

2005

## Utah v. Giles : Brief of Appellee

Utah Court of Appeals

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Margaret P. Lindsay; Attorney for Appellant.

Erin Riley; Assistant Attorney General; Mark L. Shurtleff; Utah Attorney General; C. Kay Bryson; Utah County Attorney; Attorneys for Appellee.

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
 :  
 Plaintiff/Appellee, :  
 : Case No. 20050162-CA  
 :  
 :  
 JEFFREY GILES, :  
 :  
 Defendant/Appellant. :

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*BRIEF OF APPELLEE*

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APPEAL FROM CONVICTIONS FOR TWO COUNTS OF FAILURE TO RESPOND TO AN OFFICER'S SIGNAL TO STOP, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 41-6-13.5 (West 2004) IN THE FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, THE HONORABLE STEVEN L. HANSEN PRESIDING

MARGARET P. LINDSAY  
99 East Center Street  
P.O. Box 1895  
Orem, Utah 84059-1895

ATTORNEY FOR APPELLANT

ERIN RILEY (8375)  
Assistant Attorney General  
MARK L. SHURTLEFF (4666)  
Utah Attorney General  
160 East 300 South, 6<sup>th</sup> Floor  
PO BOX 140854  
Salt Lake City, Utah 84114-0854  
Telephone: (801) 366-0180

C. KAY BRYSON  
Utah County Attorney

ATTORNEYS FOR APPELLEE

IN THE UTAH COURT OF APPEALS

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160 East 300 South, 6<sup>th</sup> Floor  
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*BRIEF OF APPELLEE*

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**JURISDICTION AND NATURE OF PROCEEDINGS**

Defendant appeals his convictions for two counts of failure to respond to an officer's signal to stop, a third degree felony, in violation of Utah Code Ann. § 41-6-13.5 (West 2004). This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(e)(West 2004).

**ISSUE ON APPEAL AND STANDARD OF REVIEW**

**Issue:** Did the trial court err in denying defendant's motion for a mistrial?

**Standard of Review:** "This court 'will not reverse a trial court's denial of a motion for mistrial absent an abuse of discretion.'" *State v. Widdison*, 2000 UT App 185, ¶57, 4 P.3d 100 (quoting *State v. Robertson*, 932 P.2d 1219, 1230 (Utah 1997)).

**CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES**

Addendum A - Rule 16. DISCOVERY - Utah R. Cr. P. 16(1)(2)(West 2004)

## STATEMENT OF THE CASE

Defendant was charged by information with two counts of failure to respond to an officer's signal to stop, a third degree felony, in violation of Utah Code Ann. § 41-6-13.5 (West 2004) (R9-10). Following a preliminary hearing, defendant was bound over for trial on both counts (R26-27).

Prior to trial, defense counsel filed a written request for discovery, which included a request for the criminal record of the defendant (R19-21). Prior to trial, the prosecution provided defendant with written notice that it planned to present defendant's prior convictions at trial (R36-38).

During trial, the prosecutor asked defendant: "Isn't it true, Mr. Giles, that you've ran [sic] from the police before?" (R100:202). Defendant answered: "I was 18. It was on my 18<sup>th</sup> birthday. I went two blocks and then went on foot." (*Id.*). At that point, defense counsel objected and a discussion was held out of the presence of the jury (R100:202-07). The objection was sustained (R100:202, 206). The jury was admonished to disregard the last question and response (R100:207). At the conclusion of the evidence, after the jury retired to deliberate, but before it returned a verdict, defense counsel made a motion for a mistrial based on the question concerning the prior conviction (R100:238, 241). The motion was denied (R100:242).

The jury found defendant guilty on both counts (R70). He received a suspended sentence (R83). Defendant timely appealed (R90).



## STATEMENT OF FACTS

*The First Pursuit.* On July 3, 2004 Orem Police Officers received a domestic violence call involving defendant (R4; 100:53). Although the officers were unable to find defendant that day, at 2:15 the next morning they spotted him at a 7-Eleven near Center Street and 1200 West (R100:54-55, 82). The officers began to follow defendant as he exited the parking lot, turning west on Center Street and then south on I-15 (R100:56, 84). Defendant was traveling at approximately 40-45 miles per hour (R100:57, 84). Just before the University Parkway exit the officers turned on their lights to pull defendant over (R100:57-58, 94). Defendant did not pull over, so the officers turned on their wigwags (alternate flashing high beams) and sirens (R100:58-59). Defendant continued to travel south on I-15, eventually leaving the freeway on Center Street in Provo (R100:59, 95).

Officers continued to pursue, traveling east on Center Street before turning north on 900 West (R100:60). Defendant then began to speed up, reaching 50 miles per hour (R100:61). At 500 North defendant ran a stop sign, turned left, and accelerated to 70-75 miles per hour (R100:61, 88). Officers decided to call off the pursuit due to safety concerns as the speeds continued to increase (R100:62, 64, 97).

*The Second Pursuit.* Later that morning, defendant was spotted driving northbound on Geneva Road by Provo police officers, who began pursuit with their lights on (R100:65, 98, 99). Orem officers joined in the pursuit at 800 North with their lights on as well (R100:99, 117). While the pursuit began at 40 miles per hour, it quickly accelerated to approximately 90 miles per hour as defendant headed up Provo Canyon (R100:100-01, 118).

At the Squaw Peak turnoff defendant made a right hand turn and drove up as the officers followed (R100:101, 120). Once defendant reached the top he turned around, driving back down the mountain (R100:102-103, 121).

The officers continued the pursuit as the Utah Highway Patrol set up spikes near the middle and bottom of the road (R100:102-03, 106, 122). As defendant rounded the corner near the first set of spikes he slammed on his breaks, initially missing the spikes but sliding into two police cars (R100:66, 105, 123). Defendant then threw his van into reverse, backing over one of the spikes with one tire, and continued to go down the mountain (R100:67, 106, 123). At the bottom of Squaw Peak, defendant hit the second set of spikes, flattening his remaining tires. (*Id.*). Officers boxed defendant in with their cars, forcing him to come to a complete stop (R100:123). Defendant was then arrested with no further resistance (R100:68, 107, 124).

***Defense Trial Theory.*** Defendant was charged with two counts of failure to respond to an officer's signal to stop. His theory at trial was voluntary intoxication (R100:214, 226-27). To support this theory, witnesses testified that defendant had been acting strangely during the weeks preceding the incident, and that he had a history of drug use, although no one actually saw defendant use drugs immediately prior to these incidents (R100:135-38, 141, 146, 151, 153-55, 157, 160, 164-65, 171, 177). Defendant testified that he had been out all night using methamphetamine, and that he had used "meth" and had "a drink" that day, but he did not remember the police pursuits (R100:182-83, 186). Upon arrest, officers searched both the defendant and the van, but found no drugs or alcohol (R100:68, 124).

## SUMMARY OF THE ARGUMENT

Defendant argues that the trial court abused its discretion by denying his motion for a mistrial. Defendant claims that a mistrial was warranted because the prosecutor willfully violated rule 16 of the Utah Rules of Criminal Procedure.

The trial court properly denied the motion for a mistrial. The court sustained defendant's objection and the jury received a curative instruction that they should disregard the question and response. Defendant cannot show that he was prejudiced by what occurred. Any error was harmless. The evidence against defendant was very strong, therefore any effect that may have survived the court's curative instruction is unlikely to have influenced the jury's verdict. In addition, denial of the motion for a mistrial could be affirmed on the alternative ground that a prosecutor cannot be cited for a discovery violation where the defendant had knowledge of the existence of the item the State failed to disclose.

## ARGUMENT

### **I. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A MISTRIAL**

On appeal, defendant claims that the prosecutor acted intentionally and in bad faith when he failed to disclose evidence of a prior conviction for the same offense (Aplt's br. at 19). Defendant therefore claims that the trial court erred in denying his motion for a mistrial. *Id.* at 20.

**A. Additional relevant facts.**

During cross-examination, the prosecutor asked defendant: “Isn’t it true, Mr. Giles, that you’ve ran [sic] from the police before?” (R100:202). Defendant answered: “I was 18. It was on my 18<sup>th</sup> birthday. I went two blocks and then went on foot.” (*Id.*). At that point, defense counsel objected and a discussion was held out of the presence of the jury (R100:202-07).

The prosecutor had a printout that showed that defendant had pled guilty to failure to stop at the command of a police officer, a third-degree felony (R100:202). Defense counsel advised the court that he believed this conviction had been reduced to a class A misdemeanor, and that the record was incomplete (R100:203). The court said: “Let’s find out first if it has been reduced.” (R100:203). However, the answer to this question is not apparent from the record.

Defense counsel argued that there were two issues. First, that the prior conviction couldn’t come in if it had been reduced to a class A misdemeanor. Second, that the State had provided him with a copy of defendant’s criminal history that didn’t show this conviction (R100:204).

Prior to trial, in answer to defendant’s discovery request, the prosecution gave a copy of defendant’s criminal history to defense counsel. However, the criminal history provided was apparently not complete (R100:205). The prosecutor stated that he didn’t realize it wasn’t complete until shortly before trial (*Id.*). The prosecutor stated that he just found the

prior conviction at issue the day before trial (*Id.*). However, the prosecutor did not provide defense counsel with a copy before questioning defendant about it (R100:205-06).

The court said: “I think you have a duty to disclose. I think it should have been disclosed. You had it in your possession yesterday. You should have disclosed it yesterday. Or at least today. A prior conviction for the exact same offense the defendant is on trial for being held back in the event the defendant testified – I’m not going to allow it. Objection is sustained.” (R100:206).

After the trial court sustained the objection, defense counsel moved to have anything from the record talking about the prior conviction stricken. The court said: “You can’t move to strike that from the record, but I can surely admonish the jury.” (R100:207). The court said: “Members of the jury, if you’ll disregard anything at all that might come to your attention regarding the last question or any of the responses that you may have heard or overheard here at the bench.” (R100:207-08).

The trial then proceeded. No further mention was made of the defendant’s prior conviction in front of the jury. However, after the jury began their deliberations, but before they returned with a verdict, defense counsel made a motion for a mistrial (R100:238).

The trial judge asked: “What is the precise grounds for your motion, that you weren’t given the criminal record timely to enable you to make a decision whether to put the

defendant on the stand?” (R100:240). Defense counsel answered: “Well, the fact that the jury heard the question and the answer.”<sup>1</sup> (R100:241).

The trial judge then said: “It’s clear that I granted your motion and didn’t allow the question to be asked . . . and the exhibit to be entered because of the reasons that I felt that it had not been provided pursuant to Rule 16 in the discovery request. But I gave a curative instruction. Are you saying that that was prejudicial? What could I have done differently?” (R100:241).

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<sup>1</sup> On appeal, defendant also appears to be arguing that he is entitled to relief based on prosecutorial misconduct. However, defendant did not raise this as a basis for the motion for mistrial (R100:240-241). The trial court cannot have abused its discretion in denying a motion for mistrial based on an issue that was not raised. Defendant cannot raise this issue for the first time on appeal. “As a general rule, appellate courts will not consider an issue, including a constitutional argument, raised for the first time on appeal unless the trial court committed plain error or the case involves exceptional circumstances.” *State v. Brown*, 856 P.2d 358, 359 (Utah App. 1993). Because defendant does not argue that “exceptional circumstances” or “plain error” justifies a review of this issue, this Court should decline to consider it on appeal. *State v. Pledger*, 896 P.2d 1226, 1229, FN 5 (Utah 1995).

In addition, defendant would not be entitled to relief even if the prosecutorial misconduct claim were reviewed on the merits. “Because a trial court is in the best position to determine an alleged error’s impact on the proceedings, [an appellate court] will not reverse a trial court’s denial of a mistrial motion based on prosecutorial misconduct absent an abuse of discretion.” *State v. Harmon*, 956 P.2d 262, 276 (Utah 1998). “This standard is met only if the error is substantial and prejudicial such that there is a reasonable likelihood that in its absence, there would have been a more favorable result for the defendant.” *Id.* (additional citations and quotation marks omitted).

As demonstrated below, defendant has not met and cannot meet this standard. *See also State v. Kohl*, 2000 UT 35, ¶ 24, 999 P.2d 7 (rejecting prosecutorial misconduct claim where trial court gave immediate curative instruction and then additional curative instruction in overall jury instructions, concluding that “[d]efendant has not shown, as is his burden, that the comment was so prejudicial as to defeat the mitigating effect of the court’s two curative instructions”); and *State v. Baker*, 963 P.2d 801, 805 (Utah App. 1998) (rejecting prosecutorial misconduct claim where, “even if there was error,” “the evidence against defendant . . . was considerable”; citing cases).

Defense counsel responded by saying: “My belief is that it’s just simply something that can’t be cured. Once they’ve heard it, they’ve heard it. Even though we give a curative instruction, I think that’s something that can’t be cured. And it is a valid point also that, had I known that there was a possible allegation floating out there, I would have discussed that with Mr. Giles and been able to discuss the fact that he could be impeached with that by taking the stand. Without that knowledge, I didn’t know anything about it so I couldn’t discuss that with Mr. Giles in making our decision to put him on the stand.” (R100:241).

In ruling on the motion for a mistrial, the trial judge said: “I think the appropriate remedy was handled pursuant to Rule 16 and the evidence was not allowed to be received either for impeachment or any other purpose. I don’t find that the level of prejudice amounts to the level of a mistrial. The motion is denied.” (R100:242).

**B. The denial of the motion for a mistrial should be affirmed on alternative grounds.**

Although the trial court’s ruling was correct, the easier route here is to affirm on an alternative ground. *See O’Keefe v. Utah State Retirement Board*, 956 P.2d 279, 280 (Utah 1998). Defendant’s claim is defeated by the obvious and decisive fact that “the prosecutor cannot be cited for a discovery violation where the defendant had knowledge of the existence of the item that the State failed to disclose.” *State v. Whittle*, 1999 UT 96, ¶25, 989 P.2d 52 (quoting *State v. White*, 931 S.W.2d 825, 832-33 (Mo.Ct.App. 1996)(citing *Hughes v. Hopper*, 629 F.2d 1036 (5th Cir.1980), *cert. denied*, 450 U.S. 933, 101 S.Ct. 1396 (1981)).

*See also Jennette v. State*, 398 S.E.2d 734, 738 (Ga. App. 1990) (“The *Brady* rule applies only to exculpatory material unknown to the appellant”).

Defendant was obviously aware of this prior conviction, because he was the person convicted. In addition, defense counsel acknowledged that he was aware of this conviction when he advised the court that he believed this conviction had been reduced to a class A misdemeanor (R100:203).<sup>2</sup>

Therefore, even if the prosecutor violated the discovery rule by failing to disclose defendant’s prior conviction, this type of technical violation should not entitle defendant to a new trial, where he already knew about his own prior conviction.

**C. After finding a violation of Rule 16, the trial court sustained the objection and gave a curative instruction.**

Utah’s discovery rules require that upon request, the prosecutor shall disclose to the defense “the criminal record of the defendant” and the “prosecutor has a continuing duty to make disclosure.” Utah R. Cr. P. 16(a)(2) and (b)(West 2004). The rule also states what the court may do if a party fails to comply with the rule:

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

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<sup>2</sup> Obviously, there was still a question as to whether the conviction had been reduced or not, and whether it would be admissible if it had been reduced. However, this question disappeared when the court granted defendant’s objection and excluded the evidence.



Utah R. Cr. P. 16(g).

In this case, the trial court sustained defendant's objection, prohibited the prosecution from introducing evidence of the defendant's prior conviction, and gave a cautionary instruction to the jury.

On appeal, defendant argues that the "prosecutor acted intentionally and in bad faith when he withheld evidence of a prior conviction." (Aplt. br. at 19, 24). However, when a trial court is considering whether the discovery rule has been violated, "[t]he good or bad faith of the prosecutor is irrelevant." *State v. Knight*, 734 P.2d 913, 918, FN5 (Utah 1987) (quoting *State v. Shabata*, 678 P.2d 785, 788 (Utah 1984)).

What is relevant is whether the defendant was prejudiced. "[A] breach of the discovery rules does not warrant reversal absent a showing of prejudice to the defendant." *State v. Blair*, 868 P.2d 802, 807 (Utah 1993). "[T]he trial court has ample power to obviate any prejudice resulting from a breach of the criminal discovery rules. If it does so, the defendant obviously cannot complain of the prosecutor's conduct, since the defendant's substantial rights will not have been affected." *Knight*, 734 P.2d at 918. In this case, defendant has failed to establish that he suffered any prejudice, especially in light of the trial court's curative instruction.

A complaint that the remedy ordered to correct a violation of Rule 16 was "insufficient to obviate the harm" is reviewed under an abuse of discretion standard. *State v. Menzies*, 889 P.2d 393, 401 (Utah 1994). "The trial court's discretion in fashioning a remedy for a violation is not abused unless prejudice sufficient to result in a reversal of the

conviction occurred due to the discovery violation.” *Id.* “An abuse of discretion occurs when, taking into account any remedial measures ordered by the trial court, the prejudice to the defendant still satisfied the standard for reversible error set forth in Rule 30.” *Knight*, 734 P.2d at 918. Rule 30 states that “[a]ny error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded.” Utah R. Cr. P. 30(a) (West 2004).

In this case, the jury was admonished to “disregard anything at all that might come to your attention regarding the last question or any of the responses that you may have heard or overheard here at the bench.” (R100:207-08). “[C]urative instructions are a settled and necessary feature of our judicial process and one of the most important tools by which a court may remedy errors at trial.” *State v. Harmon*, 956 P.2d 262, 271 (Utah 1998).

Courts “generally presume that a jury will follow the instructions given it.” *Menzies*, 889 P.2d at 401; *State v. Burk*, 839 P.2d 880, 883-84 (Utah App. 1992). Therefore, this court should presume that the jury followed the instructions given and disregarded the question and answer concerning defendant previously running from police. Considering the “nature of the testimony and the fact that it was not vivid or graphic, there is no reason to believe that the jury would be uniquely unable to follow the court’s instructions and ignore the testimony. As such, the remedy ordered was entirely sufficient to cure the discovery violation.” *Menzies*, 889 P.2d at 401.

**D. The trial court did not abuse its discretion in denying defendant's motion for a mistrial.**

Even though a curative instruction was given, defendant later made a motion for a mistrial. The trial court denied the motion because it believed that the “appropriate remedy was handled pursuant to Rule 16 and the evidence was not allowed to be received either for impeachment or any other purpose.” (R100:242). The trial court found that the level of prejudice did not amount to the level of a mistrial. *Id.*

A trial court's denial of a motion for a mistrial is subject to very limited review on appeal. *State v. Robertson*, 932 P.2d 1219, 1231 (Utah 1997), *overruled on other grounds by State v. Weeks*, 2002 UT 98, ¶ 24, 61 P.3d 1000. “A trial court's denial of a motion for mistrial will not be reversed absent an abuse of discretion.” *State v. Martinez*, 2002 UT App 126, ¶36, 47 P.3d 115 (quoting *State v. Widdison*, 2001 UT 60, ¶ 54, 28 P.3d 1278). “This is because the trial court is in the best position to determine whether the incident prejudiced the jury.” *Id.* An appellate court reviews a trial court's decision to deny a motion for mistrial “with just deference because of the advantaged position of the trial judge to determine the impact of events occurring in the courtroom on the total proceedings.” *State v. Cardall*, 1999 UT 51, ¶20, 982 P.2d 79 (quoting *Robertson*, 932 P.2d at 1231); *see also State v. Pena*, 869 P.2d 932, 935-36 (Utah 1994).

“If the trial court determines that the incident probably did not prejudice the jury, the court should deny the motion” for a mistrial. *State v. Widdison*, 2000 UT App 185, ¶ 57, 4 P.3d 100. “Once the trial court has exercised [its] discretion and made [its] judgment

thereon, the prerogative of this court on review is much more limited.” *State v. Allred*, 2002 UT App. 291, ¶ 20, 55 P.3d 1158 (quoting *Robertson*, 932 P.2d at 1231).

“Unless a review of the record shows that the court’s decision is plainly wrong in that the incident so likely influenced the jury that the defendant cannot be said to have had a fair trial, [an appellate court] will not find that the court’s decision was an abuse of discretion.” *Robertson*, 932 P.2d at 1231; *see also State v. Dominguez*, 2003 UT App 158, ¶39, 72 P.3d 127; *Martinez*, 2002 UT App 126 at ¶36; *Allred*, 2002 UT App 291 at ¶20; *State v. Madsen*, 2002 UT App 345, ¶12, 57 P.3d 1134; *Widdison*, 2000 UT App. 185 at ¶57; *Cardall*, 1999 UT 51 at ¶19.

Defendant’s argument that the trial court abused its discretion in denying his motion for a mistrial fails because he has not demonstrated that any error “so likely influenced the jury that the defendant cannot be said to have had a fair trial.” *Robertson*, 932 P.2d at 1231.

“For purposes of determining whether a mistrial should have been granted, [the appellate court’s] overriding concern is that defendant received a fair trial.” *Harmon*, 956 P.2d at 276. Defendant in this case received a fair trial. The trial court properly denied the motion for a mistrial because defendant’s objection was sustained, the prosecutor was not allowed to admit evidence of the prior conviction, and the jury was admonished to disregard the question already asked and answered.

In addition, the question and answer were not pivotal to defendant’s conviction. There was very strong and substantial evidence, including a video tape of one of the incidents (see State’s exhibit 2), which established that defendant was guilty of failing to respond to

an officer's signal to stop. Any prejudice that might have survived the court's curative instruction was unlikely to have had any effect on the jury's verdict, and "certainly not an effect that would rise to the level necessary to require reversal." *Menzies*, 889 P.2d at 401.

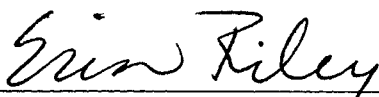
In sum, given the limited nature of the prosecutor's question and defendant's answer, the fact that defendant's objection was sustained, the curative instructions that followed, and the strength of the evidence establishing defendant's guilt, defendant cannot establish that he was prejudiced. Therefore, this Court should find that the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

#### CONCLUSION

Based on the foregoing, the State asks this Court to affirm defendant's convictions.

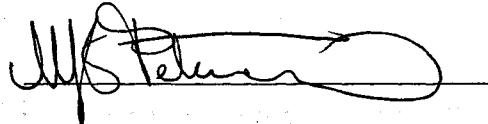
RESPECTFULLY SUBMITTED April 7<sup>th</sup>, 2006.

MARK L. SHURTLEFF  
Utah Attorney General

  
ERIN RILEY  
Assistant Attorney General

**CERTIFICATE OF MAILING**

I certify that on 7 <sup>April</sup>~~March~~ 2006, I caused to be mailed, by U.S. Mail, postage prepaid, two accurate copies of this **BRIEF OF APPELLEE** to Margaret P. Lindsay, 99 East Center Street, PO BOX 1895, Orem, Utah 84059-1895, Attorney for Appellant.

A handwritten signature in black ink, appearing to read "J. S. Felner", written over a horizontal line.

# Addendum A





Utah Rules of Criminal Procedure Rule 16

West's **Utah** Court **Rules** Annotated Currentness  
State Court **Rules**  
**Utah Rules of Criminal Procedure**  
➔**RULE 16. DISCOVERY**

**(a)** Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:

(1) relevant written or recorded statements of the defendant or codefendants;

(2) the criminal record of the defendant;

(3) physical evidence seized from the defendant or codefendant;

(4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and

(5) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.

**(b)** The prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead. The prosecutor has a continuing duty to make disclosure.

**(c)** Except as otherwise provided or as privileged, the defense shall disclose to the prosecutor such information as required by statute relating to alibi or insanity and any other item of evidence which the court determines on good cause shown should be made available to the prosecutor in order for the prosecutor to adequately prepare his case.

**(d)** Unless otherwise provided, the defense attorney shall make all disclosures at least ten days before trial or as soon as practicable. He has a continuing duty to make disclosure.

**(e)** When convenience reasonably requires, the prosecutor or defense may make disclosure by notifying the opposing party that material and information may be inspected, tested or copied at specified reasonable times and places. The prosecutor or defense may impose reasonable limitations on the further dissemination of sensitive information otherwise subject to discovery to prevent improper use of the information or to protect victims and witnesses from harassment, abuse, or undue invasion of privacy, including limitations on the further dissemination of videotaped interviews, photographs, or psychological or medical reports.

**(f)** Upon a sufficient showing the court may at any time order that discovery or inspection be denied, restricted, or deferred, that limitations on the further dissemination of discovery be modified or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge

alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

**(g)** If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

**(h)** Subject to constitutional limitations, the accused may be required to:

(1) appear in a lineup;

(2) speak for identification;

(3) submit to fingerprinting or the making of other bodily impressions;

(4) pose for photographs not involving reenactment of the crime;

(5) try on articles of clothing or other items of disguise;

(6) permit the taking of samples of blood, hair, fingernail scrapings, and other bodily materials which can be obtained without unreasonable intrusion;

(7) provide specimens of handwriting;

(8) submit to reasonable physical or medical inspection of his body; and

(9) cut hair or allow hair to grow to approximate appearance at the time of the alleged offense.

Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given to the accused and his counsel. Failure of the accused to appear or to comply with the requirements of this rule, unless relieved by order of the court, without reasonable excuse shall be grounds for revocation of pre-trial release, may be offered as evidence in the prosecutor's case in chief for consideration along with other evidence concerning the guilt of the accused and shall be subject to such further sanctions as the court should deem appropriate.

[Amended effective November 1, 2001.]

#### LAW REVIEW AND JOURNAL COMMENTARIES

Allred, Confrontation Rights and Preliminary Hearings, 1986 Utah L. Rev. 75 (1986).