

MEMORANDUM

TO: CRIMINAL RULES COMMITTEE

FROM: MCGREEVY, NICHOLS, HOLMAN AND HOFFMAN

DATED: March 20, 2017

RE: RECOMMENDATIONS FOR CHANGES IN CRIM. P. 4 AND 9 IN LIGHT OF AMENDMENTS TO § 16-5-206

Just to remind everyone, at the October 21, 2016 meeting, our Subcommittee was charged with answering the following questions:

1. Should the word “request” or “recommend” be used in Rules 4(a)(1) and 9(a)(1)? (The problem here is that the rules use “request” but it is also clear the prosecutor’s initial choice may or may not be binding on the judge.)
2. At Judge Dailey’s suggestion, grammar changes should be made to 4(a)(3) and 9(a)(3), either adding an “in” or removing one.
3. Add subsection titles to Rule 4 to correspond to Rule 9 (included in this task was examining whether we should change the title of Rule 4(a)(1)/9(a)(1) or move that whole subsection to Rule 4(a)(4)/9(a)(4)).
4. Gender neutralize.
5. Decide whether indictments in Rule 9 should be treated differently than direct files for purposes of the presumption of summons.
6. Decide how exactly the risk to victim and risk of non-appearance fit into the court versus prosecution power to decide summons or complaint.

The Subcommittee unanimously agreed on how to resolve the first five of these questions. We also discovered an extraneous bolding of the typeface in subsection (a)(2) of Rule 4, which we recommend be removed. Attached are redlined versions showing how we resolved these numbered questions, keyed in the comments to the question number at issue. There are two versions because the Subcommittee was unable to agree on the sixth question.

We agreed we should stick with “request” in 4(a)(1) and 9(a)(1), but also agreed to some additional language that makes the role of the court and prosecutor more clear: namely, that the prosecutor shall “request” that the court issue either a summons or complaint.

We agreed to remove the “in” in 4(a)(3) and 9(a)(3).

We agreed to add subsection titles to Rule 4 to correspond to those in Rule 9, but we also settled on changing the title in both 4(a)(1) and 9(a)(1) from “When Issued” to “Request by Prosecution.” The “When Issued” title never made sense here, since this subsection is not about “when.”

We gender neutralized (ouch!).

After a fair amount of discussion, we unanimously agreed that we should not treat indictments any differently than other form of initiating a criminal action in terms of the summons presumption. The argument, which we ultimately rejected, is that since indictments are issued only after a finding by the grand jury of probably cause, perhaps the Rules should recognize less of a willingness to issue a summons in those cases. But neither the statute (§ 16-5-206) nor Rule 4/9, in any of their previous iterations we’ve been able to find, have ever distinguished between indictments and any other method of charging. We concluded that a court is free to take into consideration the fact that a grand jury found probable cause in deciding under 4(a)(3) and 9(a)(3) whether there was such a risk of danger/flight that a summons should not issue, but that the rules should not categorically single out indictments for different treatment.

We agreed that a phrase in Rule 4(a)(2)—“**has been committed, and that the offense was committed**” was somehow erroneously bolded when the current codification of the Rule was printed. We unanimously agreed that while we are making recommended changes to these two Rules, we should recommend correcting this.

Our most difficult task, and one on which we reached only a non-unanimous consensus, was to try to figure out what the language in the statute and rules mean in terms of the authority between the court and prosecutor to make the summons/warrant decision. The statute, at § 16-5-206(1), has the following rather straightforward architecture for that decision. First, it carves out class 1, class 2 and class 3 felonies, and now also level 1 and level 2 drug felonies, as well as unclassified felonies punishable by more than 10 years. Then it says, except for those excluded felonies, the court has the POWER to issue a summons or warrant. Finally, there is an exception to that power: if a law enforcement officer presents in writing a basis to believe there is a significant flight risk or risk to victim or public. So far, so good. By itself, we all agreed that this language creates the following decision tree: 1) the court CANNOT issue a summons in the excepted felonies; 2) it CANNOT issue a summons if it is satisfied, based on the writing from law enforcement, that there is a significant risk of flight or danger to victim or public; and 3) it has discretion to issue a summons or warrant in all other cases.

But then in § 16-5-207(2), after for some reason repeating this decision tree, the General Assembly tacks this sentence onto the end of the tree: “The court shall issue a summons instead of an arrest warrant when the prosecuting attorney so requests.” What does this sentence do to the decision tree?

A majority of us believes this sentence operates only in the event the court otherwise would have had discretion to issue a summons or warrant (that is, in non-excepted felonies and in the absence of a finding of significant risk of flight or public danger). In those circumstances, and only those circumstances, the court must issue a summons if the prosecution requests a summons. The court continues to lack the power to issue summonses (even if the prosecution requests a summons) in the excepted felonies and where there is significant risk of flight or

danger. The majority reaches this conclusion for several reasons: this interpretation gives meaning to both the decision tree in § 16-5-206(1) and the “prosecution gets to demand summons” language in § 16-5-207(2); the minority’s reading would reinvest the court with power (and indeed duty) to issue a summons whenever the prosecution requests one, despite the fact that that power was unambiguously taken away in the decision tree; the whole subject of § 16-5-207 207 is “standards and criteria relating to the issuance of summons in lieu of warrant,” and thus this section is already assuming the court has the power to issue a summons and is therefore operating in the discretion part of the decision-tree.

One of our members (KM) reads the “prosecution gets to demand a summons” sentence in § 16-5-207(2) as trumping the decision tree in § 16-5-206(1). Under his reading, the prosecution can force the court to issue a summons in a class 1 felony (or in any other excepted felony), and also after the court has determined, based on the law enforcement writing, that there is a significant risk of flight or danger. The minority reaches this conclusion for several reasons: the “prosecutor gets to demand a summons” language is clear, unambiguous, and unlimited in any fashion; giving this language its unambiguous meaning also furthers the General Assembly’s primary purpose of favoring summonses over warrants; and, as a practical matter, prosecutors will not ask for summonses when they don’t think summonses are appropriate—they will be the strictest gauge on the propriety of summonses and that’s why they have the power to force summonses in any case they think appropriate.

Rule 4. Warrant or Summons Upon Felony Complaint

(Majority Version)

(a) Issuance.

(1) **Request by Prosecution.** Upon the filing of a felony complaint in the county court, the prosecuting attorney shall request ~~that the court issue either to order that a warrant shall issue for the arrest of the defendant, or that a summons shall issue and to~~ be served upon the defendant.

Commented [mbh1]: Item #3

(2) **Affidavits or Sworn Testimony.** If a warrant is requested, the felony complaint must contain or be accompanied by a sworn statement of facts establishing probable cause to believe that a criminal offense ~~has been committed, and that the offense was committed~~ has been committed, and that the offense was committed [no additional change.]

Commented [mbh2]: Item #1. Agreed to keep "request," but to re-phrase so it is clear prosecutor must request summons or warrant,

Commented [mbh3]: This change removes extraneous bolding. No other changes.

(3) **Summons in Lieu of Warrant.** Except in class 1, class 2, and class 3 felonies, level 1 and level 2 drug felonies, and in unclassified felonies punishable by a maximum penalty of more than 10 years, whenever a felony complaint has been filed prior to the arrest of the person named as defendant therein, the court, with the consent of the prosecuting attorney, shall have power to issue a summons commanding the appearance of the defendant in lieu of ~~an arrest warrant for his arrest, unless a law enforcement officer presents in writing a basis to believe there is a significant risk of flight or that the victim's or public's safety may be compromised.~~ If empowered to issue a summons under this subsection (a)(3), the court shall issue a summons instead of an arrest warrant when the prosecuting attorney so requests.

Commented [mbh4]: Item #2

Commented [mbh5]: Item #4 (gender neutralize).

Commented [mbh6]: Issue #6" majority version.

(4) **Standards Relating to Issuance of Summons.** Except in class 1, class 2, and class 3 felonies, level 1 and level 2 drug felonies, and unclassified felonies punishable by a maximum penalty of more than 10 years the general policy shall favor issuance of a summons instead of a warrant for the arrest of the defendant ~~except where there is reasonable ground to believe that, unless taken into custody, the defendant will flee to avoid prosecution or will fail to respond to a summons.~~ [no additional changes] . . .

(5) **Failure to Appear.** If any person properly summoned pursuant to this Rule fails to appear as commanded by the summons, the court shall forthwith issue a warrant ~~for the his arrest of that person.~~

Commented [mbh7]: Item #4 (gender neutralize)

(6) **Corporations.** [No change.]

(b) Form.

(1) **Warrant** The arrest warrant shall be issued by a judge of a court of record directed to any peace officer and shall:

(I) State the defendant's name or if that is unknown, any name or description by which ~~he~~the defendant can be identified with reasonable certainty;

Commented [mbh8]: Item #4 (gender neutralize)

(II) [No change.]

(III) [No change.]

(IV) [No change.]

(V) [No change.]

(2) **Summons.** If a summons is issued in lieu of a warrant pursuant to this Rule, the summons shall:

(I) [No change.]

(II) State the defendant's name ~~of the person and his~~ address;

Commented [mbh9]: Item #4 (gender neutralize)

(III) [No change.]

(IV) [No change.]

(V) Be signed by the judge or the clerk with the title ~~of his~~the office; and

Commented [mbh10]: Item #4 (gender neutralize)

(VI) [No change.]

(c) Execution or Service and Return.

(1) Warrant.

(I) [No change.]

(II) [No change.]

(III) **Manner.** The warrant shall be executed by arresting the defendant. ~~The warrant The officer need not be in the officer's have the warrant in his~~ possession at the time of the arrest, in which event the officers shall then inform the defendant of the offense and of the fact that a warrant has been issued, and upon request shall show the warrant to the defendant as soon as possible. If the warrant is in the officer's possession at the time of the arrest, then the officer but if he has the warrant at that time he shall show the warrant it to the defendant immediately upon request. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense and of the fact that a warrant has been issued, and upon request he shall show the warrant to the defendant as soon as possible.

Commented [mbh11]: Item #4 (gender neutralize)

(IV) **Return.** The peace officer executing a warrant shall make return thereof to the issuing court. At the request of the prosecuting attorney any unexecuted warrant shall be

returned ~~and cancelled to the issuing county judge and be cancelled by him.~~ At the request of the prosecuting attorney, made while a complaint is pending, a warrant returned unexecuted and not cancelled, or a duplicate thereof, may be delivered by the county judge to any officer or other authorized person for execution.

(2) **Summons.** [No changes.]

Commented [mbh12]: Item #4 (gender neutralize), and to correspond to Rule 9(c)(2).

Rule 9. Warrant or Summons Upon Indictment or Information

(Majority version)

(a) Issuance.

(1) Request by Prosecution When Issued. Upon the return of an indictment by a grand jury, or the filing of an information, the prosecuting attorney shall request that the court ~~to order that a warrant shall issue~~ either a warrant for the arrest of the defendant; or ~~that~~ a summons to be shall issue and be served upon the defendant.

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Commented [mbh14]: Item #1. Agreed to keep "request," but to re-phrase so it is clear prosecutor must request summons or warrant.

(2) **Affidavits or Sworn Testimony.** [No change]

(3) **Summons in Lieu of Warrant.** Except in class 1, class 2, and class 3 felonies, level 1 and level 2 drug felonies, and ~~in~~ unclassified felonies punishable by a maximum penalty of more than 10 years, whenever an indictment is returned or an information has been filed prior to the arrest of the person named as defendant therein, the court, ~~with the consent of the prosecution,~~ shall have power to issue a summons commanding the appearance of the defendant in lieu of a warrant for his arrest, unless a law enforcement officer presents in writing a basis to believe there is a significant risk of flight or that the victim's or public's safety may be compromised. If empowered to issue a summons under this subsection (a)(3), the court shall issue a summons instead of an arrest warrant when the prosecuting attorney so recommends.

Commented [mbh15]: Item #2

(4) **Standards Relating to Issuance of Summons.** ~~The court shall issue a summons instead of an arrest warrant when the prosecuting attorney so requests.~~ Except in class 1, class 2, and class 3 felonies, level 1 and level 2 drug felonies, and unclassified felonies punishable by a maximum penalty of more than 10 years, the general policy shall favor issuance of a summons instead of a warrant for the arrest of the defendant. When an application is made [no additional changes] . . .

Commented [mbh16]: Issue #6 (majority version)

Commented [mbh17]: Item #5. Did NOT except out indictments. § 16-5-207(2), which created this presumption, does NOT except out indictments.

(5) **Failure to Appear.** If any person properly summoned pursuant to this Rule fails to appear as commanded by the summons, the court shall forthwith issue a warrant for the arrest of that person.

(6) **Corporations.** When a corporation is charged with the commission of an offense, the court shall issue a summons setting forth the nature of the offense and commanding the corporation to appear before the court at a certain time and place.

(b) Form [No change]

(c) Execution or Service and Return. [No change]

Rule 4. Warrant or Summons Upon Felony Complaint

(Minority Version)

(a) Issuance.

(1) **Request by Prosecution.** Upon the filing of a felony complaint in the county court, the prosecuting attorney shall request ~~that the court issue either to order that a warrant shall issue for the arrest of the defendant, or that a summons shall issue and to be served upon the defendant.~~

Commented [mbh1]: Item #3

(2) **Affidavits or Sworn Testimony.** [No change.]

Commented [mbh2]: Item #1. Agreed to keep "request," but to re-phrase so it is clear prosecutor must request summons or warrant,

(3) **Summons in Lieu of Warrant.** ~~The court shall issue a summons instead of an arrest warrant when the prosecuting attorney so requests.~~ Except in class 1, class 2, and class 3 felonies, ~~level 1 and level 2 drug felonies, and in unclassified felonies punishable by a maximum penalty of more than 10 years, whenever a felony complaint has been filed prior to the arrest of the person named as defendant therein, the court, with the consent of the prosecuting attorney,~~ shall have power to issue a summons commanding the appearance of the defendant in lieu of ~~an arrest warrant for his arrest, unless a law enforcement officer presents in writing a basis to believe there is a significant risk of flight or that the victim's or public's safety may be compromised. If empowered to issue a summons under this subsection (a)(3), the court shall issue a summons instead of an arrest warrant when the prosecuting attorney so requests.~~

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Commented [mbh5]: Here's where Kevin and I disagree: can prosecution force issuance of summons even when an officer presents a writing demonstrating flight risk or safety concern?

Commented [mbh6]: Item #6

(4) **Standards Relating to Issuance of Summons.** Except in class 1, class 2, and class 3 felonies, ~~level 1 and level 2 drug felonies, and unclassified felonies punishable by a maximum penalty of more than 10 years~~ the general policy shall favor issuance of a summons instead of a warrant for the arrest of the defendant ~~except where there is reasonable ground to believe that, unless taken into custody, the defendant will flee to avoid prosecution or will fail to respond to a summons.~~ [no additional changes] . . .

(5) **Failure to Appear.** If any person properly summoned pursuant to this Rule fails to appear as commanded by the summons, the court shall forthwith issue a warrant ~~for the his arrest of that person.~~

Commented [mbh7]: Political correctness (item #4)

(6) **Corporations.** [No change.]

(b) Form.

(1) **Warrant** The arrest warrant shall be issued by a judge of a court of record directed to any peace officer and shall:

(I) State the defendant's name or if that is unknown, any name or description by which ~~the defendant~~ can be identified with reasonable certainty;

Commented [mbh8]: Political correctness (item #4)

(II) [No change.]

(III) [No change.]

(IV) [No change.]

(V) [No change.]

(2) **Summons.** If a summons is issued in lieu of a warrant pursuant to this Rule, the summons shall:

(I) [No change.]

(II) State the ~~defendant's name of the person and his~~ address;

Commented [mbh9]: Political correctness (item #4)

(III) [No change.]

(IV) [No change.]

(V) Be signed by the judge or the clerk with the title ~~of his~~the office; and

Commented [mbh10]: Political correctness (item #4)

(VI) [No change.]

(c) Execution or Service and Return.

(1) Warrant.

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(II) [No change.]

(III) ~~Manner.~~ The warrant shall be executed by arresting the defendant. ~~The warrant The officer need not be in the officer's have the warrant in his~~ possession at the time of the arrest, ~~in which event the officers shall then inform the defendant of the offense and of the fact that a warrant has been issued, and upon request shall show the warrant to the defendant as soon as possible. If the warrant is in the officer's possession at the time of the arrest, then the officer but if he has the warrant at that time he shall show the warrant it to the defendant immediately upon request. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense and of the fact that a warrant has been issued, and upon request he shall show the warrant to the defendant as soon as possible.~~

Commented [mbh11]: Question: Rule 9 has none of this stuff about showing the defendant the warrant. Should they be the same?

Commented [mbh12]: Political correctness (item #4)

(IV) Return. The peace officer executing a warrant shall make return thereof to the issuing court. At the request of the prosecuting attorney any unexecuted warrant shall be returned ~~and cancelled to the issuing county judge and be cancelled by him.~~ At the request of the prosecuting attorney, made while a complaint is pending, a warrant

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returned unexecuted and not cancelled, or a duplicate thereof, may be delivered by the county judge to any officer or other authorized person for execution.

(2) **Summons.** [No changes.]

Rule 9. Warrant or Summons Upon Indictment or Information

(a) **Issuance.**

(1) **Request by Prosecution When Issued.** Upon the return of an indictment by a grand jury, or the filing of an information, the prosecuting attorney shall request ~~that the court to order that a warrant shall issue~~ either a warrant for the arrest of the defendant or ~~that a summons to be shall issue and be served upon~~ the defendant.

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(2) **Affidavits or Sworn Testimony.** [No change]

(3) **Summons in Lieu of Warrant.** The court shall issue a summons instead of an arrest warrant when the prosecuting attorney so requests. Except in class 1, class 2, and class 3 felonies, level 1 and level 2 drug felonies, and in unclassified felonies punishable by a maximum penalty of more than 10 years, whenever an indictment is returned or an information has been filed prior to the arrest of the person named as defendant therein, the court, with the consent of the prosecution, shall have power to issue a summons commanding the appearance of the defendant in lieu of a warrant for his arrest, unless a law enforcement officer presents in writing a basis to believe there is a significant risk of flight or that the victim's or public's safety may be compromised. If empowered to issue a summons under this subsection (a)(3), the court shall issue a summons instead of an arrest warrant when the prosecuting attorney so recommends.

Commented [mbh16]: Item #2

Commented [mbh17]: Here's where Kevin and I disagree: can prosecution force issuance of summons even when an officer presents a writing demonstrating flight risk or safety concern?

(4) **Standards Relating to Issuance of Summons.** The court shall issue a summons instead of an arrest warrant when the prosecuting attorney so requests. Except in class 1, class 2, and class 3 felonies, level 1 and level 2 drug felonies, and unclassified felonies punishable by a maximum penalty of more than 10 years, the general policy shall favor issuance of a summons instead of a warrant for the arrest of the defendant. When an application is made [no additional changes]

Commented [mbh18]: Item #5. Did NOT except out indictments. § 16-5-207(2), which created this presumption, does NOT except out indictments.

(5) **Failure to Appear.** If any person properly summoned pursuant to this Rule fails to appear as commanded by the summons, the court shall forthwith issue a warrant for the arrest of that person.

(6) **Corporations.** When a corporation is charged with the commission of an offense, the court shall issue a summons setting forth the nature of the offense and commanding the corporation to appear before the court at a certain time and place.

(b) **Form** [No change]

(c) **Execution or Service and Return.** [No change]

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