MEMORANDUM

TO: CRIMINAL RULES COMMITTEE

FROM: McGREEVY, NICHOLS, HOLMAN AND HOFFMAN

DATED: OCTOBER 13, 2016

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

I. INTRODUCTION

Section 16-5-206 addresses the circumstances of whether a defendant is to be brought before a court by summons or by warrant. Crim. P. 4, entitled “Warrant or Summons Upon Felony Complaint,” addresses the issuance of a warrant or summons after a felony complaint (a formal charging document alleging at least one felony) is filed in the county court. Crim. P. 9, “Warrant or Summons Upon Indictment or Information,” is its counterpart for criminal cases that begin in district court, either by grand jury indictment or information (direct filing).

Various amendments over the past three years to 16-5-206, including the 2016 amendments that triggered formation of our subcommittee, have placed several aspects of these two rules in tension with the statute. On July 15, 2016, the Committee voted not to propose any changes to Crim. P. 4 and 9 based on the 2016 amendments to 16-5-204, which were limited to the circumstances of seeking a summons or warrant before charges are filed in court. However, the Committee recognized that many other pre-2016 amendments still conflicted with some of the language in these two rules, and directed the subcommittee to look at these conflicts and make recommendations about whether, and how, they should be resolved with any changes to the rules.

We identified two areas of conflict, each of which we recommend being resolved with changes to the language of the rules: 1) who makes the decision about whether to proceed by summons or warrant; and 2) the need to accommodate the newly-created felony level drug offenses. In addition to these statute-driven changes, we identified one area in which the two rules seem needlessly different—namely, Rule 4 contains a summons presumption but Rule 9 does not—and recommend that a summons presumption be added to Rule 9 that mirrors the presumption in Rule 4. Finally, we noticed several small language and other differences between the two rules (including that Rule 4 has no headings in its subsections but Rule 9 does) that we recommend cleaning up.

II. WHO DECIDES

There are two aspects of this issue, one subtle and one not-so-subtle.

The subtle aspect is raised by language in subsections (a)(1) of both rules, language which arguably conflicts with the statute and which we recommend be changed. Crim. P. 4(a)(1) currently states: "Upon the filing of a felony complaint in the county court, **the prosecuting attorney shall request** the court to order that warrant shall issue for the arrest of the defendant, or that summons shall issue and be served upon the defendant [emphasis added]." Crim. P. 9(a)(1) contains the identical highlighted language. The statute, §16-5-206(1), states that "the **court** has power to issue a summons . . . in lieu of a warrant [emphasis added]."

Of course, the statute may not be in conflict with these sections of the rules; after all, a prosecuting attorney may request a warrant or summons even if the court has the ultimate authority to decide between the two. But the subcommittee was worried that the current

language in the rules may mislead practitioners (and courts) into thinking prosecutors have a bigger role in this decision than the statute currently permits.

We think the prosecution should still be required to make a recommendation one way or the other, and that this subtle suggestion that the prosecution has a primary role in deciding whether a summons or arrest warrant can issue can be resolved essentially by changing the word "request" to "recommend." Therefore, we propose that Crim. P. 4(a)(1) be amended to read, "Upon the filing of a felony complaint in the county court, the prosecuting attorney shall recommend whether the court should issue a warrant for the arrest of the defendant or a summons to be served on the defendant." We propose the same change to Crim. P. 9(a)(1): "Upon the return of an indictment by a grand jury, or the filing of an information, the prosecuting attorney shall recommend whether the court should issue a warrant for the arrest of the defendant or a summons to be served upon the defendant."

The not-so-subtle version of this problem of who decides is raised in subsection (a)(3) of both rules, which provide that the court's issuance of a summons must be done "with the consent of the prosecuting attorney . . . ." Crim. P. 4(a)(3) and Crim. P. 9 (a)(3). In the subcommittee's view, this language is now clearly contradicted by pre-2016 amendments to the statute, which, as discussed above, provide that the court has the power to make this decision. We recommend that this language be removed.

Of course, the prosecution still has some role in this decision: if it recommends a summons, and the circumstances otherwise permit a summons, the court must issue a summons rather than an arrest warrant. This provision is in both Rules, though it appears as the last sentence in Rule 4(a)(3) and as the first sentence in Rule 9(a)(4). We think it is best to be relocated from Rule 9(a)(4) to 9(a)(3), because that will emphasize that the court must issue a

summons when the prosecution asks for it, but not when any of the charges are in the excluded list. We also need to change the word "requests" to "recommends."

III. DRUG FELONIES

Both rules (at subsection (a)(3)) and the statute currently exclude Class 1, 2 and three felonies, as well as unclassified felonies punishable by a maximum of more than ten years, from the option that summonses can be issued instead of arrest warrants. Rule 4 repeats this exclusionary language in subsection (a)(4), the subsection that creates a presumption of summonses. When drug felonies were created, § 16-5-206(1) was amended to add level 1 and level 2 drug felonies to the list of felonies that could not proceed by summons, but no corresponding change was made to the rules.

Accordingly, we recommend that Crim. P. 4(a)(3), Crim. P. (a)(4) and Crim. P. 9(a)(3) be amended to read: "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 ten years . . . ."

We also noticed that subsection (a)(4) of Rule 4—creating a summons presumption—contains the language excluding class 1, 2 and 3 felonies (and now, with our recommended addition, level 1 and 2 drug felonies), but does not exclude unclassified felonies that carry a maximum of more than 10 years. We believe those unclassified felonies need to be added to the beginning exclusionary language in (a)(4) to match the exclusionary language in (a)(3).

IV. ADDING A SUMMONS PRESUMPTION TO RULE 9

We also noticed that Rule 4(a)(4) contains a presumption that summonses issue, but that Rule 9(a)(4) does not. The subcommittee could see no logical reason why the existence of this presumption should depend on the vagaries of whether charges are brought by district attorneys in felony complaints filed in county courts, by district attorneys by informations filed directly in district court, or by grand juries by indictment. So we suggest that new language be added to Rule 9(a)(4) that mirrors the summons presumption currently in Crim. P. 4(a)(4).

V. HOUSEKEEPING

We noticed some big and small differences between the language in the two rules, and thought that that language should be harmonized, since so much of the other language between the two rules is identical.

At the big end, Rule 4 has subsections on failure to appear and on corporations, but Rule 9 doesn't. We don't see any reason the rules should not be identical in these areas. Not knowing exactly why the Supreme Court thought these provisions necessary to Rule 4, we are recommending that they be added to Rule 9.

The rules also have what appears to be a handful of accidental language differences. Again, unless the differences are about the differences between felony complaints in county court on the one hand and direct files and indictments on the other, we think all the language should be identical.

Finally, we noticed that the numbered sub-subsections in Rule 9 have headings, but that they don't in Rule 4. We suggest that identical headings be added.

VI. CONCLUSION

All of these recommendations are reflected in the following proposed language, shown first in redlined versions and then in clean versions:

Rule 4. Warrant or Summons Upon Felony Complaint

(a) Issuance.

(1) **When Issued.** Upon the filing of a felony complaint in the county court, the prosecuting attorney shall ~~request~~recommend whether the court should~~to order that a warrant shall~~ issue a warrant for the arrest of the defendant~~,~~ or ~~that~~ a summons ~~shall issue and~~to be served ~~up~~on the defendant.

(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 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 a warrant for his arrest. The court shall issue a summons instead of an arrest warrant when the prosecuting attorney so ~~requests~~recommends.

(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 in unclassified felonies punishable by a maximum penalty of more than 10 years [no additional changes] . . . .

(5) **Failure to Appear.** [No change.]

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

(b) [No change.]

(c) [No change.]

Rule 4. Warrant or Summons Upon Felony Complaint

(a) Issuance.

(1) **When Issued.** Upon the filing of a felony complaint in the county court, the prosecuting attorney shall recommend whether the court should issue a warrant for the arrest of the defendant or a summons to be served on the defendant.

(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 a felony complaint has been filed prior to the arrest of the person named as defendant therein, the court shall have power to issue a summons commanding the appearance of the defendant in lieu of a warrant for his arrest. The court shall issue a summons instead of an arrest warrant when the prosecuting attorney so recommends.

(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 in unclassified felonies punishable by a maximum penalty of more than 10 years [no additional changes] . . . .

(5) **Failure to Appear.** [No change.]

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

(b) Form. [No change.]

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

Rule 9. Warrant or Summons Upon Indictment or Information

(a) Issuance.

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

(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. The court shall issue a summons instead of an arrest warrant when the prosecuting attorney so recommends.

(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 in 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 when 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. When an application is made [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 his arrest.

(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 9. Warrant or Summons Upon Indictment or Information

(a) Issuance.

(1) **When Issued.** Upon the return of an indictment by a grand jury, or the filing of an information, the prosecuting attorney shall recommend whether the court should issue a warrant for the arrest of the defendant or a summons to be served on the defendant.

(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 shall have power to issue a summons commanding the appearance of the defendant in lieu of a warrant for his arrest. The court shall issue a summons instead of an arrest warrant when the prosecuting attorney so recommends.

(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 in 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 when 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. When an application is made [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 his arrest.

(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]