proposed Rule 617 from being part of a truth-seeking exercise into a justice thwarting one. Paragraph (b) lists factors that the court ought to consider when deciding to exclude the testimony of a witness. The list originates from the standard eyewitness identification expert concerns codified into the Long instruction. However, paragraph (b) does not offer guidance on how a judge should use these factors when deciding a jury cannot be trusted. Up until now, case law has directed consideration of the totality of the circumstances. See Gallegos, 2016 UT App 172 ¶ 35 quoting Ramirez, 817 P.2d 781. Utah's Court of Appeals has applied this test in two other cases since Gallegos: State v. Reyes, 2018 UT App 134 and State v. Craft, 2017 UT App 87. The language in proposed Rule 617 does not direct judges to consider the totality of circumstances, is just lists factors. Worse, the language in those factors is susceptible to confusion and contradicts the science of eyewitness identification.

2. Proposed Rule 617(b)(2) places an unjustified focus on weapons. It contradicts scientific research by directing courts to weigh eyewitness reliability by considering possible distraction by weapons. A meta-analysis of weapons-focus literature summarizes concluded the following: "A more recent analysis of the weapon focus literature concluded that the presence of a weapon has an inconsistent effect on identification accuracy, in

that larger effect sizes were observed in threatening scenarios than in non-threatening ones. As the retention interval increased, the weapon focus effect size decreased. The analysis further indicated that the effect of a weapon on accuracy is slight in actual crimes, slightly larger in laboratory studies, and largest for simulations." Identifying the Culprit: Assessing Eyewitness Identification (2014) from the National Academies of Science (cited in the proposed committee note) (emphasis added).

By listing "weapon" as the only example in the rule of distraction impairing a witness' attention, judges will automatically accord special weight to the presence of a weapon in a crime. The literature discusses other specific distractions, such as lighting conditions, stress, and fear, but there are many variables which may distract, including noise level, other activities in the vicinity, other people's presence and their relation to the event or witness, or words used by the perpetrator. The list of possible distractions is endless, yet the rule only specifically mentions "weapon." The drafters of the proposed rule wisely avoided adding one specific example of a general principle in proposed subsection (b)(1). For example, adding "wearing a mask" to (b)(1) would draw disproportionate attention to one scenario and risk courts conflating the principle of an adequate opportunity to observe with looking for one situation. Any rule should also avoid that mistake on the issue of possible distractions.

To the extent that policies can guide behavior, it is contrary to public policy to offer an additional benefit to offenders who threaten their victims with guns that will not be available to offenders who do not. Under proposed (b)(2), criminals who brandish a weapon in a threatening, distracting manner will be less likely to have eyewitness testimony admitted against them.

3. Proposed Rule 617(b)(5) directs judges to use race as a reason to silence witnesses. Proposed subparagraph (b)(5) directs judges to consider "Whether a difference in race or ethnicity between the witness and suspect affected the identification." Race should never be a justification for a judge to prevent a witness from testifying to a jury. Subparagraph (b)(5) aims at the well-established cross-race effect (CRE) of impairing identification performance, but recent research indicates the CRE is inconsistent among races and is significantly affected by the intercultural competence of the witness. See, e.g., Evelyn M. Maeder et al., What makes race salient? Juror Decision-making in same-race versus cross-race identification scenarios and the influence of expert testimony, Crim. Just. Behav. (2018) Geraldine Rosa Henderson et al., Intercultural competence and customer facial recognition, J. Serv. Mark., (2018) Vol. 32 Issue: 5, pp.570-580.

Jurors should be made aware of CRE, but by directing a judge to consider blocking evidence whenever the witness' race differs from the defendant's, courts run the risk of segregating justice. Cross-racial identification bans will swing both directions and will prevent a Latina victim from telling a jury about her Caucasian assailant as surely as an Asian witness from testifying about an African-American defendant. This facially neutral

policy runs the risk of exacerbating racial disparity. Utah's recent Justice Reinvestment Initiative simultaneously led to decreased incarceration rates generally and increased the incarceration rates of racial minorities. This proposed rule will impair the pursuit of justice in criminal cases involving multiple races. Preventing juries from hearing cross-racial identification testimony should not be expected to increase justice.

4. Proposed Rule 617(b)(8) ignores the increasing role of modern technology and social media. This subsection directs courts to consider "[w]hether 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." In this age of ubiquitous smartphones, Google, and social media, aggrieved victims and friends often conduct independent investigations of violent crime and subsequently identify a suspect before alerting police to the identification. Proposed Rule 617(b) is independent of any allegation of tainting by the State. Suppressing identification evidence offers an extreme remedy to perpetrators without providing law enforcement any meaningful way to prevent the same thing from happening again in the next case.

C. Proposed Rule 617(c) wrongly equates deviation from fact-specific practices as unnecessarily suggestive.

1. Proposed Rule 617(c)(1)(A) directs judges to evaluate the suggestiveness of photo arrays and live lineups by whether law enforcement follows double-blind procedures. Double-blind procedures are feasible for photo arrays but impracticable for live lineups, so lineups will automatically be suspect under the proposed rule. In the absence of a double-blind procedure, the rule directs judges to consider whether verbal or physical cues produced identification, but such direction wrongly assumes that standard recordings will capture physical cues during a lineup or photo array.

2. Proposed Rule 617(c)(1)(B) lists four important instructions to give prospective witness during lineups and photo arrays. The rule is unclear about whether the absence of any of the four instructions is enough to force exclusion of the evidence.

3. Proposed Rule 617(c)(1)(C) establishes rules for selecting the composition of photo arrays or lineups but in doing so treats the witness' description of the perpetrator and the characteristics of the defendant as equally important. For example, a recent case involved a witness identifying a perpetrator as "Mexican," but the defendant self-identified to the officer preparing a lineup as African American, this proposed rule will leave that officer in a quagmire. Whether the officer selects Mexicans, African-Americans, or a mix of both as the extra participants in the lineup, that officer cannot simultaneously match the witness' description of the perpetrator and the race of the defendant. Accordingly, that lineup will necessarily be "unnecessarily suggestive" under this proposed rule.

4. Proposed Rule 617(c)(1)(E) dumps all cases with multiple identification procedures into the bucket of being unnecessarily suggestive, but the rule fails to acknowledge the most frequent reason for multiple identification procedures: a defendant requests a second identification procedure. Under the proposed rule, defense attorneys who request a second identification procedure will also be making the original identification procedure "unnecessarily suggestive" and subject to exclusion.

D. Proposed Rule 617(d)(1) creates an unnecessary additional hurdle. This proposed subsection only allows a jury to consider photos used in an identification procedure if "the prosecution has demonstrated a reasonable need for the use." Relevant evidence is generally admissible under rule 402, and a witness' identification of the perpetrator is always relevant. Accordingly, the photos from a photo array identifying the defendant will always be relevant to the finder of fact. This ambiguous addition that the prosecution must demonstrate a "reasonable need" before the jury can receive evidence the defendant was the perpetrator does not serve the truth-seeking function of the courts and will not avoid wrongful convictions, but it may prevent rightful convictions.

E. Proposed Rule 617(e) and (f) create a built-in conflict. Subparagraph (e) states that the court may admit eyewitness expert testimony and subparagraph (f) directs the court to instruct the jury with the Long factors. However, whenever an expert testifies, there is an instruction that the jury may disregard the expert testimony. Meanwhile, the Long instruction contains much of an expert witness's testimony. Thus, a jury might choose to disregard the testimony of an expert and therefore the corresponding jury instruction. These two subsections become irreconcilable since a jury must accept all instructions. Either an expert should testify, or the court should give the Long instruction. Never both.

Law enforcement must seek the truth without tainting the investigatory process. Similarly, the rules of evidence should focus on bringing truth to the finders of fact without omitting vital evidence of what occurred. Proposed URE0617, while admirable in the intent to prevent wrongful convictions, will prevent juries from receiving evidence of perpetrators' guilt. It will do so without increasing the accuracy of the evidence a jury will receive. It contains definitions that are overbroad, standards that are inapplicable to best practices, built in contradictions, and hurdles that confuse a defendant's due process rights with an ability to avoid accountability. The Utah Supreme Court should reject this rule and continue permitting judges to apply existing law in determining whether to admit or suppress eyewitness identification.

William J. Carlson
Chief Policy Advisor/Deputy District Attorney
Justice Division
Salt Lake County District Attorney's Office

Salt Lake County District Attorney's Office
November 10, 2018 at 5:47 am

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B. Rule 617(b) should not mandate excluding evidence.

1. Proposed Rule 617(b) directs that "In cases where eyewitness identification is contested, the court shall exclude evidence if a factfinder...could not reasonably rely on the eyewitness identification." The mandatory "shall" mutates proposed Rule 617 from being part of a truth-seeking exercise into a justice thwarting one. Paragraph (b) lists factors that the court ought to consider when deciding to exclude the testimony of a witness. The list originates from the standard eyewitness identification expert concerns codified into the Long instruction. However, paragraph (b) does not offer guidance on how a judge should use these factors when deciding a jury cannot be trusted. Up until now, case law has directed consideration of the totality of the circumstances. See Gallegos, 2016 UT App 172 ¶ 35 quoting Ramirez, 817 P.2d 781. Utah's Court of Appeals has applied this test in two other cases since Gallegos: State v. Reyes, 2018 UT App 134 and State v. Craft, 2017 UT App 87. The language in proposed Rule 617 does not direct judges to consider the totality of circumstances, is just lists factors. Worse, the language in those factors is susceptible to confusion and contradicts the science of eyewitness identification.

2. Proposed Rule 617(b)(2) places an unjustified focus on weapons. It contradicts scientific research by directing courts to weigh eyewitness reliability by considering possible distraction by weapons. A meta-analysis of weapons-focus literature summarizes concluded the following: "A more recent analysis of the weapon focus literature concluded that the presence of a weapon has an inconsistent effect on identification accuracy, in that larger effect sizes were observed in threatening scenarios than in non-threatening ones. As the retention interval increased, the weapon focus effect size decreased. The analysis further indicated that the effect of a weapon on accuracy is slight in actual crimes, slightly larger in laboratory studies, and largest for simulations." Identifying the Culprit: Assessing Eyewitness Identification (2014) from the National Academies

of Science (cited in the proposed committee note) (emphasis added).

By listing "weapon" as the only example in the rule of distraction impairing a witness' attention, judges will automatically accord special weight to the presence of a weapon in a crime. The literature discusses other specific distractions, such as lighting conditions, stress, and fear, but there are many variables which may distract, including noise level, other activities in the vicinity, other people's presence and their relation to the event or witness, or words used by the perpetrator. The list of possible distractions is endless, yet the rule only specifically mentions "weapon." The drafters of the proposed rule wisely avoided adding one specific example of a general principle in proposed subsection (b)(1). For example, adding "wearing a mask" to (b)(1) would draw disproportionate attention to one scenario and risk courts conflating the principle of an adequate opportunity to observe with looking for one situation. Any rule should also avoid that mistake on the issue of possible distractions.

To the extent that policies can guide behavior, it is contrary to public policy to offer an additional benefit to offenders who threaten their victims with guns that will not be available to offenders who do not. Under proposed (b)(2), criminals who brandish a weapon in a threatening, distracting manner will be less likely to have eyewitness testimony admitted against them.

3. Proposed Rule 617(b)(5) directs judges to use race as a reason to silence witnesses. Proposed subparagraph (b)(5) directs judges to consider "Whether a difference in race or ethnicity between the witness and suspect affected the identification." Race should never be a justification for a judge to prevent a witness from testifying to a jury. Subparagraph (b)(5) aims at the well-established cross-race effect (CRE) of impairing identification performance, but recent research indicates the CRE is inconsistent among races and is significantly affected by the intercultural competence of the witness. See, e.g., Evelyn M. Maeder et al., What makes race salient? Juror Decision-making in same-race versus cross-race identification scenarios and the influence of expert testimony, Crim. Just. Behav. (2018) Geraldine Rosa Henderson et al., Intercultural competence and customer facial recognition, J. Serv. Mark., (2018) Vol. 32 Issue: 5, pp.570-580.

Jurors should be made aware of CRE, but by directing a judge to consider blocking evidence whenever the witness' race differs from the defendant's, courts run the risk of segregating justice. Cross-racial identification bans will swing both directions and will prevent a Latina victim from telling a jury about her Caucasian assailant as surely as an Asian witness from testifying about an African-American defendant. This facially neutral policy runs the risk of exacerbating racial disparity. Utah's recent Justice Reinvestment Initiative simultaneously led to decreased incarceration rates generally and increased the incarceration rates of racial minorities. This proposed rule will impair the pursuit of justice in criminal cases involving multiple races. Preventing juries from hearing cross-racial identification testimony should not be expected to increase justice.

4. Proposed Rule 617(b)(8) ignores the increasing role of modern technology and social media. This subsection directs courts to consider "[w]hether 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." In this age of ubiquitous smartphones, Google, and social media, aggrieved victims and friends often conduct independent investigations of violent crime and subsequently identify a suspect before alerting police to the identification. Proposed Rule 617(b) is independent of any allegation of tainting by the State. Suppressing identification evidence offers an extreme remedy to perpetrators without providing law enforcement any meaningful way to prevent the same thing from happening again in the next case.

C. Proposed Rule 617(c) wrongly equates deviation from fact-specific practices as unnecessarily suggestive.

1. Proposed Rule 617(c)(1)(A) directs judges to evaluate the suggestiveness of photo arrays and live lineups by whether law enforcement follows double-blind procedures. Double-blind procedures are feasible for photo arrays but impracticable for live lineups, so lineups will automatically be suspect under the proposed rule. In the absence of a double-blind procedure, the rule directs judges to consider whether verbal or physical cues produced identification, but such direction wrongly assumes that standard recordings will capture physical cues during a lineup or photo array.

2. Proposed Rule 617(c)(1)(B) lists four important instructions to give prospective witness during lineups and photo arrays. The rule is unclear about whether the absence of any of the four instructions is enough to force exclusion of the evidence.

3. Proposed Rule 617(c)(1)(C) establishes rules for selecting the composition of photo arrays or lineups but in doing so treats the witness' description of the perpetrator and the characteristics of the defendant as equally important. For example, a recent case involved a witness identifying a perpetrator as "Mexican," but the defendant self-identified to the officer preparing a lineup as African American, this proposed rule will leave that officer in a quagmire. Whether the officer selects Mexicans, African-Americans, or a mix of both as the extra participants in the lineup, that officer cannot simultaneously match the witness' description of the perpetrator and the race of the defendant. Accordingly, that lineup will necessarily be "unnecessarily suggestive" under this proposed rule.

4. Proposed Rule 617(c)(1)(E) dumps all cases with multiple identification procedures into the bucket of being unnecessarily suggestive, but the rule fails to acknowledge the most frequent reason for multiple identification procedures: a defendant requests a second identification procedure. Under the proposed rule, defense attorneys who request a second identification procedure will also be making the original identification procedure "unnecessarily suggestive" and subject to exclusion.

D. Proposed Rule 617(d)(1) creates an unnecessary additional hurdle. This proposed subsection only allows a jury to consider photos used in an identification procedure if "the prosecution has demonstrated a reasonable need for the use." Relevant evidence is generally admissible under rule 402, and a witness' identification of the perpetrator is always relevant. Accordingly, the photos from a photo array identifying the defendant will always be relevant to the finder of fact. This ambiguous addition that the prosecution must demonstrate a "reasonable need" before the jury can receive evidence the defendant was the perpetrator does not serve the truth-seeking function of the courts and will not avoid wrongful convictions, but it may prevent rightful convictions.

E. Proposed Rule 617(e) and (f) create a built-in conflict. Subparagraph (e) states that the court may admit eyewitness expert testimony and subparagraph (f) directs the court to instruct the jury with the Long factors. However, whenever an expert testifies, there is an instruction that the jury may disregard the expert testimony. Meanwhile, the Long instruction contains much of an expert witness's testimony. Thus, a jury might choose to disregard the testimony of an expert and therefore the corresponding jury instruction. These two subsections become irreconcilable since a jury must accept all instructions. Either an expert should testify, or the court should give the Long instruction. Never both.

Law enforcement must seek the truth without tainting the investigatory process. Similarly, the rules of evidence should focus on bringing truth to the finders of fact without omitting vital evidence of what occurred. Proposed URE0617, while admirable in the intent to prevent wrongful convictions, will prevent juries from receiving evidence of perpetrators' guilt. It will do so without increasing the accuracy of the evidence a jury will receive. It contains definitions that are overbroad, standards that are inapplicable to best practices, built in contradictions, and hurdles that confuse a defendant's due process rights with an ability to avoid accountability. The Utah Supreme Court should reject this rule and continue permitting judges to apply existing law in determining whether to admit or suppress eyewitness identification.

Michelle Feldman
November 10, 2018 at 12:57 pm

The Innocence Project is a national organization dedicated to exonerating the wrongfully convicted and to pursuing legislative, judicial and administrative reforms that prevent and address wrongful convictions of the innocent. The Rocky Mountain Innocence Center (RMIC) works to exonerate the wrongfully convicted in Utah, Nevada and Wyoming.

Our organizations commend the Utah Supreme Court's Advisory Committee on the Rules of Evidence for proposing Rule 617 (the "Proposed Rule") and encourage its adoption by the Judicial Council. Based on exonerations of the innocent and nearly four decades of robust social science, we believe that the Proposed Rule will prevent wrongful convictions involving eyewitness misidentification in the state of Utah.

I. Wrongful Convictions Involving Eyewitness Misidentification

Eyewitness misidentification is a leading contributor to the wrongful convictions of innocent Americans, playing a role in 70 percent of the nation's 364 DNA exonerations. In about 50 percent of our cases, our work exonerating innocent people has led to the identification of the true perpetrators. In the eyewitness misidentification cases, the actual perpetrators in these wrongful convictions went on to commit and be convicted of 24 additional violent crimes, including 16 rapes and two murders.

Mistaken eyewitnesses – particularly crime victims – suffer doubly when DNA demonstrates that the real perpetrator was not the person they identified. Wrongful convictions destroy lives and represent a serious threat to public safety. Science-based fixes designed to address the leading contributing causes of wrongful conviction – like the Proposed Rule – are crucial to preventing future wrongful convictions and ensuring public safety.

In Utah, mistaken eyewitness identification contributed to the wrongful convictions of Bruce Goodman and Harry Miller. Both men lost a combined 25 years in prison for crimes they did not commit until they were exonerated with representation from the Rocky Mountain Innocence Center. Maurice Possley, Bruce Dallas Goodman, Innocence Project, **https://www.innocenceproject.org/cases/bruce-dallas-goodman/**. Their wrongful convictions had a ripple effect of harming the innocent and their families, allowing the actual assailants to remain undetected, and costing taxpayer dollars to fund state compensation for their wrongful convictions.

In 1986 Goodman was convicted of murdering Sherry Ann Fales Williams in Beaver, Utah. Two eyewitnesses claimed that they saw Goodman and Williams together within 24 hours of the discovery of her body and jurors were told that the rope used to bind Williams was the same rope used where Goodman worked. Goodman was sentenced to five years to life in prison. In 2002, DNA testing was conducted on the rape kit and fluids found in the snow at the crime scene and the results excluded him. In 2004, upon the recommendation of the Utah Attorney General's Office, Goodman's conviction was vacated and the case was dismissed. Possley, supra. (In 2015, the State of Utah stipulated to a posthumous finding of actual innocence for Mr. Goodman as well as compensation for the time he spent wrongfully incarcerated). Our Exonerees: Bruce Dallas Goodman, Rocky Mountain Innocence Project, **http://rminnocence.org/our-exonerees/bruce-dallas-goodman.html**.

Harry Miller spent four years in prison for aggravated robbery. In 2000, a white woman was robbed at knifepoint at a store in Salt Lake City, and three years later she saw Miller, who is African-American, in a photo lineup and identified him to police as the robber. The victim again identified him in a live lineup and in court. Miller told police that he had lived in Louisiana since 2000 and suffered a stroke two weeks before the crime that made him unable to drive. His in-home nurse said she had visited him in Louisiana the day before the crime. Miller's attorney failed to call any of his alibi witnesses. In 2007 Miller was granted a motion for a reversal of his conviction, and the district attorney dismissed all charges before retrial. Stephanie Denzel, Harry Miller, The National Registry of Exonerations, **https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3468**. On September 11, 2011, the State stipulated to Mr. Miller's factual innocence and provided compensation for the time he was wrongfully incarcerated. Our Exonerees: Harry Miller, Rocky Mountain Innocence Project, **http://rminnocence.org/our-exonerees/harry-miller.html**.

II. Rule 617 Enhances the Accuracy & Value of Eyewitness Identification Evidence

Proposed Rule 617 reflects decades of peer-reviewed social science research and is based on recommendations by the National Research Counsel, the U.S. Department of Justice, the International Association of Chiefs of Police, the American Bar Association and other organizations. In addition to ensuring the admissibility of eyewitness identification evidence that is reliable, the Proposed Rule would facilitate the use of evidence-based practices by law enforcement. If adopted, Rule 617 would be one of the nation's strongest measures to improve the accuracy and value of eyewitness identification evidence.

Improving the value of eyewitness identification evidence in court. Rule 617 offers protections against unreliable eyewitness identification evidence at the trial court level.

The Utah Supreme Court has long been a leader in addressing the risk of eyewitness misidentification by incorporating this scientific research into its decisions addressing the evaluation and treatment of eyewitness identification evidence and ensuring that jurors have sufficient context—whether through expert testimony or jury instructions or both—to evaluate eyewitness identification evidence. See, e.g., State v. Long, 721 P.2d 483, 487-95 (Utah 1986); State v. Ramirez, 817 P.2d 774 (Utah 1991); State v. Clopten, 223 P.3d 1103 (Utah 2009).

Rule 617 provides an important new tool that will ensure that factfinders evaluate identification evidence in light of established social science findings. It would implement an evidentiary framework for the treatment of challenged identification evidence that is based on a modern scientific understanding of visual perception and memory and that reflects the many factors science has shown can affect the reliability of an identification. In addition, the rule adopts nearly all of the National Research Council's recommendations for best practices for law enforcement and for strengthening the

value of eyewitness evidence in court including, critically, allowing expert testimony and jury instructions, if requested, to assist triers of fact in understanding the variables that may influence a witness' visual experience of an event and the factors that underlie the formation, storage and recall of memory.

With the adoption of Rule 617, Utah will join a growing number of states that have incorporated scientific research into the judicial review and treatment of eyewitness identification evidence. The supreme courts of New Jersey, State v. Henderson, 208 N.J. 208, 27 A.3d 872 (2011); Oregon, State v. Lawson, 352 Or. 724, 291 P.3d 673 (2012); Alaska, Young v. State, 374 P.3d 395 (Alaska 2016); Massachusetts, Com. v. Thomas, 68 N.E.3d 1161 (Mass. 2017); and Connecticut, State v. Harris, 191 A.3d 119 (Conn. 2018), have each issued landmark decisions that modify existing legal standards for the evaluation of identification evidence to make them consistent with scientific research. Other state supreme courts have reviewed and accepted the scientific research on a range of issues, including system and estimator variables that can affect the reliability of a witness's memory and the accuracy of a witness's identification. See Com. v. Walker, 92 A.3d 766, 782-83 (2014) (collecting cases from 44 states, the District of Columbia, and 10 federal circuit courts permitting expert testimony); State v. Guilbert, 49 A.3d 705, 721–25 (Conn. 2012) (collecting cases and studies demonstrating that the scientific research is well-settled and largely unknown to fact finders). In addition to making expert testimony available in many cases, id., some courts have issued substantially more robust, science-based identification instructions that offer jurors clear guidance for evaluating identification evidence, see New Jersey Identification Instruction (July 19, 2012), **http://www.judiciary.state.nj.us/pressrel/2012/jury_instruction.pdf**; Massachusetts Model Eyewitness Identification Instruction (Nov. 2015), **http://www.mass.gov/courts/docs/courts-and-judges/courts/district-court/jury-instructions-criminal/6000-9999/9160-defenses-identification.pdf**, while others have strictly limited in-court identifications or other aspects of a witness's testimony. See State v. Dickson, 141 A.3d 810 (Conn. 2016); Com. v. Crayton, 21 N.E.3d 157 (Mass. 2014); Com. v. Collins, 21 N.E.3d 528 (Mass. 2014); State v. Lawson, 291 P.3d 673 (Or. 2012). These decisions, like Rule 617, reflect decades of scientific research and improve both the reliability of eyewitness identification admitted at trial and factfinders' evaluation of that evidence.

Incentivizing law enforcement to use evidence-based procedures: Like Rule 616 on recording custodial interrogations, adopted by the Utah Judicial Council in 2016, the Proposed Rule strongly incentivizes statewide adoption of best practices by law enforcement. This will help to facilitate more accurate eyewitness identifications, preventing wrongful convictions and enhancing law enforcement investigations.

The evidence-based identification practices for lineups and show-ups listed in the proposed rule are supported by decades of social science research and include: double-blind

administration of the procedure; prophylactic pre-procedure instructions to the eyewitness that the perpetrator may or may not be present and the investigation will continue regardless of whether or not an identification is made; selection of fillers that match the eyewitness's description of the perpetrator and do not make the suspect noticeably stand out; documenting the eyewitness's level of confidence in his or her identification and any other responses; ensuring separate procedures for different eyewitnesses; avoiding involving the same witness to multiple . procedures; and recording eyewitness identification procedures to preserve a permanent record of the conditions associated with the initial identification

Four of these evidence-based procedures – double-blind administration; prophylactic pre-procedure instructions; selection of fillers that match the eyewitness's description of the perpetrator and do not make the suspect noticeably stand out; and documenting the eyewitness's level of confidence in his or her identification – have been successfully implemented by 22 states through a high court decision or rule, statute or voluntary adoption of written policies by the majority of law enforcement agencies. (States that have adopted four key evidence-based practices: California, Colorado, Connecticut, Georgia, Hawaii, Louisiana, Maryland, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Jersey North Carolina, Ohio, Oregon, Rhode Island, Texas, Vermont, West Virginia, Wisconsin). Recording the identification procedures is required by statute in California, Georgia, Illinois Louisiana, and North Carolina. CA Chap 977 (2018); Ga. Code Ann. §17-20-1, et seq (2015); IL ST CH 725 § 5/107A-0.1 (eff. 2014, amend. 2015); LSA-C.Cr.P. Art. 251; N.C. Gen Stat. § 15A-284.52 (2008, amend. 2015)

Utah law enforcement agencies have already been exposed to best practices for administering eyewitness identification procedures. The Innocence Project and RMIC provided the Salt Lake Sheriff's Unified Police Department and the Salt Lake City Police Department with in-person training in 2015. In addition, the Innocence Project offers free tools that can assist Utah law enforcement agencies with implementation including training videos produced with the International Association of Chiefs of Police, policy-writing guides and model policies from other jurisdictions.

Proposed Rule 617 would provide an excellent legal framework for improving the evidentiary value of eyewitness identification evidence and, if a misidentification does occur, preventing a wrongful conviction. The potential benefits of this rule have been demonstrated in other states that have adopted similar reforms: the innocent and crime victims would be protected, law enforcement would have more accurate and reliable evidence to assist in investigations and keep communities safe, and taxpayer funds would be spared from state compensation and civil payments stemming from wrongful convictions. The Innocence Project and Rocky Mountain Innocence Center strongly encourages the Utah Judicial Council to adopt the Proposed Rule.

Jessica Peterson
November 10, 2018 at 2:46 pm

We should all seek to have fair and reliable evidence admitted at trial and not settle for anything less. As the judge is the gatekeeper, deciding what is and isn't reliable, this rule would ensure that only reliable evidence was presented to the factfinder. Our justice system is premised on due process, fair process and all sides should support this rule, because it does so much to promote a fair system.

This rule also would ensure that the burden of proving reliability of evidence remains with the proponent of that evidence and is never shifted to the opposing party. The government's burden is a high one by design, and in seeking to admit eyewitness ID evidence, they must also show that the ID is reliable, before a factfinder gets to hear the evidence. This rule does just that.

Eyewitness ID has long been viewed by the public as nearly infallible, while science tells us otherwise. This rule is wonderfully drafted and I commend the committee on its efforts. This rule would put Utah light years ahead of others by appropriately using science, data and expert opinions to preserve the fairness of our justice system.

Ultimately, this rule will ensure that best practices in eyewitness ID are upheld. Prosecutors, defense attorneys and judges should all agree we need to follow best practices and do everything we can to make sure the system is fair and only reliable evidence is used.

Jennifer Thompson
November 10, 2018 at 3:57 pm

Dear Members of the Utah Judicial Council:

I am a crime victim whose case resulted in a wrongful conviction due to flawed eyewitness identification procedures. I can personally attest to the trauma and suffering caused to crime victims when the wrong person gets convicted and the true perpetrator goes free. Based on my experience, I urge the Utah Judicial Council to adopt Proposed Rule 617, which will improve the accuracy of our criminal justice system and protect everyone – the innocent and their families, the original crime victims and their families, and the general public – from failed justice.

My experience and advocacy stem from a brutal sexual assault that I survived when I was in college in North Carolina. During the attack, I focused on staying alive and attempted to

memorize the features of my attacker so that I might be able to identify him if I lived. I would only learn later that memory is often compromised by the violence and trauma of such an attack. I would also learn that the traditional eyewitness identification procedures used by police following my attack, which were aimed at helping me identify the perpetrator, often unwittingly cause victims and other witnesses to mistakenly choose the wrong person.

Specifically, following my attack police investigators asked me to create a composite sketch of my attacker. Unknown to me, someone reported an individual who resembled the sketch, a man named Ronald Cotton. Police then included that man in both the photo line-up and live line-up I was asked to view. I did my best under the circumstances to choose the person who most resembled the composite sketch that had been created from my memory. The eyewitness identification process through which I was led convinced me that I had succeeded in identifying my attacker. A decade later, I was devastated to learn that DNA testing proved that someone else had committed the crime against me – and that person, Bobby Poole, had gone on to commit additional rapes while the innocent man, Ronald Cotton, languished in prison. The criminal justice system had failed both Ronald and me, as well as the other victims of Bobby Poole.

For many years now, Ronald and I have worked together around the country to advocate for implementation of evidence-based practices to improve the accuracy of identification evidence. Rule 617 would address many of the faulty investigative procedures that led to failed justice in our case and would, thereby, help to ensure that crime victims are served true justice and the public kept safe. As such, I applaud the Utah Supreme Court's Advisory Committee on the Rules of Evidence for proposing this excellent measure, and I urge that it be adopted.

Thank you for your time and consideration.

Jennifer Thompson
Founder, Healing Justice
Co-Author, Picking Cotton
Commissioner, North Carolina Innocence Inquiry Commission

Tab 4

Rule 504. ~~Lawyer~~ Legal Professional- Client.

(a) Definitions.

(1) "Client" means a person, public officer, corporation, association, or other organization or entity, either public or private, who is rendered legal services by a ~~lawyer~~ legal professional or who consults a ~~lawyer or a lawyer~~ legal professional or legal professional referral service to obtain legal services.

(2) "Client's representative" means a person or entity authorized by the client to:

(A) obtain legal services for or on behalf of the client;

(B) act on advice rendered pursuant to legal services for or on behalf of the client;

(C) provide assistance to the client that is reasonably necessary to facilitate the client's confidential communications; or

(D) disclose, as an employee or agent of the client, confidential information concerning a legal matter to the ~~lawyer~~ legal professional.

(3) "Communication" includes:

(A) advice, direction or guidance given by the ~~lawyer, the lawyer's~~ legal professional or the legal professional's representative or a ~~lawyer~~ legal professional referral service in the course of providing legal services; and

(B) disclosures of the client and the client's representative to the ~~lawyer, the lawyer's~~ legal professional or the legal professional's representative or a ~~lawyer~~ legal professional referral service incidental to the client's legal services.

(4) "Confidential communication" means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of rendition of legal services to the client or to those reasonably necessary for the transmission of the communication.

~~(5) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.~~

(5) "Legal professional" means a lawyer and a licensed paralegal practitioner:

(5)(a) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(5)(b) “Licensed paralegal practitioner” means a person authorized under URGLPP Rule 15-701 to provide legal representation in the state, or reasonably believed by the client to be authorized to provide legal representation in the state.

(6) “~~Lawyer~~ Legal professional referral service” means an organization, either non-profit or for-profit that is providing intake or screening services to clients or prospective clients for the purpose of referring them to legal services.

(7) “Legal services” means the provision by a ~~lawyer~~ legal professional or ~~lawyer~~ legal professional referral service of:

(A) professional counsel, advice, direction or guidance on a legal matter or question;

(B) professional representation on the client’s behalf on a legal matter; or

(C) referral to a ~~lawyer~~ legal professional.

(8) ~~Lawyer’s~~ “Legal professional’s representative” means a person or entity employed to assist the ~~lawyer~~ legal professional in the rendition of legal services.

(b) Statement of the Privilege. A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications if:

(1) the communications were made for the purpose or in the course of obtaining or facilitating the rendition of legal services to the client; and

(2) the communications were:

(A) between (i) the client or the client's representative and (ii) the ~~lawyer~~ legal professional, the ~~lawyer's~~ legal professional’s representatives, or a ~~lawyer~~ legal professional representing others in matters of common interest;

(B) between clients or clients’ representatives as to matters of common interest but only if each clients’ ~~lawyer or lawyer’s~~ legal professional or legal professional’s representatives was also present or included in the communications;

(C) between (i) the client or the client's representatives and (ii) a ~~lawyer~~ legal professional referral service; or

(D) between (i) the client's ~~lawyer or lawyer's~~ legal professional or legal professional's representatives and (ii) the client's ~~lawyer~~ legal professional referral service.

(c) Who May Claim the Privilege. The privilege may be claimed by:

(1) the client;

(2) the client's guardian or conservator;

(3) the personal representative of a client who is deceased;

(4) the successor, trustee, or similar representative of a client that was a corporation, association, or other organization, whether or not in existence; and

(5) the ~~lawyer or the lawyer~~ legal professional or the legal professional referral service on behalf of the client.

(d) Exceptions to the Privilege. Privilege does not apply in the following circumstances:

(1) Furtherance of the Crime or Fraud. If the services of the ~~lawyer~~ legal professional were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Claimants through Same Deceased Client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) Breach of Duty by ~~Lawyer~~ Legal Professional or Client. As to a communication relevant to an issue of breach of duty by the ~~lawyer~~ legal professional to the client;

(4) Document Attested by ~~Lawyer~~ Legal Professional. As to a communication relevant to an issue concerning a document to which the ~~lawyer~~ legal professional was an attesting witness; or

(5) Joint Clients. As to the communication relevant to a matter of common interest between two or more clients if the communication was made by any of

them to a ~~lawyer~~ legal professional retained or consulted in common, when offered in an action between any of the clients.

2018 Advisory Committee Note: These amendments are limited to the scope of the attorney-client privilege. Nothing in the amendments is intended to suggest that for other purposes, such as application of the Utah Rules of Professional Conduct or principles of attorney liability, an attorney forms an attorney-client relationship with a person merely by making a referral to another lawyer, even if privileged confidential communications are made in the process of that referral.

2019 Advisory Committee Note: The 2019 amendments expand the scope of the privilege to include Licensed Paralegal Practitioners as well as lawyers.

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RULE 1101. APPLICABILITY OF RULES

(a) Proceedings Generally. These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivisions (c) and (d). They apply generally to civil actions and proceedings, criminal cases and contempt proceedings except those in which the court may act summarily.

(b) Rule of Privilege. The rule with respect to privileges applies at all stages of all actions, cases and proceedings.

(c) Rules Inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary Questions of Fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.
(2) Grand Jury. Proceedings before grand juries.
(3) Miscellaneous Proceedings.

(A) Proceedings for extradition or rendition;
(B) Hearings for sentencing, including restitution hearings;~~or~~
(C) Hearings for granting ~~or revoking~~ probation;
(D) Proceedings for issuance of warrants for arrest, criminal summonses, and search warrants; and
(E) ~~p~~Proceedings with respect to release on bail or otherwise.

(d) Reliable Hearsay in Criminal Preliminary Examinations. In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.

NOTE: In *State v. Weeks*, 61 P.3d 1000, ¶16 (Utah 2002), the Utah Supreme Court relied on rule 1101 to hold that hearsay evidence is admissible in restitution hearings.

Also, Utah Code section 77-18-1(12)(d)(iii) deals with revoking probation. It states that in a probation revocation proceeding, "[t]he persons who have given adverse information on which the allegations are based *shall be presented as witnesses* subject to questioning by the defendant unless the court for good cause otherwise orders."