SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

RULE PROMULGATION ORDER 17-01

(Adding Super. Ct. Crim. R. 4.1 and 12-I and Amending Super. Ct. Crim. R. 1, 3, 4, 5, 5.1, 6, 7, 9, 11, 12, 12.1, 12.3, 15, 16, 16-I, 24, 26.2, 29, 32, 33, 34, 37, 41, 43, 44-I, 45, 47, and 118)

WHEREAS, pursuant to D.C. Code § 11-946, the Board of Judges of the Superior Court approved the addition of Superior Court Rules of Criminal Procedure 4.1 and 12-I and the amendments to Superior Court Rules of Criminal Procedure 1, 3, 4, 5, 5.1, 6, 7, 9, 11, 12, 12.1, 12.3, 15, 16, 16-I, 24, 26.2, 29, 32, 33, 34, 37, 41, 43, 44-I, 45, 47, and 118; and

WHEREAS, pursuant to D.C. Code § 11-946, the addition of and amendments to these rules, to the extent that they modify the corresponding federal rules, have been approved by the District of Columbia Court of Appeals; it is

ORDERED, that Superior Court Rules of Criminal Procedure 1, 3, 4, 4.1, 5, 5.1, 6, 7, 9, 11, 12, 12-I, 12.1, 12.3, 15, 16, 16-I, 24, 26.2, 29, 32, 33, 34, 37, 41, 43, 44-I, 45, 47, and 118 are hereby enacted and amended as set forth below;[1] and it is further

ORDERED, that the above enumerated rules and amendments shall take effect May 1, 2017, and shall govern all proceedings thereafter commenced and insofar is just and practicable all pending proceedings.

[1] The rules include citations to material anticipated in the June 2017 Supplement to the D.C. Code.

Rule 1. Scope; Authority of the Chief Judge; Definitions

(a) ~~Scope~~SCOPE. These rules govern the procedure in all criminal proceedings in the Superior Court of the District of Columbia.

(b) ~~Authority of the Chief Judge~~AUTHORITY OF THE CHIEF JUDGE. The Chief Judge by order may arrange and divide the business of the Criminal Division as may be necessary for the sound administration of justice, except that branches within the Division may be created or eliminated only by court rule.

(c) ~~Tax Division~~TAX DIVISION. All proceedings brought by the District of Columbia for the imposition of criminal penalties ~~pursuant to~~under the provisions of the statutes relating to taxes levied by or in behalf of the District of Columbia shall be conducted in the Tax Division.

(d) ~~Definitions~~DEFINITIONS. The following definitions apply to these rules:~~.~~

(1) "Attorney for the government" means:

(A) the Attorney General of the United States or an authorized assistant;

(B) a United States Attorney or an authorized assistant;

(C) the Attorney General for the District of Columbia or an authorized assistant; and

(D) any other attorney authorized by law to conduct proceedings under these rules as a prosecutor.

(2) "Civil action" refers to a civil action in the Superior Court.

(3) "Court" means a judge or magistrate judge performing functions authorized by law, except where the term is used to mean the court as an institution.

(4) "District Court" means all United States District Courts.

(5) "Judge" means the Chief Judge, an Associate Judge, or a Senior Judge of the Superior Court of the District of Columbia.

(6) "Law enforcement officer" or "investigative officer" means an officer or member of the Metropolitan Police Department of the District of Columbia or of any other police force operating in the District of Columbia, or an investigative officer or agent of the United States or the District of Columbia.

(7) "Magistrate Judge" means a Magistrate Judge of the Superior Court of the District of Columbia as defined in D.C. Code §§ 11-1732 and -1732A (2012 Repl. & 2017 Supp.).

(8) "Oath" includes an affirmation.

(9) "Organization" is defined in *18 U.S.C. § 18*.

(10) "Superior Court" means the Superior Court of the District of Columbia.

(11) "Telephone" means any technology for transmitting live electronic voice communication.

(12) "Victim" means any person or entity defined as a "victim" or "crime victim" in D.C. Code § 23-1905 (2) (2017 Supp.) or as a "crime victim" in *18 U.S.C. § 3771 (e)(2)(A).*

(13) "Video teleconference" means any technology for transmitting live electronic video communication.

COMMENT TO 2017 AMENDMENTS

Subsections (d)(11), defining "telephone," and (d)(12), defining "victim," were added to correspond with the 2008 and 2011 amendments to the federal rule. The definition of "video teleconference" is unique to the Superior Court rule; it was added to explain the term, which appears throughout the rules.

COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. It differs from the federal rule in several respects.

Paragraph (a) makes clear that these rules apply to all criminal proceedings in the Superior Court.

D.C. Code § 11-902 (b) (2012 Repl.) permits the Superior Court by rule to establish branches within the Division. This rule eliminates the Felony, Misdemeanor and District of Columbia-Traffic Branches of the Criminal Division to permit greater flexibility in case management and utilization of resources.

Paragraph (b) reflects the Chief Judge's authority pursuant to D.C. Code § 11-906 (b) (2012 Repl.) to organize the business of the Superior Court. It replaces former paragraph (d).

Paragraph (d) (Definitions) differs from the federal rule in several ways to reflect local practice. In addition, consistent with the incorporation of Federal Rule 54 into Federal Rule 1, the definitional paragraphs of former Superior Court Rule 54 have been moved, as modified, to this rule.

Subparagraph (d)(3), defining "court," substitutes "judge or magistrate judge" for "federal judge" and adds the phrase "except where the term is used to mean the court as an institution."

Rule 3. The Complaint

The complaint is a written statement of the essential facts constituting the offense charged. Except as provided in Rule 4.1, ~~I~~it must be made under oath before a judge or magistrate judge or any employee of the Superior Court authorized by the Chief Judge to administer oaths.

COMMENT TO 2017 AMENDMENTS

This rule has been amended consistent with the 2011 amendments to the federal rule. It refers to new Rule 4.1 (Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means), permitting complaints to be sought and approved by reliable electronic means.

COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. It differs from the federal rule by substituting the term "judge or magistrate judge" for the term "magistrate judge" and by retaining the local provision that permits any authorized employee of the Superior Court to administer oaths.

Rule 4. Arrest Warrant or Summons on a Complaint

(a) ~~Issuance~~ISSUANCE. If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of an attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If a defendant fails to appear in response to a summons, a judge or magistrate judge must issue a bench warrant. A judge may issue an arrest warrant in lieu of a bench warrant. Except for good cause shown by specific statements appearing in the complaint or in an affidavit filed with the complaint, no warrant shall be issued unless the complaint has been approved by an appropriate prosecutor.

(b) ~~Probable cause~~PROBABLE CAUSE. The finding of probable cause may be based upon hearsay evidence in whole or in part.

(c) ~~Form~~FORM.

(1) *Warrant*. An arrest warrant must:

(A) contain the defendant's name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty;

(B) describe the offense charged in the complaint;

(C) command that the defendant be arrested and brought without unnecessary delay before the court or other person enumerated in *18 U.S.C. § 3041*;

(D) be signed by a judge;

(E) state or contain the name of the court; and

(F) state or contain the date of the issuance of the warrant.

(2) *Summons*. A summons must be in the same form as a warrant except that it must require the defendant to appear before the court at a stated time and place.

(d) ~~Execution or Service, and Return~~EXECUTION OR SERVICE, AND RETURN.

(1) *By Whom*. Only a law enforcement officer or other authorized officer may execute a warrant. The summons may be served by any person authorized to serve a summons in a civil action in the Superior Court or by any officer authorized to execute an arrest warrant.

(2) *Territorial Limits*. A warrant or summons for a felony under D.C. Code §§ 16-1022 and -1024 (2012 Repl. & 2017 Supp.) or for an offense punishable by imprisonment for more than 1 year may be executed or served at any place within the jurisdiction of the United States. A warrant or summons for an offense punishable by imprisonment for not more than 1 year, or by a fine only, or by such imprisonment and a fine, may be executed or served in any place in the District of Columbia.

(3) *Time Limit*. An arrest warrant or summons for an offense punishable by imprisonment for not more than 1 year, or by a fine only, or by such imprisonment and a fine, may not be executed more than 1 year after the date of issuance.

(4) *Manner*.

(A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the original or a duplicate original warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the original or a duplicate original warrant to the defendant as soon as possible.

(B) A summons is served on an individual defendant:

(i) by delivering a copy to the defendant personally; ~~or~~

(ii) by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location; or

(iii) by mailing a copy to the defendant's last known address.

(C) A summons is served on an organization by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. A copy must also be mailed to the organization's last known address within the District of Columbia or to its principal place of business elsewhere in the United States.

(5) *Return*.

(A) After executing a warrant, the officer must return it to the judge, magistrate judge, or other judicial officer before whom the defendant is brought in accordance with Rule 5. The officer may do so by reliable electronic means. At the request of an attorney for the government, an unexecuted warrant must be brought back to and cancelled by a judge.

(B) The person to whom a summons was delivered for service must return it on or before the return day.

(C) At the request of an attorney for the government, a judge may deliver an unexecuted warrant, an unserved summons, or a copy of the warrant or summons to a law enforcement officer or other authorized person for execution or service.

(e) WARRANT BY TELEPHONE OR OTHER RELIABLE ELECTRONIC MEANS. In accordance with Rule 4.1, a judge may issue a warrant or summons based on information communicated by telephone or other reliable electronic means.

COMMENT TO 2017 AMENDMENTS

This rule has been amended consistent with the 2011 amendments to the federal rule. Subsection (d)(4)(A) permits an arresting officer to show the arrestee either "the original or a duplicate original warrant." Subsection (d)(5)(A) permits an arresting officer to return the warrant by reliable electronic means. Finally, a new section (e) was added to refer to new Rule 4.1 (Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means) and to permit warrants and summonses to be sought and approved by reliable electronic means.

COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. It differs from the federal rule in several respects.

Paragraph (a) takes into account the dictates of D.C. Code § 23-561 (a)(2) (2012 Repl.) which states: "If a person fails to appear in response to a summons, a warrant shall issue for his arrest." It also retains the language of the former rule requiring approval by an appropriate prosecutor of any complaint before an arrest warrant issues, except where good cause is shown.

Paragraph (b) retains the language of the former rule regarding the use of hearsay to support probable cause. The language was removed from the federal rule as unnecessary, in part because this principle is addressed in *Federal Rule of Evidence 1101*. Because this jurisdiction has not adopted the Federal Rules of Evidence, the Superior Court rule did not follow this change.

Subparagraphs (c)(1)(E) and (F) retain the additional requirement of the former rule that the warrant contain the name of the court and the date of the issuance of the warrant to conform with the requirements of D.C. Code § 23-561 (b)(1) (2012 Repl.).

Subparagraph (c)(2) differs from subparagraph (b)(2) of the federal rule by substituting "the court" for "Magistrate Judge."

Subparagraphs (d)(2) and (3) include territorial and time limits not found in the federal rule. See D.C. Code § 23-563 (a)–(b) (2012 Repl.) (dealing with warrants or summons issued by the Superior Court); D.C. Code §§ 16-1022, -1024 (2012 Repl.) (defining the crime and punishment for parental kidnapping, which, although a felony, is punishable by a fine of not more than $1000 and/or imprisonment for not more than six months). The time limit in subparagraph (d)(3) is not intended to apply to bench warrants issued as to any offense.

Subparagraphs (d)(2) and (5) recognize the possibility of arrests on Superior Court warrants within or outside the District of Columbia. Accordingly, subparagraph (d)(5) provides for a return to the appropriate judge, magistrate judge, or other appropriate federal, state or local judicial officer.

Subparagraph (d)(4) is substantially identical to subparagraph (c)(3) of the federal rule, with changes in the manner of serving a summons to reflect D.C. Code § 23-562 (a)(2) (2012 Repl.).

Subparagraph (d)(5) is substantially identical to subparagraph (c)(4) of the federal rule, with minor changes to reflect local practice.

Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means

(a) IN GENERAL. A judge may consider information communicated by telephone or other reliable electronic means when reviewing a complaint or deciding whether to issue a warrant or summons.

(b) PROCEDURES. If a judge decides to proceed under this rule, the following procedures apply:

(1) *Taking Testimony Under Oath.* The judge must place under oath—and may examine—the applicant and any person on whose testimony the application is based.

(2) *Creating a Record of the Testimony and Exhibits.*

(A) *Testimony Limited to Attestation*. If the applicant does no more than attest to the contents of a written affidavit submitted by reliable electronic means, the judge must acknowledge the attestation in writing on the affidavit.

(B) *Additional Testimony or Exhibits.* If the judge considers additional testimony or exhibits, the judge must:

(i) have the testimony recorded verbatim by an electronic recording device, by a court reporter, or in writing;

(ii) have any recording or reporter's notes transcribed, have the transcription certified as accurate, and file it;

(iii) sign any other written record, certify its accuracy, and file it; and

(iv) make sure that the exhibits are filed.

(3) *Preparing a Proposed Duplicate Original of a Complaint, Warrant, or Summons.* The applicant must prepare a proposed duplicate original of a complaint, warrant, or summons, and must read or otherwise transmit its contents verbatim to the judge.

(4) *Preparing an Original Complaint, Warrant, or Summons.* If the applicant reads the contents of the proposed duplicate original, the judge must enter those contents into an original complaint, warrant, or summons. If the applicant transmits the contents by reliable electronic means, the transmission received by the judge may serve as the original.

(5) *Modification.* The judge may modify the complaint, warrant, or summons. The judge must then:

(A) transmit the modified version to the applicant by reliable electronic means; or

(B) file the modified original and direct the applicant to modify the proposed duplicate original accordingly.

(6) *Issuance.* To issue the warrant or summons, the judge must:

(A) sign the original documents;

(B) enter the date and time of issuance on the warrant or summons; and

(C) transmit the warrant or summons by reliable electronic means to the applicant or direct the applicant to sign the judge's name and enter the date and time on the duplicate original.

(c) SUPPRESSION LIMITED. Absent a finding of bad faith, evidence obtained from a warrant issued under this rule is not subject to suppression on the ground that issuing the warrant in this manner was unreasonable under the circumstances.

COMMENT TO 2017 AMENDMENTS

This new rule is substantially identical to its federal counterpart, adopted in 2011. The federal rule brought together in one rule the procedures for using a telephone or other reliable electronic

means for reviewing complaints and applying for and issuing warrants and summonses. Such procedures are new to the Superior Court rules.

The rule permits a judge to issue a warrant or summons based on sworn information communicated to the judge by telephone or other reliable electronic means. Like its federal counterpart, this rule provides that, absent a finding of bad faith, evidence seized pursuant to a warrant issued in that manner will not be subject to suppression on the ground that issuing the warrant in that manner was unreasonable under the circumstances. Like the federal rule, this rule does not purport to address suppression of seized evidence based on a claim that the warrant was issued in violation of the Constitution.

Rule 5. Initial Appearance

(a) APPEARANCE UPON AN ARRESTppearance Upon an Arrest.

(1) *In General.* A law enforcement officer within the District of Columbia making an arrest under a warrant issued by the Superior Court upon a complaint, making an arrest without a warrant, or receiving a person arrested by a special police officer or other authorized person must take the arrested person without unnecessary delay before the court.

(2) *Arrest Without a Warrant.* If a person arrested without a warrant is brought before the court, a complaint or information must be filed forthwith.

(3) *Preliminary Police Duties.* Before taking an arrested person before the court, a law enforcement officer may perform any recording, fingerprinting, photographing, or other preliminary police duties required in the particular case, and if such duties are performed with reasonable promptness, the period of time required therefforfor them will not constitute delay within the meaning of this rule.

(4) *18 U.S.C. § 3501.* This rule shouldall not be construed to conflict with or otherwise supersede *18 U.S.C. § 3501*.

(b) ADVICEdvice. The court must inform the defendant of the following:

(1) the complaint against the defendant, and of any affidavit filed with it;

(2) the defendant's right to retain counsel or to request that counsel be appointed if the defendant cannot obtain counsel;

(3) the defendant's right to a preliminary hearing if a felony is charged; and

(4) the defendant's right not to make a statement, and that any statement made may be used against the defendant;. and

(5) that a defendant who is not a United States citizen may request that an attorney for the government or a law enforcement official notify a consular officer from the defendant's country of nationality that the defendant has been arrested--but that even without the defendant's request, a treaty or other international agreement may require consular notification.

(c) CONSULTING WITH COUNSELonsulting With Counsel. The court must allow the defendant reasonable time and opportunity to consult counsel.

(d) DETENTION OR RELEASEetention or Release. The court must detain or release the defendant as provided by statute or these rules.

(e) PROBABLE CAUSE DETERMINATION FOLLOWING ARREST WITHOUT A WARRANTrobable Cause Determination Following Arrest Without a Warrant.

(1) *Sworn Statement of Fact.* If a defendant is arrested without a warrant, and the court imposes upon the defendant any conditions of release which constitute a significant restraint on pretrial liberty, the court must, unless the defendant waives an initial probable cause determination, require the prosecutor to file with the clerk by the end of the next working day a copy of a sworn statement of fact offered to establish probable cause.

(2) *Probable Cause Determination.* Upon the filing of the sworn statement of fact, the court must then proceed promptly to determine if there is probable cause to believe that an offense has been committed and that the defendant committed it.

(3) *Without a Hearing.* The determination of probable cause may be made by the court without conducting a hearing.

(4) *Hearsay Evidence.* The court's finding of probable cause may be based upon hearsay evidence in whole or in part.

(5) *Docket Entry.* The court must enter its determination as to probable cause on the docket along with the date of the determination.

(6) *Nonmoving Traffic Violation.* In nonmoving traffic violation cases, the traffic citation may be considered by the court as sufficient to establish probable cause.

(7) *No Probable Cause.* If the court determines, based on the information offered by the prosecutor, that there is no probable cause, the court must release the defendant, without significant restraints on the defendant's liberty, and must order the defendant to appear for the next court proceeding.

(f) ARRESTS OUTSIDE THE DISTRICT OF COLUMBIA~~rrests Outside the District of Columbia~~. A person arrested outside the District of Columbia on a warrant issued by the Superior Court of the District of Columbia must be taken before the court or other person enumerated in *18 U.S.C. § 3041* and must be held to answer in the court having jurisdiction to try the defendant pursuant to the Federal Rules of Criminal Procedure as if the warrant had been issued by the United States District Court for the District of Columbia.

(g) VIDEO TELECONFERENCING~~ideo Teleconferencing~~. Video teleconferencing may be used to conduct an appearance under this rule if the defendant, having been afforded the opportunity to consult with counsel, consents.

COMMENT TO 2017 AMENDMENTS

The Superior Court rule continues to differ substantially from the federal rule, including omission of federal subsection (c)(4), "Procedure for Persons Extradited to the United States"—a provision that was added to the federal rule in 2012.

However, the Superior Court rule incorporates the 2014 federal amendment, which requires the court, at arraignment or presentment, to advise all defendants of the right to or requirement for consular notification if the defendant is a non-citizen. The provision appears in section (d) of the federal rule, but it has been added to section (b) of the Superior Court rule.

COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. It differs from the federal rule in several respects.

Subparagraph (a)(1) of this rule limits its application to instances of arrest or receipt of an arrested person within the District of Columbia. *Cf.* D.C. Code § 23-563 (c) (2012 Repl.). Subparagraph (a)(4) includes a rule of construction to avoid conflicting with or superseding of *18 U.S.C. § 3501*, dealing with the admissibility of confessions. *See* D.C. Code §§ 23-562 (c)(1), 5-115.01 (2012 Repl.). *Cf. Dickerson v. United States*, 530 U.S. 428 (2000).

The provisions of former Rule 5(d) have been moved to Rule 5.1 to be consistent with *Federal Rules 5 and 5.1*. 12

Paragraph (e), which contains the provisions of former paragraph (c), has no federal counterpart. It sets forth the procedures for a probable cause determination that must be made whenever the court imposes significant restraints on the pretrial liberty of a person arrested without a warrant. See *Gerstein v. Pugh*, 420 U.S. 103 (1975). Subparagraph (e)(5) substitutes the term "docket" for "case jacket."

Paragraph (f) contains the provisions of former Superior Court Rule 5-I.

Paragraph (g) is identical to paragraph (f) of the federal rule except that it makes explicit that the defendant must have been afforded the opportunity to consult with counsel before consenting to the procedure.

Rule 5.1. Preliminary Hearing

(a) ~~In General~~IN GENERAL. If a defendant is charged with a felony, the court must conduct a preliminary hearing unless:

(1) the defendant waives the hearing;

(2) the defendant is indicted;

(3) the government files an information under Rule 7(b) charging the defendant with a felony; or

(4) the government files an information charging the defendant with a misdemeanor.

(b) ~~Scheduling~~SCHEDULING. Unless otherwise provided by statute, the court must hold the preliminary hearing within a reasonable time, but no later than 1~~0~~4 days after the initial appearance if the defendant is detained and no later than 2~~0~~1 days if the defendant is not detained.

(c) ~~Extending the Time~~EXTENDING THE TIME. With the defendant's consent and upon a showing of good cause—taking into account the public interest in the prompt disposition of criminal cases—the court may extend the time limits in Rule 5.1(b) one or more times. If the defendant does not consent, the court may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay.

(d) ~~Hearing and Finding~~HEARING AND FINDING. At the preliminary hearing, the defendant must not be called upon to plead. The finding of probable cause may be based on hearsay evidence in whole or in part. The defendant may cross-examine adverse witnesses and may introduce evidence but may not object to evidence on the ground that it was unlawfully acquired. Motions to suppress must be made to the court as provided in Rules 12 and 47. The purpose of the preliminary hearing is not for discovery. If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the court must promptly require the defendant to appear for further proceedings.

(e) ~~Discharging the Defendant~~DISCHARGING THE DEFENDANT. If the court finds no probable cause to believe an offense has been committed or the defendant committed it, the court must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.

(f) PRODUCING A STATEMENT.

(1) *In General.* Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the court for good cause rules otherwise in a particular case.

(2) *Sanctions for Not Producing a Statement.* If a party disobeys a Rule 26.2 order to deliver a statement to the moving party, the court must not consider the testimony of a witness whose statement is withheld.

COMMENT TO 2017 AMENDMENTS

In accordance with the 2009 amendments to the federal rule, the deadlines formerly set at 10 or 20 days have been revised to 14 or 21 days—an amendment that reflects the time-calculation changes made to Rule 45.

Section (f) is added to the rule. This section makes Rule 26.2 applicable to preliminary hearings. It is substantially identical to section (h) of the federal rule.

COMMENT TO 2016 AMENDMENTS

This rule consists of provisions previously found in paragraph (d) of former Superior

Court Rule 5. This change conforms Rules 5 and 5.1 to their federal counterparts.

Paragraph (b) has been modified by the addition of the phrase "unless otherwise provided by statute" in recognition of D.C. Code §§ 23-1322, -1323, and -1329 (2012 Repl.), which address the scheduling of preventive detention hearings.

Paragraph (d) retains the language of the former rule regarding the use of hearsay to support probable cause. The language was removed from the federal rule as unnecessary, in part because this principle is addressed in *Federal Rule of Evidence 1101*. Because this jurisdiction has not adopted the Federal Rules of Evidence, the Superior Court rule did not follow this change.

Paragraph (g) of the federal rule ("Recording the Proceeding") has been omitted from this rule as unnecessary in light of Superior Court Rule 36-I, which requires the recording of all court proceedings.

Paragraph (h) of the federal rule, which provides that Rule 26.2(a)-(d) and (f) applies at preliminary hearings, is not included because that paragraph was not adopted during prior reviews and amendments to the Superior Court rules.

Rule 6. The Grand Jury

(a) ~~Summoning a Grand Jury~~SUMMONING A GRAND JURY.

(1) *In General*. When the public interest so requires, the Chief Judge or an associate judge designated by the Chief Judge must order one or more grand juries to be summoned. A grand jury must have 16 to 23 members, and the Chief Judge or an associate judge designated by the Chief Judge must order that enough legally qualified persons be summoned to meet this requirement.

(2) *Alternate Jurors*. When a grand jury is selected, the court may also select alternate jurors. Alternate jurors must have the same qualifications and be selected in the same manner as any other juror. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror is subject to the same challenges, takes the same oath, and has the same authority as the other jurors.

(b) ~~Objection to the Grand Jury or to a Grand Juror~~OBJECTION TO THE GRAND JURY OR TO A GRAND JUROR.

(1) *Challenges*. Either the government or a defendant may challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified.

(2) *Motion to Dismiss an Indictment*. A party may move to dismiss the indictment based on an objection to the grand jury or on an individual juror's lack of legal qualification, unless the court has previously ruled on the same objection under Rule 6(b)(1). The motion to dismiss is governed by D.C. Code § 11-1910 (2012 Repl.). The court must not dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment.

(c) ~~Foreperson and Deputy Foreperson~~FOREPERSON AND DEPUTY FOREPERSON. The summoning judge or, in the summoning judge's absence or disability, the Chief Judge or a judge designated by the Chief Judge will appoint one juror as the foreperson and another as the deputy foreperson. In the foreperson's absence, the deputy foreperson will act as the foreperson. The foreperson may administer oaths and affirmations and will sign all indictments. The foreperson—or another juror designated by the foreperson—will record the number of jurors concurring in every indictment and will file the record with the clerk, but the record may not be made public unless the court so orders.

(d) ~~Who May Be Present~~WHO MAY BE PRESENT.

(1) *While the Grand Jury Is in Session*. The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device.

(2) *During Deliberations and Voting*. No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting.

(e) ~~Recording and Disclosing the Proceedings~~RECORDING AND DISCLOSING THE PROCEEDINGS.

(1) *Recording the Proceedings*. Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. But the validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.

(2) *Secrecy*.

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

(3) *Exceptions*.

(A) Disclosure of a grand-jury matter—other than the grand jury's deliberations or any grand juror's vote—may be made to:

(i) an attorney for the government for use in performing that attorney's duty;

(ii) any government personnel—including those of a state, state subdivision, Indian tribe, or foreign government—that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal and District of Columbia criminal law; or

(iii) a person authorized by *18 U.S.C. § 3322*.

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal and District of Columbia criminal law. An attorney for the government must promptly provide the Superior Court with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand-jury matter to another grand jury in the District of Columbia.

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in *50 U.S.C. § 3003*), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any state, state subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only in a manner consistent with any guidelines issued by the Attorney General and the Director of National Intelligence.

(ii) Within a reasonable time after disclosure is made under Rule 6(e)(3)(D), an attorney for the government must file, under seal, a notice with the court stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

(iii) As used in Rule 6(e)(3)(D), the term "foreign intelligence information" means:

(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against—

- actual or potential attack or other grave hostile acts of a foreign power or its agent;
- sabotage or international terrorism by a foreign power or its agent; or
- clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to—

- the national defense or the security of the United States; or
- the conduct of the foreign affairs of the United States.

(E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter:

(i) preliminarily to or in connection with a judicial proceeding;

(ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury;

(iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation;

(iv) at the request of the government if it shows that the matter may disclose a violation of state, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, or Indian tribal, or foreign government official for the purpose of enforcing that law; or

(v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(F) A petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed with the clerk of the court. Unless the hearing is ex parte—as it may be when the government is the petitioner—the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:

(i) an attorney for the government;

(ii) the parties to the judicial proceeding; and

(iii) any other person whom the court may designate.

(4) *Sealed Indictment*. The judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons.

(5) *Closed Hearing*. Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.

(6) *Sealed Records*. Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

(7) *Contempt*. A knowing violation of Rule 6, or of guidelines jointly issued by the Attorney General and the Director of National Intelligence ~~pursuant to~~under Rule 6, may be punished as a contempt of court.

(f) ~~Indictment and Return~~INDICTMENT AND RETURN. A grand jury may indict only if at least 12 jurors concur. The grand jury—or its foreperson or deputy foreperson—must return the indictment to a judge in open court. To avoid unnecessary cost or delay, the judge may take the return by video teleconference. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the judge.

(g) ~~Discharging the Grand Jury~~DISCHARGING THE GRAND JURY. A grand jury must serve until discharged by the Chief Judge or other judge designated by the Chief Judge; but no grand jury may serve more than 18 months unless the Chief Judge or designee extends the service of the grand jury for a period of 6 months or less upon determination that such extension is in the public interest.

(h) ~~Excusing a Juror~~EXCUSING A JUROR. At any time, for good cause, the Chief Judge or other judge designated by the Chief Judge may excuse a juror either temporarily or permanently, and if permanently, the Chief Judge or designee may impanel an alternate juror in place of the excused juror.

(i) ~~"Indian Tribe" Defined~~"INDIAN" TRIBE DEFINED. "Indian tribe" means an Indian tribe recognized by the Secretary of the Interior on a list published in the Federal Register under *25 U.S.C. § ~~479a-1~~5131*.

COMMENT TO 2017 AMENDMENTS

Section (f) has been amended to conform to the 2011 amendments to the federal rule. It permits the court to take an indictment return by video teleconference to avoid unnecessary cost or delay.

COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002, and to the minor stylistic changes made in 2006. It differs from the federal rule in several respects.

Paragraphs (a), (c) (g),and (h) provide that the Chief Judge (or his or her designee), rather than the court in general, controls the summoning, discharging, and excusing of jurors and the appointing of the foreperson and deputy foreperson.

Subparagraph (b)(2), concerning motions to dismiss the indictment, refers to D.C. Code § 11-1910 (2012 Repl.), rather than to the federal statute, *28 U.S.C. § 1867(e)*.

The contempt provision, formerly the last sentence of subparagraph (e)(2), is now subparagraph (e)(7).

Subparagraph (e)(3) contains several new provisions. First, subparagraph (e)(3)(A)(ii) recognizes the sovereignty of Indian tribes and the possibility that it would be necessary to disclose grand-jury information to appropriate tribal officials in order to enforce the law. Similar language has been added to Rule 6(e)(3)(E)(iv).

Second, subparagraph (e)(3)(A)(iii) recognizes that disclosure may be made to a person under *18 U.S.C. § 3322* (authorizing disclosures to an attorney for the government and banking regulators for enforcing civil forfeiture and civil banking laws).

Third, subparagraph (e)(3)(E)(v) addresses disclosure of grand-jury information to armed forces personnel where the disclosure is for the purpose of enforcing military criminal law under the Uniform Code of Military Justice, *10 U.S.C. §§ 801-946*.

Fourth, subparagraph (e)(3)(D) reflects changes made to Rule 6 by Section 203 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 (Pub. L. No. 107-56; 115 Stat. 272) and by Section 6501 of the Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004 (Pub. L. No. 108-458; 118 Stat. 3638). The USA PATRIOT Act provision permits an attorney for the government to disclose grand-jury matters involving foreign intelligence or counterintelligence to other federal officials, in order to assist those officials in performing their duties. The term "foreign intelligence information" is defined in Rule 6(e)(3)(D)(iii). The IRTPA provision permits an attorney for the government to disclose grand jury matters involving, within the United States or elsewhere, threats of attack, sabotage, terrorism and clandestine intelligence gathering activities to appropriate federal, state, Indian tribal, or foreign government officials, in order to assist those officials in preventing or responding to such threats or activities. Under Rule 6(e)(3)(D)(i), the federal official receiving the information may only use the information as necessary and may be otherwise limited in making further disclosures. Any disclosures made under this provision must be reported under seal, within a reasonable time, to the court.

Finally, subparagraph (e)(3)(E)(iii) is a new provision added by the IRTPA. It permits the court, on motion of the government, to authorize disclosures sought by a foreign court or prosecutor for use in an official criminal investigation.

Subparagraph (e)(3)(B) differs from the federal rule in two ways. First, it retains a reference to the government attorney's duty to enforce both local and federal criminal law. Second, it retains a requirement that the attorney for the government provide disclosure notice to "the Superior Court" rather than to "the court that impaneled the grand jury."

Subparagraph (e)(3)(C) consists of language formerly found in subparagraph (e)(3)(C)(iii). It retains language permitting the attorney for the government to disclose a "grand-jury matter to another grand jury in the District of Columbia", rather than to a federal grand jury. Similarly, subparagraph (e)(3)(F) retains language, formerly in subparagraph (e)(3)(D), requiring that a disclosure petition be filed "with the clerk of the court" rather than "in the district where the grand jury convened."

Subparagraph (e)(3)(G) of the federal rule, concerning a disclosure petition "aris[ing] out of a judicial proceeding in another district," has been omitted as not applicable to Superior Court practice.

Subparagraph (e)(4) is the same as the federal rule except that this rule refers to the "judge" rather than to the "magistrate judge to whom an indictment is returned." Similarly, paragraph (f) refers twice to "judge" rather than to "magistrate judge."

Paragraphs (g) and (h) ("Discharging the Grand Jury" and "Excusing a Juror," respectively) consist of language that was previously found in paragraph (g) ("Discharge and Excuse").

Paragraph (g) differs from the federal rule by omitting the phrase "except as otherwise provided by statute," which refers to the locally inapplicable *18 U.S.C. § 3331*.

Rule 7. The Indictment and the Information

(a) ~~When Used~~WHEN USED. An offense which may be punished by imprisonment for a term exceeding one year must be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or information. An information may be filed without leave of court, but in the case of a person arrested without a warrant, the person must be brought before the court and charged forthwith by information or complaint or the person must be discharged.

(b) ~~Waiving Indictment~~WAIVING INDICTMENT. An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant—in open court and after being advised of the nature of the charge and of the defendant's rights—waives prosecution by indictment.

(c) ~~Nature and Contents~~NATURE AND CONTENTS.

(1) *In General*. The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government. It need not contain a formal introduction or conclusion. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated. For purposes of an indictment referred to in D.C. Code § 23-331 (2012 Repl.), for which the defendant's true name is unknown and the defendant's identity has been established with reasonable certainty by forensic testing of DNA evidence as described in that statute, it shall be sufficient for the indictment to be by fictitious name.

(2) *Citation Error*. Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction.

(d) ~~Surplusage~~SURPLUSAGE. Upon the defendant's motion, the court may strike surplusage from the indictment or information.

(e) ~~Amending an Information~~AMENDING AN INFORMATION. Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the court may permit an information to be amended at any time before the verdict or finding.

(f) ~~Bill of Particulars~~BILL OF PARTICULARS. The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 14~~0~~ days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.

COMMENT TO 2017 AMENDMENTS

In accordance with the 2009 amendment to the federal rule, the 10-day time period was expanded to 14 days—an amendment that reflects the time-calculation changes made to Rule 45.

COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. It differs from the federal rule in several respects.

Paragraph (a) retains the structure and content of the former Superior Court rule, and rejects the structure and content of the federal rule as not locally applicable for the following reasons.

First, paragraph (a) defines when an indictment is used in relation to the length of the penalty, not whether the offense is termed a felony or misdemeanor. See D.C. Code § 23-301 (2012 Repl.) (prosecution by indictment for offenses punishable by imprisonment for a term exceeding one year). An offense denominated a felony under District of Columbia law may be punished by a term of imprisonment of less than one year. See D.C. Code § 16-1024 (2012 Repl.) (parental kidnapping). No indictment would be required by virtue of the penalty.

Second, paragraph (a) does not adopt the provision of the federal rule that excludes criminal contempt from prosecution by indictment. Where a District of Columbia statute authorizes punishment for criminal contempt, an indictment or information may be required, depending on the maximum penalty. See D.C. Code § 23-1329 (c) (2012 Repl.) (criminal contempt for violating release conditions, penalty not to exceed six months); D.C. Code § 11-944 (2012 Repl.) (criminal contempt, penalty not specified); D.C. Code § 23-301 (2012 Repl.) (prosecution by indictment for offenses punishable by imprisonment for a term exceeding one year). This modification is not intended to have any impact on contempt proceedings under Rule 42.

Third, paragraph (a) omits references to offenses punishable by death. The District of Columbia has no death penalty.

Finally, paragraph (a) does not refer to *Federal Rule 58(b)(1)* respecting misdemeanors since that rule has no local counterpart.

Subparagraph (c)(1) reflects local law regarding DNA indictments.

Subparagraph (c)(2) of the federal rule dealing with criminal forfeitures is omitted. Proceedings for the forfeiture of property in the Superior Court are brought pursuant to Superior Court Civil Rule 71A-I.

Rule 9. Arrest Warrant or Summons on an Indictment or Information

(a) ~~Issuance~~ISSUANCE. A judge must issue a warrant—or at the government's request, a summons—for each defendant named in an indictment or named in an information if one or more affidavits accompanying the information establish probable cause to believe that an offense has been committed and that the defendant committed it. The judge may issue more than one warrant or summons for the same defendant. The judge must issue the arrest warrant to an officer authorized to execute it or the summons to a person authorized to serve it. If a defendant fails to appear in response to a summons, the court must issue a warrant.

(b) ~~Form~~FORM.

(1) *Warrant*. The warrant must conform to Rule 4(c)(1) except that it must be signed by the clerk and must describe the offense charged in the indictment or information. The terms of release or detention may be fixed by the judge and endorsed on the warrant.

(2) *Summons*. The summons must be in the same form as a warrant except that it must require the defendant to appear before the court at a stated time and place.

(c) ~~Execution or Service; Return; Initial Appearance~~EXECUTION OR SERVICE; RETURN; INITIAL APPEARANCE.

(1) *Execution or Service*.

(A) The warrant must be executed or the summons served as provided in Rule 4(d).

(B) The officer executing the warrant must proceed in accordance with Rule 5(a)(1).

(2) *Return*. A warrant or summons must be returned in accordance with Rule 4(d)(5).

(3) *Initial Appearance*. When an arrested or summoned defendant first appears before the court, the judge or magistrate judge must proceed under Rule 5.

(d) WARRANT BY TELEPHONE OR OTHER MEANS. In accordance with Rule 4.1, a judge may issue an arrest warrant or summons based on information communicated by telephone or other reliable electronic means.

COMMENT TO 2017 AMENDMENTS

This rule has been amended consistent with the 2011 amendments to the federal rule. New section (d) refers to new Rule 4.1 (Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means), permitting warrants and summonses to be sought and approved by reliable electronic means.

COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. It differs from the federal rule in several respects.

In paragraph (a), the phrase “a judge” has been substituted for “the court.” The latter phrase is now defined to include both judges and magistrate judges. A magistrate judge is not authorized to issue an arrest warrant. The last sentence of paragraph (a) takes into account D.C. Code § 23-561 (a)(2) (2012 Repl.), which requires that a warrant issue when a person fails to appear in response to a summons. Because a judge or a magistrate judge may issue such a warrant, that sentence uses the phrase “the court.”

In addition, paragraph (a) differs from the former Superior Court rule by eliminating as unnecessary language specifying that some warrants be issued to the Chief of Police and that others be issued to the Chief or to the United States Marshal, and by substituting the requirement

that process be issued to and served by authorized persons. The latter are specified in D.C. Code § 16-703 (c) and (d) (2012 Repl.). A similar change has been made to paragraph (c).

In order to conform to local practice, subparagraph (b)(1) retains a provision permitting the court to specify release conditions on a warrant. See D.C. Code §§ 16-704, 23-1110 (2012 Repl.).

Subparagraph (c)(3) differs from the federal rule because a person arrested on a warrant may first appear before an associate judge or a magistrate judge in Superior Court.

Rule 11. Pleas

(a) ~~Entering a Plea~~ENTERING A PLEA.

(1) *In General*. A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) *Conditional Plea*. With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) *Nolo Contendere Plea*. Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) *Failure to Enter a Plea*. If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) ~~Considering and Accepting a Guilty or Nolo Contendere Plea~~CONSIDERING AND ACCEPTING A GUILTY OR NOLO CONTENDERE PLEA.

(1) *Advising and Questioning the Defendant*. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) the court's authority to order restitution; and

(K) that if the defendant is not a citizen of the United States, conviction of the offense for which the defendant has been charged may have the consequences of removal, deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

(2) *Ensuring That a Plea Is Voluntary*. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) *Determining the Factual Basis for a Plea*. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(4) *Innocence Protection Act*. If the defendant is entering a plea to a crime of violence, the court must ensure that the defendant has been advised as required by D.C. Code § 22-4132 (2012 Repl.).

(c) ~~Plea Agreement Procedure~~PLEA AGREEMENT PROCEDURE.

(1) *In General*. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) *Disclosing a Plea Agreement*. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) *Judicial Consideration of a Plea Agreement*.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report. If, however, the defendant enters a plea of guilty or nolo contendere to an offense involving a victim ~~as defined in D.C. Code § 23-1905 (2)(A) (2012 Repl.)~~, and the agreement is of the type specified in Rule 11(c)(1)(C), the court must defer that decision until the conditions of Rule 32(a) are met.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) *Accepting a Plea Agreement*. If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) *Rejecting a Plea Agreement*. If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) ~~Withdrawing a Guilty or Nolo Contendere Plea~~WITHDRAWING A GUILTY OR NOLO CONTENDERE PLEA. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason;

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal; or

(3) after the court imposes sentence, in order to correct manifest injustice.

(e) ~~Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements~~ADMISSIBILITY OR INADMISSIBILITY OF A PLEA, PLEA DISCUSSIONS, AND RELATED STATEMENTS. Except as otherwise provided in this section~~paragraph~~, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the government that do not result in a plea of guilty or that result in a plea of guilty later withdrawn.

However, such a statement is admissible:

(1) in any proceeding wherein another statement made in the course of the same plea or plea discussion has been introduced and the statement ought in fairness be considered contemporaneously with it; or

(2) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) ~~Recording the Proceedings~~RECORDING THE PROCEEDINGS. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(g) ~~Harmless Error~~HARMLESS ERROR. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

COMMENT TO 2017 AMENDMENTS

Subsection (c)(3)(A) has been amended to reflect that the definition of "victim" is now in Rule 1. Additionally, the term "removal" has been added to the warning about immigration consequences in subsection (b)(1)(K). This amendment maintains the language prescribed by D.C. Code § 16-713 (2012 Repl.) but reflects the shift in terminology brought about by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. It differs from the federal rule in several respects.

In subparagraph (b)(1), the advice required to be given to the defendant differs from the federal rule. Four subparagraphs found in the federal rule are not included, as they are locally inapplicable: (J) on forfeiture, (L) on special assessments, (M) on application of the United States Sentencing Guidelines, and (N) on waiver of appeal and collateral attacks.

Subparagraph (b)(1)(H) includes a new requirement that the court advise the defendant of the applicable term of supervised release. This has long been required by the federal rule, but was not relevant in Superior Court until the enactment of D.C. Code § 24-403.01 (2012 Repl.) as part of the Sentencing Reform Amendment Act of 2000, which requires the imposition of supervised release following a term of imprisonment.

A new subparagraph (b)(1)(K) has been added to reflect the requirements of D.C. Code § 16-713 (2012 Repl.) (Alien Sentencing).

A new subparagraph (b)(4) has been added to reflect the requirements of the Innocence Protection Act of 2001, D.C. Code § 22-4132 (2012 Repl.).

Subparagraph (c)(1)(C) omits the federal rule's reference to the United States Sentencing Guidelines.

Subparagraph (c)(3)(A) provides that whenever the plea agreement is of the type specified in subparagraph (c)(1)(C) and the plea is to an offense involving a victim as defined in D.C. Code § 23-1905 (2012 Repl.), the court must defer deciding whether to accept the agreement until it has reviewed the presentence report.

Consistent with the reorganization of the federal rules, paragraph (d) of this rule now contains the substance of former Superior Court Rule 32(e) (Withdrawal of Plea of Guilty). It retains the difference between the federal and Superior Court provisions: post-sentence plea withdrawal is not permitted by the federal rule, but is permitted by this rule to correct manifest injustice. No change in practice is intended.

Paragraph (e) retains the language of the former Superior Court rule regarding the admissibility of pleas and related statements. The corresponding language in the federal rule was changed to refer to *Federal Rule of Evidence 410*. Because this jurisdiction has not adopted the Federal Rules of Evidence, the Superior Court rule did not follow this change.

Paragraph (i) of the former Superior Court rule, defining the term "court," has been deleted as unnecessary in light of the definition of the term in Rule 1.

Rule 12. Pleadings and Pretrial Motions

(a) PLEADINGS~~leadings~~. The pleadings in a criminal proceeding are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.

(b) PRETRIAL~~retrial~~ MOTIONS~~otions~~.

(1) *In General*. A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits. Rule 47 applies to a pretrial motion.

(2) *Motions That May Be Made at Any Time~~Before Trial~~*. ~~A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.~~ A motion that the court lacks jurisdiction may be made at any time while the case is pending.

(3) *Motions That Must Be Made Before Trial*. The following defenses, objections, and requests must be raised ~~before trial~~by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

(A) ~~a motion alleging~~ a defect in instituting the prosecution,~~;~~ including:

(i) improper venue;

(ii) preindictment delay;

(iii) a violation of the constitutional right to a speedy trial;

(iv) selective or vindictive prosecution; and

(v) an error in the grand-jury proceeding or preliminary hearing;

(B) ~~a motion alleging~~ a defect in the indictment or information, including:~~—but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense;~~

(i) joining two or more offenses in the same count (duplicity);

(ii) charging the same offense in more than one count (multiplicity);

(iii) lack of specificity;

(iv) improper joinder; and

(v) failure to state an offense;

(C) ~~a motion to~~ suppression of evidence;

(D) ~~a Rule 14 motion to~~ severance of charges or defendants under Rule 14; and

(E) ~~a~~discovery under Rule 16~~ motion for discovery~~.

(4) *Notice of the Government's Intent to Use Evidence*.~~:~~

(A) *At the Government's Discretion*. At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) *At the Defendant's Request*. At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(c) DEADLINE FOR A PRETRIAL MOTION; CONSEQUENCES OF NOT MAKING A TIMELY MOTION.

(1) *Setting the Deadline*. The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing. If the court does not set one, the deadline is the start of trial.

(2) *Extending or Resetting the Deadline*. At any time before trial, the court may extend or reset the deadline for pretrial motions.

(3) *Consequences of Not Making a Timely Motion Under Rule 12(b)(3)*. If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if the party shows good cause.

(dc) RULING ON A MOTION~~uling on a Motion~~. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

~~(d) Waiver of a Defense, Objection, or Request. A party waives any Rule 12(b)(3) defense, objection, or request not raised at the time required by Rule 47 or by any extension the court provides. For good cause, the court may grant relief from the waiver~~.

(e) ~~Defendant's Continued Custody or Release Status~~DEFENDANT'S CONTINUED CUSTODY OR RELEASE STATUS. If the court grants a motion to dismiss based on a defect in instituting the prosecution, in the indictment, or in the information, it may order the defendant to be released or detained under D.C. Code § 23-1321 et seq. (2012 Repl. & 2017 Supp.) for a specified time until a new indictment or information is filed. This rule does not affect any statutory period of limitations.

(f) ~~Producing Statements at a Suppression Hearing~~PRODUCING STATEMENTS AT A SUPPRESSION HEARING. Rule 26.2 applies at a suppression hearing under Rule 12(b)(3)(C). If the defendant has called a law enforcement officer as a witness, both the government and the defendant are required to produce statements of the officer in their possession under the terms of Rule 26.2.

COMMENT TO 2017 AMENDMENTS

This rule incorporates the 2014 amendments to *Federal Rule of Criminal Procedure 12*, except that section (e) has not been reserved. In addition to the 2014 federal amendments, the Superior Court rule now includes federal subsections (c)(1)-(2), which allow the court to establish the motion deadlines. Correspondingly, motion deadlines have been removed from Rule 47.

COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. It differs from the federal rule in several respects.

Consistent with the former rule, paragraphs (c) and (f) of the federal rule have been omitted. Paragraph (c) of the federal rule (Motion Deadline) is unnecessary because the time for filing motions is governed by Rule 47. Paragraph (f) (Recording the Proceedings) is unnecessary in light of Superior Court Rule 36-I, which requires the recording of all proceedings.

Consistent with the organization of the federal rules, paragraphs (c) and (e) of this rule have been incorporated from former Superior Court Rule 47-I (g) and (h).

Paragraph (c) now includes the federal rule's requirement that the court state its essential factual findings on the record when deciding a motion.

Paragraph (e) has been modified to refer to local rather than federal law.

Paragraph (f) retains a difference between the federal and local rule with respect to producing statements of law enforcement officers called by the defendant.

Rule 12-I. Motions Practice

(a) STATEMENT OF POINTS AND AUTHORITIES. Each motion must include or be accompanied by a statement of the specific points and authorities that support the motion, including where appropriate a concise statement of facts. If a table of cases is provided, counsel must place asterisks in the margin to the left of those cases or authorities on which counsel chiefly relies.

(b) OPPOSING POINTS AND AUTHORITIES. Within 14 days after service of the motion or at such other time as the court may direct, an opposing party must file and serve a statement of opposing points and authorities in opposition to the motion. If a statement of opposing points and authorities is not filed within the prescribed time, the court may treat the motion as conceded.

(c) PROPOSED ORDER. Each motion and opposition must be accompanied by a proposed order.

COMMENT TO 2017 AMENDMENTS

This rule is new to the Superior Court Rules of Criminal Procedure. It includes provisions previously found in Rule 47, including the requirement for stating authorities and the time for filing an opposition. The statement of points and authorities may be included as part of the motion; there is no requirement that it be a separate document. This rule also imposes the additional requirement of a proposed order.

Rule 12.1. Notice of an Alibi Defense

(a) ~~Government's Request for Notice and Defendant's Response~~GOVERNMENT'S REQUEST FOR NOTICE AND DEFENDANT'S RESPONSE.

(1) *Government's Request*. An attorney for the government may request in writing that the defendant notify an attorney for the government of any intended alibi defense. The request must state the time, date, and place of the alleged offense.

(2) *Defendant's Response*. Within 1~~4~~0 days after the request, or at some other time the court sets, the defendant must serve written notice on an attorney for the government of any intended alibi defense. The defendant's notice must state:

(A) each specific place where the defendant claims to have been at the time of the alleged offense; and

(B) the name, address, and telephone number of each alibi witness on whom the defendant intends to rely.

(b) ~~Disclosing Government Witnesses~~DISCLOSING GOVERNMENT WITNESSES.

(1) *Disclosure*.

(A) *In General*. If the defendant serves a Rule 12.1(a)(2) notice, an attorney for the government must disclose in writing to the defendant or the defendant's attorney:

(i~~A~~) the name~~,~~ of each witness—and the address~~,~~ and telephone number of each witness other than a victim—that the government intends to rely on to establish that the defendant~~'s~~ was present~~ee~~ at the scene of the alleged offense; and

(ii~~B~~) each government rebuttal witness to the defendant's alibi defense.

(B) *Victim's Address and Telephone Number*. If the government intends to rely on a victim's testimony to establish that the defendant was present at the scene of the alleged offense and the defendant establishes a need for the victim's address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant's attorney; or

(ii) fashion a reasonable procedure that allows preparation of the defense and also protects the victim's interests.

(2) *Time to Disclose*. Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within 1~~4~~0 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 1~~4~~0 days before trial.

(c) ~~Continuing Duty to Disclose~~CONTINUING DUTY TO DISCLOSE.

(1) *In General*. Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name~~,~~ of each additional witness—and the address~~,~~ and telephone number of each additional witness other than a victim— if:

(A~~1~~) the disclosing party learns of the witness before or during trial; and

(B~~2~~) the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had known of the witness earlier.

(2) *Address and Telephone Number of an Additional Victim Witness*. The address and telephone number of an additional victim witness must not be disclosed except as provided in Rule 12.1 (b)(1)(B).

(d) ~~Exceptions~~EXCEPTIONS. For good cause, the court may grant an exception to any requirement of Rule 12.1(a)–(c).

(e) ~~Failure to Comply~~FAILURE TO COMPLY. If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the defendant's alibi. This rule does not limit the defendant's right to testify.

(f) ~~Inadmissibility of Withdrawn Intention~~INADMISSIBILITY OF WITHDRAWN INTENTION. Evidence of an intention to rely on an alibi defense, later withdrawn, or of a statement made in connection with that intention, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

COMMENT TO 2017 AMENDMENTS

This rule incorporates the 2008 and 2009 amendments to *Federal Rule of Criminal Procedure 12.1*. The 2008 amendments to sections (b) and (c) implement the federal Crime Victims' Rights Act (*18 U.S.C. § 3771*). Also, in accordance with the 2009 amendments to the federal rule, the 10-day time periods were expanded to 14 days—an amendment that reflects the time-calculation changes made to Rule 45.

COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. It is identical to the federal rule.

Rule 12.3. Notice of a Public-Authority Defense

(a) ~~Notice of the Defense and Disclosure of Witnesses~~NOTICE OF THE DEFENSE AND DISCLOSURE OF WITNESSES.

(1) *Notice in General*. If a defendant intends to assert a defense of actual or believed exercise of public authority on behalf of a law enforcement agency or federal intelligence agency at the time of the alleged offense, the defendant must so notify an attorney for the government in writing and must file a copy of the notice with the clerk within the time provided for filing a pretrial motion, or at any later time the court sets. The notice filed with the clerk must be under seal if the notice identifies a federal intelligence agency as the source of public authority.

(2) *Contents of Notice*. The notice must contain the following information:

(A) the law enforcement agency or federal intelligence agency involved;

(B) the agency member on whose behalf the defendant claims to have acted; and

(C) the time during which the defendant claims to have acted with public authority.

(3) *Response to the Notice*. An attorney for the government must serve a written response on the defendant or the defendant's attorney within 14~~0~~ days after receiving the defendant's notice, but no later than 21~~0~~ days before trial. The response must admit or deny that the defendant exercised the public authority identified in the defendant's notice.

(4) *Disclosing Witnesses*.

(A) *Government's Request*. An attorney for the government may request in writing that the defendant disclose the name, address, and telephone number of each witness the defendant intends to rely on to establish a public-authority defense. An attorney for the government may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(3), or later, but must serve the request no later than 21~~0~~ days before trial.

(B) *Defendant's Response*. Within 14~~7~~ days after receiving the government's request, the defendant must serve on an attorney for the government a written statement of the name, address, and telephone number of each witness.

(C) *Government's Reply*. Within 14~~7~~ days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name~~,~~ of each witness—and the address~~,~~ and telephone number of each witness other than a victim—that the government intends to rely on to oppose the defendant's public-authority defense.

(D) *Victim's Address and Telephone Number*. If the government intends to rely on a victim's testimony to oppose the defendant's public-authority defense and the defendant establishes a need for the victim's address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant's attorney; or

(ii) fashion a reasonable procedure that allows for preparing the defense and also protects the victim's interests.

(5) *Additional Time*. The court may, for good cause, allow a party additional time to comply with this rule.

(b) ~~Continuing Duty to Disclose~~CONTINUING DUTY TO DISCLOSE.

(1) *In General*. Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name~~,~~ of any additional witness—and the address~~,~~ and telephone number of any additional witness other than the victim—if:

(A~~1~~) the disclosing party learns of the witness before or during trial; and

(B~~2~~) the witness should have been disclosed under Rule 12.3(a)(4) if the disclosing party had

known of the witness earlier.

(2) *Address and Telephone Number of an Additional Victim-Witness.* The address and telephone number of an additional victim-witness must not be disclosed except as provided in Rule 12.3(a)(4)(D).

(c) ~~Failure to Comply~~FAILURE TO COMPLY. If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the public-authority defense. This rule does not limit the defendant's right to testify.

(d) ~~Protective Procedures Unaffected~~PROTECTIVE PROCEDURES UNAFFECTED. This rule does not limit the court's authority to issue appropriate protective orders or to order that any filings be under seal.

(e) ~~Inadmissibility of Withdrawn Intention~~INADMISSIBILITY OF WITHDRAWN INTENTION. Evidence of an intention as to which notice was given under Rule 12.3(a), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

COMMENT TO 2017 AMENDMENTS

This rule incorporates the 2009 and 2010 amendments to *Federal Rule of Criminal Procedure 12.3*. In accordance with the 2009 amendments to the federal rule, the 10-day time periods were expanded to 14 days—an amendment that reflects the time-calculation changes made to Rule 45. The 2010 amendments to sections (a) and (b) implement the federal Crime Victims' Rights Act (*18 U.S.C. § 3771*).

COMMENT TO 2016 AMENDMENTS

This rule, new to the Superior Court, is identical to the federal rule.

Rule 15. Depositions

(a) ~~When Taken~~WHEN TAKEN.

(1) *In General*. A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is not privileged, including any book, paper, document, record, recording, or data.

(2) *Detained Material Witness*. A witness who is detained under D.C. Code § 23-1326 (2012 Repl.) may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken within a reasonable period of time and may discharge the witness after the witness has signed under oath the deposition transcript.

(b) ~~Notice~~NOTICE.

(1) *In General*. A party seeking to take a deposition must give every other party reasonable written notice of the deposition's date and location. The notice must state the name and address of each deponent. If requested by a party receiving the notice or by the deponent, the court may, for good cause, change the deposition's date or location.

(2) *To the Custodial Officer*. A party seeking to take the deposition must also notify the officer who has custody of the defendant of the scheduled date and location.

(c) ~~Defendant's Presence~~DEFENDANT'S PRESENCE.

(1) *Defendant in Custody*. Except as authorized by Rule 15(c)(3), ~~T~~the officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:

(A) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(2) *Defendant Not in Custody*. Except as authorized by Rule 15(c)(3), ~~A~~a defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant—absent good cause—waives both the right to appear and any objection to the taking and use of the deposition based on that right.

(3) *Taking Depositions Outside the United States Without the Defendant's Presence*. The deposition of a witness who is outside the United States may be taken without the defendant's presence if the court makes case-specific findings of all the following:

(A) the witness's testimony could provide substantial proof of a material fact in a felony prosecution;

(B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;

(C) the witness's presence for a deposition in the United States cannot be obtained;

(D) the defendant cannot be present because:

(i) the country where the witness is located will not permit the defendant to attend the deposition;

(ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or

(iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and

(E) the defendant can meaningfully participate in the deposition through reasonable means.

(d) ~~Expenses~~EXPENSES. If the deposition was requested by the government, the court may—or if the defendant is unable to bear the deposition expenses, the court must—order the government to pay:

(1) any reasonable travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition; and

(2) the costs of the deposition transcript.

(e) ~~Manner of Taking~~MANNER OF TAKING.

(1) *In General*. Unless these rules or a court order provides otherwise, a deposition must be taken and filed in the same manner as a deposition in a civil action, except that:

(A) a defendant may not be deposed without that defendant's consent.

(B) the scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial.

(2) *On Written Interrogatories*. When the examination is on written interrogatories, at or before the time fixed in the notice, any other party may file cross interrogatories. Any subsequent interrogatories may be filed with leave of court. If a party fails to file written interrogatories or fails to attend an oral examination, the person before whom the deposition is taken must propound the interrogatories listed in D.C. Code § 23-108 (2012 Repl.).

(3) *Statements of the Deponent*. The party taking the deposition must provide to the opposing party, for use at the deposition, any statement of the deponent in that party's possession to which the opposing party would be entitled at trial under Rule 26.2. If the deposing party disobeys an order to produce or deliver a statement, the court must strike the witness's testimony from the record.

(f) ~~Use as Evidence~~ADMISSIBILITY AND USE AS EVIDENCE. An order authorizing a deposition to be taken under this rule does not determine its admissibility. A party may use all or part of a deposition as provided by the law of evidence.

(g) ~~Objections~~OBJECTIONS. A party objecting to deposition testimony or evidence must state the grounds for the objection during the deposition.

(h) ~~Depositions by Agreement Permitted~~DEPOSITIONS BY AGREEMENT PERMITTED. The parties may by agreement take and use a deposition with the court's consent.

COMMENT TO 2017 AMENDMENTS

This rule incorporates the 2012 federal amendments to subsection (c)(3) and section (f). The amendments authorize the taking of a deposition outside the United States without the defendant present if the court makes certain case-specific findings. The rule also specifically states that an order authorizing a deposition does not determine its admissibility.

COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. It differs from the federal rule in several respects.

Subparagraph (a)(2) cites the D.C. Code provision concerning the detention of material witnesses, D.C. Code § 23-1326 (2012 Repl.). In addition, this rule retains the requirement that a detained material witness be deposed "within a reasonable period of time," which is language not found in the federal rule.

Subparagraph (b)(1) allows a deponent as well as a party to move for a change in the date or place of a deposition.

Paragraph (e) is substantially different from the federal rule. First, subparagraph (e)(2) specifies a procedure that must be followed when a deposition is to be conducted on interrogatories. Second, subparagraph (e)(3) provides for "reverse Jencks" disclosures that parallel the government's obligations. Both of these differences are retained from the former rule, although the Jencks and

"reverse Jencks" provisions of (e)(3) have been combined into a single paragraph, simplified by referring to Rule 26.2, and made consistent with that rule.

Paragraph (f) omits reference to the Federal Rules of Evidence.

Rule 16. Discovery and Inspection

(a) ~~Government's Disclosure~~GOVERNMENT'S DISCLOSURE.

(1) *Information Subject to Disclosure*.

(A) *Defendant's Oral Statement*. Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

(B) *Defendant's Written or Recorded Statement*. Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

(i) any relevant written or recorded statement by the defendant if:

- the statement is within the government's possession, custody, or control; and
- the attorney for the government knows—or through due diligence could know—that the statement exists;

(ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and

(iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

(C) *Organizational Defendant*. Upon a defendant's request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:

(i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or

(ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.

(D) *Defendant's Prior Record*. Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows—or through due diligence could know—that the record exists.

(E) *Documents and Objects*. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

(F) *Reports of Examinations and Tests*. Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the government's possession, custody, or control;

(ii) the attorney for the government knows—or through due diligence could know—that the item exists; and

(iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.

(G) *Expert Witnesses*. At the defendant's request, the government must give to the defendant a written summary of any expert testimony that the government intends to use during its case-in-chief at trial. If the government requests discovery under Rule 16(b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, give to the defendant a written summary of expert testimony that the government intends to use as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subsectionparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(2) *Information Not Subject to Disclosure*. Except as permitted by Rule 16(a)(1)(A)-(D), (F), and (G) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in *18 U.S.C. § 3500*.

(3) *Grand Jury Transcripts*. This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(f), 16(a)(1), and 26.2.

(b) Defendant's DisclosureDEFENDANT'S DISCLOSURE.

(1) *Information Subject to Disclosure*.

(A) *Documents and Objects*. If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial.

(B) *Reports of Examinations and Tests*. If a defendant requests disclosure under Rule 16(a)(1)(F) and the government complies, the defendant must permit the government, upon request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

(C) *Expert Witnesses*. The defendant must, at the government's request, give to the government a written summary of any expert testimony that the defendant intends to use as evidence at trial, if—

(i) the defendant requests disclosure under Rule 16(a)(1)(G) and the government complies; or

(ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(2) *Information Not Subject to Disclosure*. Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:

(A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or

(B) a statement made to the defendant, or the defendant's attorney or agent, by:

(i) the defendant;

(ii) a government or defense witness; or

(iii) a prospective government or defense witness.

(c) ~~Continuing Duty to Disclose~~CONTINUING DUTY TO DISCLOSE. A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if:

(1) the evidence or material is subject to discovery or inspection under this rule; and

(2) the other party previously requested, or the court ordered its production.

(d) ~~Regulating Discovery~~REGULATING DISCOVERY.

(1) *Protective and Modifying Orders*. At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

(2) *Failure to Comply*. If a party fails to comply with this rule, the court may:

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;

(B) grant a continuance;

(C) prohibit that party from introducing the undisclosed evidence; or

(D) enter any other order that is just under the circumstances.

(e) ~~Detained Defendants~~DETAINED DEFENDANTS. In the case of a defendant who is detained pursuant to D.C. Code §§ 23-1322 (b) or -1329 (b) (~~2012 Repl.~~2017 Supp.), a request for discovery under this rule may be made after 30 days following the initial order of detention or at any time after the detention hearing pursuant to D.C. Code § 23-1322 (d) (~~2012 Repl.~~2017 Supp.), whichever is later.

COMMENT TO 2017 AMENDMENTS

This rule incorporates the 2013 amendment to *Federal Rule of Criminal Procedure 16(a)(2)*, which clarifies that the 2002 restyling did not change the government work product protection.

COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. It is identical to the federal rule in all but three respects.

First, it omits references to the Federal Rules of Evidence found in subparagraphs (a)(1)(G) and (b)(1)(C) of the federal rule, concerning expert witnesses. Second, those two subparagraphs refer to the parties' duties to disclose summaries of "expert testimony" to make clear those provisions reach only expert testimony. Finally, this rule retains a final paragraph (e) (formerly (f)), not found in the federal rule, concerning pre-indictment discovery in cases where the defendant is detained.

Consistent with the federal rule, former paragraph (e), which addressed the topic of notice of alibi witnesses, has been deleted as duplicative of Rule 12.1.

Rule 16-I. Informal Discovery

The defense attorney has a duty to consult with the attorney for the government assigned to the case in order to seek informal discovery. This consultation must take place before the time for filing pretrial motions under Rule ~~47(c)~~12. No motion for a bill of particulars under Rule 7(f) or for discovery under Rule 16 will be accepted for filing unless defense counsel certifies, in writing, that counsel has made a good faith attempt to secure the requested relief voluntarily from the attorney for the government, and that the attorney for the government has not complied.

COMMENT TO 2016 AMENDMENTS

This rule, retained from the former version of these rules, has no federal counterpart. It has been renumbered from 16-II to 16-I, since former Rule 16-I was deleted as part of an earlier revision. In addition, in keeping with general stylistic changes made to the federal rules, the rule has been redrafted to make it more easily understood and to maintain consistency throughout the rules

Rule 24. Trial Jurors

(a) ~~Examination~~EXAMINATION.

(1) *In General*. The court may examine prospective jurors or may permit the attorneys for the parties to do so.

(2) *Court Examination*. If the court examines the jurors, it must permit the attorneys for the parties to:

(A) ask further questions that the court considers proper; or

(B) submit further questions that the court may ask if it considers them proper.

(b) ~~Peremptory Challenges~~PEREMPTORY CHALLENGES.

(1) *Number of Peremptory Challenges*. Each side is entitled to an equal number of peremptory challenges to prospective jurors as specified below.

(A) *Offenses Punishable by Imprisonment of More Than One Year*. Each side has ten peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year.

(B) *Offenses Punishable by Fine, Imprisonment of One Year or Less, or Both*. Each side has three peremptory challenges when the defendant is charged with a crime punishable by fine, imprisonment of one year or less, or both.

(C) *Multiple Defendants or Prosecuting Authorities*. If there is more than one defendant, or if a case is prosecuted both by the United States and the District of Columbia, the court may allow additional peremptory challenges and permit them to be exercised separately or jointly, but in no event shall one side be entitled to more peremptory challenges than the other.

(2) *Procedure*. ~~All peremptory challenges must be made at the bench. The prosecution must make the first peremptory challenge with each side proceeding in turn thereafter.~~ The trial judge must permit the parties to exercise peremptory challenges outside the presence of the prospective jurors. The trial judge may choose an alternating or simultaneous procedure, or a combination thereof.

(A) Under an alternating procedure, the prosecution makes the first peremptory challenge(s) with each side proceeding in turn thereafter.

(B) Under a simultaneous procedure, each party exercises its challenges by simultaneously submitting to the court its list of venire persons to be stricken.

(c) ~~Alternate Jurors~~ALTERNATE JURORS.

(1) *In General*. The court may impanel up to six alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties.

(2) *Procedure*.

(A) Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror.

(B) Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror has the same authority as the other jurors.

(3) *Retaining Alternate Jurors*. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

(4) *Peremptory Challenges*. Each side is entitled to the number of additional peremptory challenges to prospective alternate jurors specified below. These additional challenges may be used only to remove alternate jurors.

(A) *One or Two Alternates*. One additional peremptory challenge is permitted when one or two alternates are impaneled.

(B) *Three or Four Alternates*. Two additional peremptory challenges are permitted when three or four alternates are impaneled.

(C) *Five or Six Alternates*. Three additional peremptory challenges are permitted when five or six alternates are impaneled.

COMMENT TO 2017 AMENDMENTS

Subsection (b)(2) has been amended to permit greater flexibility in the manner of exercising peremptory challenges. For example, the court may now require that all challenges be exercised simultaneously, or that fewer than all be exercised simultaneously and that the remainder be exercised in an alternating fashion, or, as before the amendment, that all be exercised in an alternating fashion.

COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. In addition to basic changes in style, the 2002 federal amendments to paragraph (a) were intended to clarify that a defendant may personally conduct voir dire only if the defendant is acting pro se.

Paragraph (b) of this rule differs from the federal rule in several respects. First, it omits the reference to the number of peremptory challenges in capital cases. The District of Columbia has no death penalty.

Second, subparagraph (b)(1) allows each side an equal number of peremptory challenges, as required by D.C. Code § 23-105 (a) (2012 Repl.).

Third, subparagraph (b)(1)(A) allows ten peremptory challenges for each side in cases where the offense charged is punishable by more than one year of imprisonment, to conform to the requirements of D.C. Code § 23-105 (a) (2012 Repl.).

Fourth, subparagraph (b)(1)(B) substitutes the title, "Offenses Punishable by Fine, Imprisonment of One Year or Less, or Both" for the title "Misdemeanor Case" used in the federal rule. See, e.g., D.C. Code §§ 16-1022, -1024 (2012 Repl.) (defining the crime of parental kidnapping as a felony although punishable by a term of imprisonment not to exceed six months).

Fifth, subparagraph (b)(1)(C) retains language from the former rule recognizing that two prosecuting authorities may bring a case in Superior Court.

Finally, subparagraph (b)(2) retains language from the former rule providing that peremptory challenges must be made at the bench and that the prosecution must make the first peremptory challenge with each side proceeding in turn thereafter.

Rule 26.2. Producing a Witness's Statement

(a) ~~Motion to Produce~~MOTION TO PRODUCE. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony.

(b) ~~Producing the Entire Statement~~PRODUCING THE ENTIRE STATEMENT. If the entire statement relates to the subject matter of the witness's testimony, the court must order that the statement be delivered to the moving party.

(c) ~~Producing a Redacted Statement~~PRODUCING A REDACTED STATEMENT. If the party who called the witness claims that the statement contains information that is privileged or does not relate to the subject matter of the witness's testimony, the court must inspect the statement in camera. After excising any privileged or unrelated portions, the court must order delivery of the redacted statement to the moving party. If the defendant objects to an excision, the court must preserve the entire statement with the excised portion indicated, under seal, as part of the record.

(d) ~~Recess to Examine a Statement~~RECESS TO EXAMINE A STATEMENT. The court may recess the proceedings to allow time for a party to examine the statement and prepare for its use.

(e) ~~Sanction for Failure to Produce or Deliver a Statement~~SANCTION FOR FAILURE TO PRODUCE OR DELIVER A STATEMENT. If the party who called the witness disobeys an order to produce or deliver a statement, the court must strike the witness's testimony from the record. If an attorney for the government disobeys the order, the court must declare a mistrial if justice so requires.

(f) ~~Statement Defined~~STATEMENT DEFINED. As used in this rule, a witness's "statement" means:

(1) a written statement that the witness makes and signs, or otherwise adopts or approves;

(2) a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording; or

(3) the witness's statement to a grand jury, however taken or recorded, or a transcription of such a statement.

(g) ~~Scope~~SCOPE. This rule applies at trial, at a suppression hearing under Rule 12, and to the extent specified in the following rules:

(1) Rule 5.1(f) (preliminary hearing);

(~~1~~2) Rule 32(c) (sentencing);

(~~2~~3) Rule 32.1(c) (hearing to revoke or modify probation);

(~~3~~4) Rule 46(f) (detention hearing); and

(~~4~~5) Rule 8(c) of the Rules Governing Proceedings Under D.C. Code § 23-110.

COMMENT TO 2017 AMENDMENTS

Section (g) has been amended to make this rule applicable to preliminary hearings.

COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. It differs from the federal rule in two respects. First, consistent with the former rule and unlike its federal counterpart, paragraph (g) omits preliminary hearings from the scope of the rule.

Second, subparagraph (g)(4), which is new to this rule, refers to the local Rules Governing Proceedings Under D.C. Code § 23-110.

The last sentence of paragraph (c) is new to this and the federal Rule. It requires that the court retain, under seal, the entirety of a witness's statement whenever parts are excised over the objection of the defendant. The former rule required that the prosecutor retain such a statement.

Rule 29. Motion for a Judgment of Acquittal

(a) ~~Before Submission to the Jury~~BEFORE SUBMISSION TO THE JURY. After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) ~~Reserving Decision~~RESERVING DECISION. The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) ~~After Jury Verdict or Discharge~~AFTER JURY VERDICT OR DISCHARGE.

(1) *Time for a Motion*. A defendant may move for a judgment of acquittal, or renew such a motion, within 14~~7~~ days after a guilty verdict or after the court discharges the jury, whichever is later.

(2) *Ruling on the Motion*. If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.

(3) *No Prior Motion Required*. A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

(d) ~~Conditional Ruling on a Motion for a New Trial~~CONDITIONAL RULING ON A MOTION FOR A NEW TRIAL.

(1) *Motion for a New Trial*. If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

(2) *Finality*. The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3) *Appeal*.

(A) *Grant of a Motion for a New Trial*. If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.

(B) *Denial of a Motion for a New Trial*. If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

COMMENT TO 2017 AMENDMENTS

In accordance with the 2009 amendments to the federal rule, this rule was amended to expand the 7-day filing period for motions to 14 days—an amendment that reflects the time-calculation changes made to Rule 45.

COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. It is identical to the federal rule. This rule includes paragraph (d) of the federal rule, which was not previously adopted by the Superior Court.

It also includes the 2005 amendment to the federal rule. In that year, *Federal Rules 29* (Motion for Judgment of Acquittal), *33* (New Trial) and *34* (Arresting Judgment) were amended to remove the requirement that the court act within seven days on motions for enlargement of time. A conforming amendment has been made to Rule 45 (Computing and Extending Time).

Rule 32. Sentencing and Judgment

(a) ~~Time of Sentencing~~TIME OF SENTENCING.

(1) *In General*. Except as otherwise provided in this rule, upon a finding of guilty by plea or verdict, the court may sentence the defendant immediately or continue the sentencing to a further date.

(2) *In Cases Involving Certain Victims*. In any case in which a defendant has been found guilty of an offense involving a victim ~~as defined in D.C. Code § 23-1905 (2) (2012 Repl.)~~:

(A) The victim must be given a reasonable time prior to imposition of sentence to submit a victim impact statement as prescribed in D.C. Code § 23-1904 (2012 Repl.).

(B) The attorney for the government must make reasonable efforts to notify the victim of the right to submit a victim impact statement, and to be present and to make a statement at the defendant's sentencing. The notification may be made by first-class mail, postage prepaid, and must contain clear and concise instructions regarding the preparation of the impact statement, the name and address of a person in the office of the attorney for the government to whom it should be returned, and the time, date, and place where the sentencing will occur. The notification must allow the victim a reasonable time to respond prior to imposition of sentence.

(C) The attorney for the government must certify that the requirements of Rule 32(a)(2)(B) have been met. If such a certification has been made, or if the victim waives the right to submit a victim impact statement, the court may impose sentence without a victim impact statement. If for any reason the requirements of Rule 32(a)(2)(B) have not been met, the court must continue imposition of sentence for a time sufficient to permit compliance.

(D) The attorney for the government must promptly forward any victim impact statement either:

(i) to the Court Services and Offender Supervision Agency if it is preparing a presentence report~~;~~, or

(ii) to the court, and must serve it on the defendant's attorney. The victim impact statement must be included in any presentence report and must be disclosed to the defendant's attorney at a reasonable time prior to sentencing. The court must consider any victim impact statement in determining the appropriate sentence.

(b) ~~Presentence Investigation~~PRESENTENCE INVESTIGATION AND REPORT.

(1) *When Made*.

(A) *Required Investigation.*

(i) *In General.* In a case in which the defendant is to be sentenced for an offense punishable by imprisonment for more than one year, the Court Services and Offender Supervision Agency must make a presentence investigation and report to the court before the pronouncement of the sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.

(ii) *Restitution*. If the law permits restitution, the Court Services and Offender Supervision Agency must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

(B) *Request by the Court.* In any other case, the Court Services and Offender Supervision Agency must make a presentence investigation and report upon request by the court.

(C) *Criminal Record.* If an investigation and report are not requested or made, and the defendant is not sentenced at the time of a guilty plea or guilty verdict, the court may order the

Court Services and Offender Supervision Agency to provide the court with the defendant's prior criminal record.

(2) *Report*. The report of the presentence investigation must contain:

(A) any prior criminal record of the defendant;

(B) such information about the defendant's characteristics, financial condition and the circumstances affecting the defendant's behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant;

(C) information that assesses any financial impact on any victim;

(~~C~~D) any victim impact statement as prescribed in D.C. Code § 23-1904 (2012 Repl.); and

(~~D~~E) such other information as may be required by the court.

(3) *Disclosure*.

(A) *In General.* The court must make available to the defendant through the defendant's attorney and to the attorney for the government a copy of the report of the presentence investigation a reasonable time before imposing sentence. To the extent that the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons, the court may withhold any such portions of the presentence investigation report.

(B) *Oral or Written Summary.* If the court is of the view that there is information in the presentence report which should not be disclosed under Rule 32(b)(3)(A), the court in lieu of making the report or part thereof available must state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and must give the defendant or the defendant's attorney an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) *Disclosure to Adverse Party.* Any material disclosed to the one party must also be disclosed to the adverse party.

(D) *Time to Disclose.* The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere, or has been found guilty, except that a judicial officer may, with the consent of the defendant given on the record or in writing, inspect a presentence report at any time.

(E) *Report Under D.C. Code § 24-903(e).* The reports of studies and recommendations contained therein made pursuant to D.C. Code § 24-903 (e) (~~2012 Repl.~~2017 Supp.) shall be considered a presentence investigation within the meaning of Rule 32(b)(3).

(c) ~~Sentencing~~SENTENCING.

(1) *In General*. At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report; and

(B) must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence.

(2) *Introducing Evidence; Producing a Statement*. The court may permit the parties to introduce evidence. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) *Court Determinations*. At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

(4) *Opportunity to Speak*.

(A) *By a Party*. Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) *By a Victim*. Before imposing sentence in a case in which a defendant has been found guilty of an offense involving a victim ~~as defined in D.C. Code § 23-1905 (2) (2012 Repl.)~~, the court must address any such victim who is present at sentencing and must permit the victim to speak or submit any information about the sentence.

(C) *In Camera Proceedings*. Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(c)(4).

(5) *Pronouncement*. Sentence must thereafter be pronounced. Unless the court pronouncing a sentence otherwise provides, a sentence imposed on a defendant for conviction of an offense must run consecutively to any other sentence imposed on such defendant for conviction of an offense. The defendant may be placed on probation unless otherwise provided by law. The court must precisely define any conditions of probation to the defendant.

(d) ~~Defendant's Right to Appeal~~DEFENDANT'S RIGHT TO APPEAL.

(1) *Advice of a Right to Appeal*.

(A) *Appealing a Conviction*. If the defendant pleaded not guilty and was convicted, after sentencing the court must advise the defendant of the right to appeal the conviction.

(B) *No Duty to Advise*. There shall be no duty on the court to advise the defendant of any right to appeal after sentence is imposed following a plea of guilty or nolo contendere.

(C) *Appeal Costs*. The court must advise a defendant who is unable to pay appeal costs of the right to ask for permission to appeal in forma pauperis.

(2) *Clerk's Filing of Notice*. If the defendant so requests, the clerk must immediately prepare and file a notice of appeal on the defendant's behalf.

(e) ~~Defendant's Right to Seek Modification or Suspension of Child Support Payments~~DEFENDANT'S RIGHT TO SEEK MODIFICATION OR SUSPENSION OF CHILD SUPPORT PAYMENTS. If the defendant is sentenced to a period of imprisonment of more than 30 days, the court must inquire whether the defendant is subject to a child support order. If so, the court must comply with D.C. Code § 23-112a (2012 Repl.). If the defendant elects to file a pro se petition to modify or suspend the support order, the clerk must serve it as provided in D.C. Code § 23-112a (c) (2012 Repl.).

(f) ~~Judgment~~JUDGMENT. In the judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence. If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so order. The court must sign the judgment, the clerk must enter it, and it must be transmitted to the authority taking custody of or having supervision over the defendant.

(g) ~~Discharge From Probation, Dismissal of Proceedings, and Expungement of Official Records Pursuant to D.C. Code § 48-904.01 (e) (2014 Repl.)~~DISCHARGE FROM PROBATION, DISMISSAL OF PROCEEDINGS, AND EXPUNGMENT OF OFFICIAL RECORDS UNDER D.C. CODE § 48-904.01.

(1) *Discharge From Probation and Dismissal of Proceedings*.

(A) *Notice*. If a person has been placed on probation ~~pursuant to~~under D.C. Code § 48-904.01 (e)(1) (~~2014 Repl.~~2017 Supp.), the Court Services and Offender Supervision Agency must, 30 days before the expiration of probation, notify the court in writing if the person is not successfully completing probation. The Agency must mail a copy of the notice to the person, the person's attorney, the attorney for the government, the Metropolitan Police Department, and the clerk of the Criminal Division. The attorney for the government may file and serve a response in opposition within 14~~0~~ days.

(B) *Hearing and Discharge*. The court may hold a hearing to determine whether the person has successfully completed probation. If the court so determines, it must enter an order discharging the person from probation and dismissing the proceedings against the person. The court may, with notice as provided above, take such action prior to the expiration of the maximum period of probation imposed.

(C) *Nonpublic Record*. If an order of discharge and dismissal is entered, the clerk must thereafter retain a nonpublic record of the case solely for use by the courts in determining whether, in subsequent proceedings, such person qualifies for treatment under D.C. Code § 48-904.01 (e)(1) (~~2014 Repl.~~2017 Supp.).

(2) *Expungement of Official Records*.

(A) *Motion to Expunge*. A person who has been discharged from probation and whose charges have been dismissed pursuant to D.C. Code § 48-904.01 (e)(1) (~~2014 Repl.~~2017 Supp.) and Rule 32(g)(1) may file with the court and serve upon the attorney for the government a motion for expungement of all official records relating to the offense. The attorney for the government may file and serve an opposition within 14~~0~~ days.

(B) *Expungement*. If the court, after hearing, determines that the person was discharged from probation and that the proceedings against the person were dismissed under D.C. Code § 48-904.01 (e)(1) (~~2014 Repl.~~2017 Supp.), the court must enter an order expunging all official records of the offense to the extent required by D.C. Code § 48-904.01 (e)(2) (~~2014 Repl.~~2017 Supp.).

(C) *Exceptions*. In a case involving codefendants, the court must first sanitize the records to be expunged. The order of expungement shall not affect the nonpublic record maintained under D.C. Code § 48-904.01 (e)(1) (~~2014 Repl.~~2017 Supp.) and Rule 32(g)(1)(C).

COMMENT TO 2017 AMENDMENTS

This rule has been amended consistent with the 2008 amendments to the federal rule. Specifically, subsection (b)(1)(A) has been amended to add a requirement that the presentence investigation include information concerning restitution in cases in which the law permits restitution. Subsection (b)(2) has been amended to include a requirement that the report contain information about the financial impact of the crime on any victim.

References to "victim as defined in D.C. Code § 23-1905(2)" were shortened to "victim" in light of the new definition in Rule 1(d)(12).

The 10-day deadlines in this rule have been changed to 14 days in light of the time-calculation changes made to Rule 45.

Certain 2011 amendments to *Federal Rule of Criminal Procedure 32(d)(2)* (which corresponds to subsection (b)(2) of this rule) have been rejected as locally inapplicable.

COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. It differs from the federal rule in several respects.

This rule omits all references to the Federal Sentencing Guidelines. It also omits paragraph (a) of the federal rule (Definitions), because its definitions are locally inapplicable.

Paragraph (a) of this rule, regarding the time of sentencing, corresponds to paragraph (b) of the federal rule. It contains provisions implementing The Crime Victims' Rights Act of 2000 (D.C. Code § 23-1901 et seq. (2012 Repl.)).

Paragraph (b) of this rule, regarding presentence investigations, corresponds to paragraphs (c)-(g) of the federal rule. It differs from the federal rule to reflect local practice. It requires a presentence report in felony cases, unless the defendant waives it or the court makes certain findings. A report is required in misdemeanor cases only if the court requests one.

Paragraph (c) of this rule, regarding sentencing, corresponds to paragraph (i) of the federal rule. Subparagraph (c)(3), "Court Determinations," is identical to its federal counterpart, but is new to this rule. It requires the court to make findings with respect to any disputed portion of the presentence report or other sentencing matter, unless that portion will not affect the sentence or the court will not consider it. Any such finding must be reduced to writing and appended to the presentence report.

Subparagraph (c)(4)(B) contains provisions implementing The Crime Victims' Rights Act of 2000 (D.C. Code § 23-1901 et seq. (2012 Repl.))

Paragraph (d), concerning advice of appellate rights, corresponds to paragraph (j) of the federal rule. Consistent with the former Superior Court rule, it provides that the court has no duty to advise the defendant of any right to appeal after a guilty or nolo contendere plea.

Material formerly in paragraph (e), concerning plea withdrawal, has been moved to Rule 11.

Paragraph (e), regarding motions to suspend or modify child support payments, was added to reflect the requirements of D.C. Code § 23-112a (2012 Repl.). That section, and hence paragraph (e) of this rule, apply whether the proceeding is the initial sentencing or a probation revocation resulting in imprisonment for more than 30 days.

Paragraph (f), regarding judgment, corresponds to paragraph (k) of the federal rule. It omits provisions dealing with property subject to forfeiture. Proceedings for the forfeiture of property in the Superior Court are brought pursuant to Superior Court Civil Rule 71A-I.

Material formerly in paragraph (g), concerning production of witness statements, has been moved to subparagraph (c)(2) of this rule.

Paragraph (g), concerning "probation before judgment" under D.C. Code § 48-904.01 (e)(1) (2014 Repl.), has no federal counterpart. It has been revised to make it easier to read. No change in substance is intended.

References in the former rule to the "Social Services Division" have been replaced with the "Court Services and Offender Supervision Agency," as the latter agency is now responsible for preparation of presentence reports and supervision of probationers.

Rule 33. New Trial

(a) ~~Defendant's Motion~~DEFENDANT'S MOTION. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

(b) ~~Time to File~~TIME TO FILE.

(1) *Newly Discovered Evidence*. Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

(2) *Other Grounds*. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14~~7~~ days after the verdict or finding of guilty.

COMMENT TO 2017 AMENDMENTS

In accordance with the 2009 amendments to the federal rule, this rule was amended to expand the 7-day filing period for motions to 14 days—an amendment that reflects the time-calculation changes made to Rule 45.

COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. It is identical to the federal rule. It does not govern motions under D.C. Code § 22-4135 (2012 Repl.), which permits a person convicted of a criminal offense to move the court, at any time, to vacate the conviction or grant a new trial on grounds of actual innocence based on new evidence.

The rule includes in subparagraph (b)(2) the 2005 amendment to the federal rule. In that year, *Federal Rules 29* (Motion for Judgment of Acquittal), *33* (New Trial) and *34* (Arresting Judgment) were amended to remove the requirement that the court act within seven days on motions for enlargement of time. A conforming amendment has been made to Rule 45 (Computing and Extending Time).

Rule 34. Arresting Judgment

(a) ~~In General~~IN GENERAL. Upon the defendant's motion or on its own, the court must arrest judgment if~~:~~

~~(1) the indictment or information does not charge an offense; or~~

~~(2)~~ the court does not have jurisdiction of the charged offense.

(b) ~~Time to File~~TIME TO FILE. The defendant must move to arrest judgment within 14~~7~~ days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere.

COMMENT TO 2017 AMENDMENTS

In accordance with the 2009 amendments to the federal rule, this rule was amended to expand the 7-day filing period for motions to 14 days—an amendment that reflects the time-calculation changes made to Rule 45.

This rule also incorporates the 2014 federal amendment, which eliminates language requiring the court to arrest judgment if the indictment or information does not charge an offense. This amendment was based on the holding in *United States v. Cotton*, 535 U.S. 625 (2002), where the Supreme Court found that a defect in the indictment was not jurisdictional.

COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. It is identical to the federal rule. Consistent with a change in the federal rule, the rule has been amended to permit the court, on its own motion, to arrest judgment.

It also includes the 2005 amendment to the federal rule. In that year, *Federal Rules 29* (Motion for Judgment of Acquittal), *33* (New Trial) and *34* (Arresting Judgment) were amended to remove the requirement that the court act within seven days on motions for enlargement of time. A conforming amendment has been made to Rule 45 (Computing and Extending Time).

Rule 37. ~~Appeals~~ Indicative Ruling on a Motion for Relief That Is Barred by a Pending Appeal

~~Appeals from judgments or orders of the Superior Court to the District of Columbia Court of Appeals are governed by the rules of that court.~~

(a) RELIEF PENDING APPEAL. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state that it would grant the motion if the District of Columbia Court of Appeals remands for that purpose.

(b) NOTICE TO THE COURT OF APPEALS. The movant must promptly notify the District of Columbia Court of Appeals under District of Columbia Court of Appeals Rule 4(f) if the trial court states that it would grant the motion.

(c) REMAND. The trial court may decide the motion if the District of Columbia Court of Appeals remands for that purpose.

COMMENT TO 2017 AMENDMENTS

This rule is substantially similar to *Federal Rule of Criminal Procedure 37*, which was introduced in 2011, but it contains two local differences—1) it references the District of Columbia Court of Appeals and its applicable rule; and 2) the language "or that the motion raises a substantial issue" has been omitted as inconsistent with local appellate rules.

COMMENT TO 2016 AMENDMENTS

This rule, retained from the former rule, has no federal counterpart. The rule no longer states the specific fee for filing a notice of appeal, because that fee is set forth in Rule 50 of the Rules of the District of Columbia Court of Appeals.

Rule 41. Search and Seizure

(a) ~~Scope and Definition~~SCOPE AND DEFINITION. This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances. The term "property" as used in this rule includes documents, books, papers, any other tangible objects, and information.

(b) ~~Authority to Issue a Warrant~~AUTHORITY TO ISSUE A WARRANT. A search warrant authorized by this rule may be issued by a judge.

(c) ~~Persons or Property Subject to Search or Seizure~~PERSONS OR PROPERTY SUBJECT TO SEARCH OR SEIZURE. A warrant may be issued for any of the following:

(1) evidence of a crime;

(2) contraband, fruits of crime, or other items illegally possessed;

(3) property designed for use, intended for use, or used in committing a crime; or

(4) a person to be arrested or a person who is unlawfully restrained.

(d) ~~Obtaining a Warrant~~OBTAINING A WARRANT.

(1) *Probable Cause*. Upon application of a law enforcement officer or attorney for the government, a judge may issue a search warrant if there is probable cause to search for and seize a person or property under Rule 41(c). The finding of probable cause may be based upon hearsay evidence in whole or in part.

(2) *Application for Search Warrants*.

(A) *In General*. Each application for a search warrant, which may include depositions or affidavits of other persons containing allegations of fact supporting or tending to support those contained in the application, must be made ~~in writing~~ upon oath to a judge~~. Each application~~ and must include:

(i~~A~~) the name and title of the applicant;

(ii~~B~~) a statement that there is probable cause to believe that property or persons described in Rule 41(c) as subject to seizure are likely to be found in a designated premise, in a designated vehicle or object, or upon designated persons;

(iii~~C~~) allegations of fact supporting such statement; and

(iv~~D~~) a request that the judge issue a search warrant directing a search for and seizure of the property or person in question.

(B~~3~~) *Applications for Warrants to be Executed at Any Time*. The application may contain a request that the search warrant be made executable at any hour of the day or night, if accompanied and supported by allegations of fact supporting that:

(i~~A~~) there is probable cause to believe that it cannot be executed during the hours of daylight;

(ii~~B~~) the property sought is likely to be removed or destroyed if not seized forthwith; or

(iii~~C~~) the property or person sought is not likely to be found except at certain times or in certain circumstances.

~~(4) Depositions and Affidavits. The applicant may submit depositions or affidavits of other persons containing allegations of fact supporting or tending to support those contained in the application.~~

(C) *Requesting a Warrant in the Presence of a Judge*.

(i) *Warrant on an Affidavit*. When a law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces.

(ii) *Warrant on Sworn Testimony*. The judge may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony if doing so is reasonable under the circumstances.

(iii) *Recording Testimony*. Testimony taken in support of a warrant must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit.

(D) *Requesting a Warrant by Telephonic or Other Reliable Electronic Means*. In accordance with Rule 4.1, a judge may issue a warrant based on information communicated by telephone or other reliable electronic means.

(e) ~~Contents of the Warrant~~CONTENTS OF THE WARRANT.

(1) *In General.* A search warrant must contain:

(A~~1~~) The name of the issuing court, the name and signature of the issuing judge, and the date of issuance;

(B~~2~~) If the warrant is addressed to a specific law enforcement officer, the name of that officer, otherwise, the classifications of officers to whom the warrant is addressed;

(C~~3~~) A designation of the premises, vehicles, objects, or persons to be searched, sufficient for certainty of identification;

(D~~4~~) A description of the property or person whose seizure is the object of the warrant;

(E~~5~~) A direction that the warrant be executed during the hours of daylight, or an authorization for execution at any time of the day or night where:

(i~~A~~) the judge has found cause therefor under Rule 41(d)(2~~3~~)(B); or

(ii~~B~~) the warrant is issued under D.C. Code § 48-921.02 (2014 Repl.); and

(F~~6~~) A direction that the warrant and an inventory of any property or person seized pursuant thereto be returned to the court on the next court day after its execution.

(2) *Warrant Seeking Electronically Stored Information*. A warrant under this rule may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing the warrant in this rule refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review.

(f) ~~Executing and Returning the Warrant~~EXECUTING AND RETURNING THE WARRANT.

(1) *Time of Execution*. A search warrant must not be executed more than 10 days after the date of issuance. A search warrant may be executed on any day of the week and, in the absence of express authorization in the warrant, must be executed only during hours of daylight.

(2) *Place of Execution*. A search warrant may be executed anywhere within the District of Columbia.

(3) *Manner of Execution*. An officer executing a warrant directing a search of a dwelling house, other building, or vehicle may break and enter any of these premises pursuant to *18 U.S.C. § 3109*. An officer executing a warrant directing a search of a person must give, or make reasonable effort to give, notice of the officer's identity and purpose to the person.

(4) *Noting the Time*. An officer executing the warrant must enter on its face the exact date and time it is executed.

(5) *Inventory*. An officer executing a search warrant must write and subscribe an inventory setting forth the property or person seized under it. In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to describing the physical storage media that were seized or copied. The officer may retain a copy of the electronically stored information that was seized or copied.

(6) *Receipt*. An officer executing the warrant must:

(A) give a copy of the warrant and the inventory to the person from whom, or from whose premises, the property was taken; or

(B) if that person is not present, leave a copy of the warrant and the inventory with an occupant, custodian, or other person present, or if no person is present, at the place where the officer took the property.

(7) *Return*. An officer must return a copy of the warrant—together with a copy of the inventory—to the court on the next court day after its execution. The officer may do so by reliable electronic means.

(8) *Disposition of Seized Property*. Property seized in the execution of the warrant must be safely kept for use as evidence. No property seized shall be released or destroyed except in accordance with law and upon order of a court or an attorney for the government.

(g) ~~Motion to Return Property~~MOTION TO RETURN PROPERTY. A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

(h) ~~Motion to Suppress~~MOTION TO SUPPRESS. A defendant may move to suppress evidence, as Rule 12 provides.

COMMENT TO 2017 AMENDMENTS

Subsection (d)(2)(A) of this rule has been amended to recite the things which may be contained in a warrant application before the itemized list of things that must be included. No change of substance is intended. Subsections have been renumbered accordingly.

In terms identical to the federal rule, subsection (d)(2)(C)(ii) of this rule permits a judge to accept sworn testimony, which must be recorded, in person rather than or in addition to in writing, if it is reasonable to do so. Subsection (d)(2)(D), like its federal counterpart, refers to the new Rule 4.1 (Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means) and permits search warrants to be sought and approved by reliable electronic means. The amendment is identical to the 2011 amendment to the federal rule.

Subsection (e)(2) of this rule is new and is substantially identical to its federal counterpart, as amended in 2009. As explained more fully in the Advisory Committee Notes to that amendment, computers and other electronic storage media commonly contain such large amounts of information that it is often impractical for law enforcement to review all of the

information during execution of the warrant at the search location. This rule acknowledges the need for a two-step process: officers may seize or copy the entire storage medium and review it later to determine what electronically stored information falls within the scope of the warrant.

The last two sentences of subsection (f)(5) of this rule are identical to subsection (f)(l)(B) of the federal rule, as amended in 2009. As explained in the Advisory Committee Note to the 2009 federal amendment:

> The [former] rule [did] not address the question of whether the inventory should include a description of the electronically stored information contained in the media seized. Where it is impractical to record a description of the electronically stored information at the scene, the inventory may list the physical storage media seized. Recording a description of the electronically stored information at the scene is likely to be the exception, and not the rule, given the large amounts of information contained on electronic storage media and the impracticality for law enforcement to image and review all of the information during the execution of the warrant. This is consistent with practice in the "paper world." In circumstances where filing cabinets of documents are seized, routine practice is to list the storage devices, i.e., the cabinets, on the inventory, as opposed to making a document by document list of the contents.

Subsection (f)(7) has been amended, in terms identical to the federal rule, to permit an officer to return a search warrant by reliable electronic means.

COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. It differs from the federal rule in several respects.

Paragraph (a) excludes definitions that are not applicable to Superior Court practice.

Paragraph (b) omits language dealing with the authority of certain judges and federal magistrates to issue search warrants.

Subparagraph (d)(1) retains the language of the former rule regarding the use of hearsay to support probable cause. The language was removed from the federal rule as unnecessary, in part because this principle is addressed in *Federal Rule of Evidence 1101*. Because this jurisdiction has not adopted the Federal Rules of Evidence, the Superior Court rule did not follow this change.

Subparagraphs (d)(2)-(4) retain the language of paragraph (c) of the former rule.

Paragraph (e) retains the language of paragraph (d) of the former rule, and is analogous to *Federal Rule 41(e)(2)*. Its provisions conform to D.C. Code § 23-521 et seq. (2012 Repl.). Subparagraph (e)(5) has been added to make explicit that a search warrant for controlled substances must contain a direction that it may be served at any time of day or night. See D.C. Code § 48-921.02 (h) (2014 Repl.).

Subparagraphs (f)(1)-(3), which have no federal counterpart, retain the language of subparagraphs (e)(1)-(3) of the former rule. Subparagraph (f)(3) cites *18 U.S.C. § 3109* (the federal "knock and announce" statute), which is made applicable by D.C. Code § 23-524 (a) (2012 Repl.).

Subparagraphs (f)(4)-(7) adopt the organizational format of the federal rule; they also clarify and make consistent the terms "inventory" and "return." No change in substance from the former rule is intended.

Subparagraph (f)(8), which has no federal counterpart, retains the language of paragraph (f) of the former rule.

Rule 43. Defendant's Presence

(a) ~~When Required~~WHEN REQUIRED. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

(1) the initial appearance, the initial arraignment, and the plea;

(2) every trial stage, including jury impanelment and the return of the verdict; and

(3) sentencing.

(b) ~~When Not Required~~WHEN NOT REQUIRED. A defendant need not be present under any of the following circumstances:

(1) *Organizational Defendant*. The defendant is an organization represented by counsel who is present.

(2) *Misdemeanor Offense*. The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur by video teleconferencing or in the defendant's absence.

(3) *Conference or Hearing on a Legal Question*. The proceeding involves only a conference or hearing on a question of law.

(4) *Sentence Correction*. The proceeding involves the correction or reduction of sentence under Rule 35.

(c) ~~Waiving Continued Presence~~WAIVING CONTINUED PRESENCE.

(1) *In General*. A defendant who was initially present at trial waives the right to be present under the following circumstances:

(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;

(B) when the defendant is voluntarily absent during sentencing; or

(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) *Waiver's Effect*. If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

COMMENT TO 2017 AMENDMENTS

This rule incorporates the 2011 amendment to *Federal Rule of Criminal Procedure 43*. Subsection (b)(2) has been amended to permit proceedings in misdemeanor cases to occur by video teleconference, if the defendant consents in writing and the court approves.

COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. It is identical to the federal rule except that subparagraph (c)(1)(B) omits the phrase “in a noncapital case” since there are no such cases in Superior Court.

The former Superior Court rule did not permit the court to impose sentence on a defendant who was voluntarily absent. As amended, this rule does permit it, and so conforms to the changes made in the federal rule in 1995.

Rule 44-I. Assignment of Ccounsel.

(a) ~~Appointment authority~~APPOINTMENT AUTHORITY. ~~-- From a list of attorneys prepared and maintained pursuant to~~ When a person qualifies for appointment of counsel under D.C. Code ~~1981,~~ § 11-2601 (2012 Repl.), or is otherwise entitled to have counsel appointed, ~~the~~a judge~~s~~ or ~~hearing commissioners~~magistrate judge must make the appointment from a list of attorneys and qualified law students approved by the court ~~sitting in the Assignment Section, the District of Columbia Section, the Traffic Section, and the Tax Division shall appoint counsel to represent persons qualifying~~ under D.C. Code ~~1981,~~ §§ 11-2601 to -2609 (2012 Repl. & 2017 Supp.)~~., this Rule, or who are otherwise entitled to the appointment of counsel. Counsel may similarly be appointed by a judge or hearing commissioner to whom a case has been assigned under these Rules for further proceedings.~~

(b) ~~Notification of availability for appointment~~NOTIFICATION OF AVAILABILITY FOR APPOINTMENT. ~~--~~Attorneys available for appointment~~s~~ on a particular day ~~should~~must so advise the ~~Deputy Coordinator's~~Defender Services Office ~~before~~by ~~10~~7:00 a.m. ~~of the~~on that day ~~on which they are available for appointments~~.

(c) ~~Deprivation of appointment~~VACATING APPOINTMENT. ~~--~~If ~~A~~an attorney ~~who~~appointed under this rule is not present when the ~~attorney's~~ case is called for arraignment or presentment ~~may be deprived of that appointment and~~, the judge or magistrate judge may vacate the appointment and, if the attorney is absent without adequate excuse, he or she may be subject to further sanction.

~~(d) Appointment considerations. -- In appointing counsel, in addition to the counsel's qualifications, the judge shall consider whether the counsel seeking appointment can be relied upon to be present when required.~~

(d~~e~~) ~~Scheduling of trials~~SCHEDULING OF TRIALS. ~~-- Defense a~~Attorneys appointed under this rule ~~shall~~must not schedule on any day more ~~than 3~~ trials than may be permitted by administrative order of the Chief Judge.~~for any continued date, except on notice to and with permission of the Court.~~

(e~~f~~) ~~Legal assistance by law students~~LEGAL ASSISTANCE BY LAW STUDENTS.

(1) *Practice.*

(A) Any law student admitted to the limited practice of law~~, pursuant to~~ under District of Columbia Court of Appeals Rule 48 ~~of the general Rules of the District of Columbia Court of Appeals, and certified and registered as therein required,~~ may engage in the limited practice of law in the Superior Court ~~of the District of Columbia~~ in connection with any criminal case or matter (not involving a felony), on behalf of any indigent person who has consented in writing to that appearance, provided that a "supervising lawyer.~~,~~"~~;~~ as ~~hereinafter~~ defined in Rule 44-I(e)(3), has approved such action and also entered an appearance.

(B) Any law student eligible under these rules may also appear in any criminal case or matter on behalf of the United States or the District of Columbia with the written approval of the United States Attorney or the Attorney General for the District of Columbia~~Corporation Counsel~~, or their authorized representatives, and the "supervising lawyer."~~.~~

(C) In each case, the written consent and approval referred to above ~~shall~~must be filed in the record of the case.

(2) *Requirements and limitations*.

(A) The law student must be enrolled in a clinical program. A clinical program for purposes of this ~~R~~rule ~~shall be~~is a law school program for credit of at least 4 semester hours held under the direction of a full-time faculty member of ~~such~~the law school, or an adjunct professor for a

consortium of law schools, whose primary duty is the conduct of such program in which a law student obtains practical experience in the operation of the District of Columbia legal system by participating in cases and matters pending before the courts or administrative tribunals. A student need not be so enrolled if that student has satisfactorily completed a clinical program and is continuing in the representation of a program's client.

___(B) The law student must be registered and certified by the Admissions Committee of the District of Columbia Court of Appeals as eligible to engage in the limited practice of law as authorized by ~~the~~ District of Columbia Court of Appeals ~~General~~ Rule 48.

___(C) ~~Certified~~The law student~~s participating in the representation of the government or any individual litigant~~ ~~shall~~must not schedule more than ~~1~~one trial for any single date except ~~on notice to and~~ with the court's permission ~~of the Court~~.

__(3) *Supervision*. ~~--~~The "supervising lawyer" referred to in this ~~R~~rule ~~shall~~must:

___(A) Be a lawyer whose service as a supervising lawyer for the clinical program is approved by the law school ~~by~~in which the law student is enrolled and who is an active practitioner of law in this ~~C~~court~~;~~.

___(B) Assume full responsibility for guiding the student's work in any pending case or matter or any case-related activity in which ~~he or she~~the student participates, and for supervising the quality of that student's work~~;~~.

___(C) Assist the student ~~in his or her participation~~ to the extent necessary, in the supervising lawyer's professional judgment, to insure that the student participation is effective~~; on behalf of the indigent person represented.~~

___(D) Sign each pleading, memorandum, or other document filed by the student, and appear with the student at each ~~C~~court appearance, except that the supervisor need not be present for a non-adversary matter so long as he or she is available to the ~~C~~court within one-half hour~~; after such supervisor's presence is requested by the Court.~~

___(E) Not schedule more than 3 cases for trial on any given day for law students ~~being~~whom he or she is supervising~~ed by him or her~~.

__(~~4F~~) *No CJA Funds.* No CJA funds ~~shall~~may be paid to any student or supervising lawyer in any case in which a law student is appointed ~~pursuant to~~under this ~~R~~rule.

(~~g~~f) ~~Suspension or removal~~SUSPENSION OR REMOVAL.

__(1) *Grounds*.

___(A) An attorney may be suspended or removed from the list of attorneys maintained ~~pursuant to~~under D.C. Code § 11-260~~2~~1 (~~1989~~2012 Repl.) for willful falsification, by commission or omission, of any material information in any voucher, requisition, or other document relating to the District of Columbia Criminal Justice Act~~;~~, for receipt of other payments in violation of D.C. Code §§ 11-2604 to ~~11~~-2606 (~~1989~~2012 Repl. & 2017 Supp.)~~;~~, or for any other conduct ~~which~~that violates the provisions of the District of Columbia Criminal Justice Act, the Plan ~~F~~for Furnishing Representation ~~T~~to Indigents Under ~~T~~the District Of Columbia Criminal Justice Act or any guidelines promulgated by the Superior Court Board of Judges for the implementation of the Plan.

___(B) Any person or organization authorized ~~pursuant to~~under D.C. Code § 11-2605 (~~1989~~2012 Repl.) to provide investigative, expert, or other services may be suspended or removed from further participation in the District of Columbia Criminal Justice Act Program for willful falsification by commission or omission, of any material information in any voucher, requisition, or other document relating to the District of Columbia Criminal Justice Act~~;~~, for receipt of other payments in violation of D.C. Code § 11-2606 (~~1989~~2012 Repl.)~~;~~, or for any other conduct

~~which~~that violates the provisions of the District of Columbia Criminal Justice Act, the Plan ~~F~~for Furnishing Representation ~~T~~to Indigents Under ~~T~~the District Of Columbia Criminal Justice Act or any guidelines promulgated by the Superior Court Board of Judges for the implementation of the Plan.

(2) ~~Disciplinary committee~~*Power to Suspend or Remove*. ~~—~~The power to suspend ~~an attorney and the power to suspend~~ or remove an attorney or any other person or organization appointed or otherwise employed ~~pursuant to~~under the District of Columbia Criminal Justice Act ~~shall be~~is vested in ~~a committee of judges appointed by~~ the Chief Judge or the Chief Judge's designee.

(3) *Procedures*. ~~—~~No order of suspension or removal ~~shall~~may be entered unless the respondent has been given an opportunity to be heard. Notice of the hearing date together with a clear and concise statement of the complaint against the respondent ~~shall~~must be served by certified mail not less than 21 days before the date of the hearing. In the conduct of the hearing, the committee may follow such procedures as it deems appropriate.

COMMENT TO 2017 AMENDMENTS

Stylistic changes were made to this rule to conform with the 2002 amendments to the Federal Rules of Criminal Procedure. In addition, what was formerly section (d), entitled "Appointment Considerations," has been deleted as unnecessary, and the remaining sections have been redesignated accordingly.

New section (d) of this rule replaces section (e) of the former rule. To promote trial date certainty, the maximum number of trials an attorney may schedule per day will be governed by administrative order.

Section (f) has been updated to reflect that, under the 2009 Plan for Furnishing Representation to Indigents Under the District of Columbia Criminal Justice Act, the power to suspend or remove an attorney is vested in the Chief Judge or the Chief Judge's designee.

COMMENT

This Rule has been added to clarify the procedure to be followed in appointing counsel.

For a case interpreting the Sixth Amendment right to appointment of counsel, see Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972).

Subsection (g)(2) of the Rule does not address the power to remove an attorney from the list of attorneys authorized to practice under the Criminal Justice Act. The power to remove an attorney from the list is vested in the Joint Committee For Judicial Administration pursuant to section II A(2) of the Plan For Furnishing Representation To Indigents Under the District of Columbia Criminal Justice Act.

Rule 45. Computing and Extending Time

(a) COMPUTING TIME~~omputing Time~~. The following rules apply in computing any time period ~~of time~~ specified in these rules, ~~or~~ in any court order, or in any statute that does not specify a method of computing time.~~:~~

(1) *Period Stated in Days or a Longer Unit*~~Day of the Event Excluded~~. When the period is stated in days or a longer unit of time:

(A) ~~E~~exclude the day of the ~~act,~~ event~~, or default~~ that triggers~~begins~~ the period;~~.~~

(~~2~~B) ~~Exclusion from Brief Periods. Exclude~~count every day, including intermediate Saturdays, Sundays, and legal holidays; and ~~when the period is less than 11 days.~~

(~~3~~C) ~~Last Day.~~ ~~I~~include the last day of the period, but if the last day ~~unless it~~ is a Saturday, Sunday, or legal holiday, ~~or any part of a day in which the Clerk's Office is closed. When the last day is excluded,~~ the period continues to run~~s~~ until the end of the next day that is not a Saturday, Sunday, or legal holiday~~, or day when the Clerk's Office is closed~~.

(2) *Period Stated in Hours*. When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) *Inaccessibility of the Clerk's Office*. Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 45(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 45(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) *"Last Day" Defined*. Unless a different time is set by a statute, rule or court order, the last day ends at midnight in the court's time zone.

(5) *"Next Day" Defined*. The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(~~4~~6) *"Legal Holiday" Defined*. ~~As used in this rule,~~ ''~~l~~Legal holiday'' means:

(A) the day set aside by statute for observing~~:~~

~~(i)~~ New Year's Day~~,~~;

~~(ii)~~ Martin Luther King~~,~~ Jr.'s Birthday~~,~~;

~~(iii)~~ Washington's Birthday~~,~~;

~~(iv)~~ Memorial Day~~,~~;

~~(v)~~ Independence Day~~,~~;

~~(vi)~~ Labor Day~~,~~;

~~(vii)~~ Columbus Day~~,~~;

~~(viii)~~ Veterans' Day~~,~~;

~~(ix)~~ Thanksgiving Day, or~~;~~

~~(x)~~ Christmas Day; and

(B) any ~~other~~ day declared a holiday by the President or ~~the~~ Congress, or observed as a holiday by the ~~C~~court.

(b) EXTENDING TIME~~xtending Time~~.

(1) *In General*. When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made:

(A) before the originally prescribed or previously extended time expires; or

(B) after the time expires if the party failed to act because of excusable neglect.

(2) *Exception*. The court may not extend the time to take any action under Rule 35, except as stated in that rule.

(c) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE~~dditional Time After Certain Kinds of Service~~. Whenever a party must or may act within a specified ~~period~~time after being served~~ice~~ and service is made in the manner provided under Superior Court Rule of Civil Procedure 5(b)(2)(C~~B~~) (mailing), (D~~C~~) (leaving with the clerk), or (F~~D~~) (other means consented to), 3 days are added after the period would otherwise expire under Rule 45(a).

COMMENT TO 2017 AMENDMENTS

This rule is identical to *Federal Rule of Criminal Procedure 45*, as amended in 2009 and 2016, except for 1) deletion of reference to local rules and 2) modification of subsection (a)(6)(B) to include holidays observed by the court, which made federal subsection (a)(6)(C) inapplicable. As explained in the Advisory Committee Notes to the federal rule, the 2009 federal amendments were intended to simplify and clarify the process for computing deadlines.

COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002, and to conform to a change in paragraph (c) of the federal rule in 2007. It is substantially identical to the federal rule. It retains a distinction, now in subparagraph (a)(3), that permits an extra day for computing time when the clerk's office is actually closed.

In subparagraph (a)(4)(B), the phrase "or observed as a holiday by the court" was added to account for local holidays, such as District of Columbia Emancipation Day, that are observed by the court.

Subparagraph (b)(2) includes a change made to the federal rule in 2005. In that year, *Federal Rule 45* was amended to conform to contemporaneous changes made to *Federal Rules 29* (Motion for Judgment of Acquittal), *33* (New Trial) and *34* (Arresting Judgment), removing the requirement that the court act within seven days on motions for enlargement of time.

The subject matter of former paragraph (d), concerning the timing of written motions and affidavits, is addressed in Rule 47. That paragraph has been deleted from this rule.

Rule 47. Motions and Supporting Affidavits

(a) ~~In General~~IN GENERAL. A party applying to the court for an order must do so by motion.

(b) ~~Form and Content of a Motion and Opposition~~FORM AND CONTENT OF A MOTION. A motion ~~or an opposition~~ —except when made during a trial or hearing—must be in writing, unless the court permits the party to make the motion ~~or opposition~~ by other means. ~~It~~A motion must state the grounds on which it is based~~, the legal authorities upon which it relies,~~ and the relief or order sought. ~~It~~A motion may be supported by affidavit.

(c) ~~Time for Filing~~TIMING OF A MOTION. A party must serve a written motion—other than one that the court may hear ex parte—and any hearing notice at least 7 days before the hearing date, unless a rule or court order sets a different period. For good cause, the court may set a different period upon ex parte application. ~~All motions, except motions to compel discovery, to dismiss for lack of speedy trial, for review of release conditions, or for continuance, must be filed within 20 days after the initial status hearing following arraignment in felony cases and in misdemeanor cases where a jury trial has been demanded, unless otherwise provided by the court or by rule. In misdemeanor cases scheduled for a bench trial, all such motions must be filed within 10 days of arraignment or entry of appearance of counsel, whichever date is later, unless otherwise provided by the court. Any opposition must be filed within 10 days thereafter and be served upon all parties, unless otherwise provided by the court. If no opposition is filed by the time set by this rule or by the court, the court may treat the motion as conceded.~~

(d) AFFIDAVIT SUPPORTING A MOTION. The moving party must serve any supporting affidavit with the motion. A responding party must serve any opposing affidavit at least one day before the hearing, unless the court permits later service.

COMMENT TO 2017 AMENDMENTS

Section (c) was amended to address the time for service of motions. It no longer addresses motion deadlines. In conformance with the federal rules, motion deadlines are now addressed in Rule 12(c)(1)-(2).

Section (d) of this rule is new; it addresses service of the affidavit supporting a motion or opposition.

COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. It differs from the federal rule in several respects.

Paragraphs (b) and (c) substantially incorporate provisions of former Superior Court Rule 47-I. Paragraph (b) includes the requirement of former Rule 47-I(b) that a motion state the legal authorities upon which it relies, although it omits the requirement that the authorities appear in a separate statement. It states parallel requirements for oppositions. Paragraph (c) incorporates, with minor stylistic changes, the substance of former Rule 47-I(c). It sets the time for filing motions and oppositions and allows for motions to be treated as conceded.

Rule 118. [Deleted].~~Sealing of arrest records.~~

~~(a) Motion for sealing and declaratory relief. -- Any person arrested for the commission of an offense punishable by the District of Columbia Code, whose prosecution has been terminated without conviction and before trial, may file a motion to seal the records of the person's arrest within 120 days after the charges have been dismissed. For good cause shown and to prevent manifest injustice, the person may file a motion within 3 years after the prosecution has been terminated, or at any time thereafter if the government does not object. As to arrests occurring on or after July 19, 1979, but before the Adoption of the Rule, a motion may be filed within 120 days after the adoption of this Rule. The motion shall state facts in support of the movant's claim and shall be accompanied by a statement of points and authorities in support thereof. The movant may also file any appropriate exhibits, affidavits, and supporting documents. A copy of the motion shall be served upon the prosecutor. The fee for filing a motion under this Rule shall be $ 20.00.~~

~~(b) Response by prosecutor. -- If the prosecutor does not intend to oppose the motion, the prosecutor shall so inform the Court and the movant, in writing, within 30 days after the motion has been filed. Otherwise, the prosecutor shall not be required to respond to the motion unless ordered to do so by the Court, pursuant to paragraph (c) of this Rule.~~

~~(c) Initial review by Court; summary denial; response by prosecutor. -- If it plainly appears from the face of the motion, any accompanying exhibits and documents, the record of any prior proceedings in the case, and any response which the prosecutor may have filed, that the movant is not entitled to relief, the Court, stating reasons therefore on the record or in writing, shall deny the motion and send notice thereof to all parties. In the event the motion is not denied, the Court shall order the prosecutor to file a response to the motion, if the prosecutor has not already done so. Such response shall be filed and served within 60 days after entry of the Court's order. The response shall be accompanied by a statement of points and authorities in opposition, and any appropriate exhibits and supporting documents.~~

~~(d) Court's determination of whether to hold a hearing. -- Upon the filing of the prosecutor's response, the Court shall determine whether an evidentiary hearing is required. If it appears that a hearing is not required, the Court shall enter an appropriate order, pursuant to paragraph (f) of this Rule. If the Court determines that a hearing is required, one shall be scheduled promptly.~~

~~(e) Determination of motion. -- If a hearing is held, hearsay evidence shall be admissible. If, based upon the pleadings or following a hearing, the Court finds by clear and convincing evidence that the offense for which the movant was arrested did not occur or that the movant did not commit the offense, the Court shall order the movant's arrest records retrieved and sealed pursuant to paragraph (f).~~

~~(f) Findings and order; declaratory relief.~~

~~(1) Order denying motion. -- If the Court denies the motion, it shall issue an order and shall set forth its reasons on the record or in writing.~~

~~(2) Order granting motion. -- If the Court grants the motion, it shall issue an order, in writing, pursuant to subparagraphs (f)(2)(A), (B), and (C) of this Rule.~~

~~(A) Retrieval of arrest records and purging of computer records. -- The Court shall order the prosecutor to collect from the prosecutor's office, the law enforcement agency responsible for the arrest and/or the Metropolitan Police Department all records of the movant's arrest in their central files, including without limitation all photographs, fingerprints, and other identification data. The Court shall also direct the prosecutor to arrange for the elimination of any computerized record of the movant's arrest. However, the Court shall expressly allow the~~

~~prosecutor and the law enforcement agency to maintain a record of the arrest so long as the record is not retrievable by the identification of the movant. The Court shall also order the prossecutor [prosecutor] to request that the law enforcement agency responsible for the arrest retrieve any of the aforementioned records which were disseminated to pretrial services, corrections, and other law enforcement agencies, and to collect these records when retrieved.~~

~~(B) Requirement that arrest records be sealed. -- The Court shall order the prosecutor to file with the Clerk of the Court, within 60 days, all records collected by the law enforcement agency and in the prosecutor's own possession. These records shall be accompanied by a certification that to the best of the prosecutor's knowledge and belief no further records exist in the prosecutor's own possession and in the possession of the law enforcement agency's central records files or those of its disseminees, or that, if such records do exist, steps have been taken to retrieve them. The Court shall order the Clerk to collect all Superior Court records pertaining to the movant's arrest and cause to be purged any computerized record of such arrest. However, the Court shall expressly allow the Clerk to maintain a record of the arrest so long as the record is not retrievable by the identification of the movant. The Court shall also order the Clerk to file under seal all Superior Court records so retrieved, together with all records filed by the prosecutor pursuant to this paragraph, within 7 days after receipt of such records.~~

~~(C) Declaratory relief. -- The Court shall summarize in the order the factual circumstances of the challenged arrest [and] any post-arrest occurrences it deems relevant, and, if the facts support such a conclusion, shall rule as a matter of law that the movant did not commit the offense for which the movant was arrested or that no offense had been committed. A copy of the order shall be provided to the movant or his or her counsel. The movant may obtain a copy of the order at any time from the Clerk of the Court, upon proper identification, without a showing of need.~~

~~(g) Sanitization of records involving co-defendants. -- In a case involving co-defendants in which the Court orders the movant's records sealed, the Court may order that only those records, or portions thereof, relating solely to the movant be sealed. The Court may make an in camera inspection of these records in order to make this determination. If practicable, the Court may order those records relating to co-defendants returned to the prosecutor, with all references to the movant sanitized.~~

~~(h) Indexing and access to sealed records. -- The Clerk shall place the records ordered sealed by the Court in a special file, appropriately and securely indexed in order to protect its confidentiality, subject to being opened on further order of the Court only upon the showing of compelling need. A request for access to such sealed records may be made ex parte. However, unless otherwise ordered by the Court, the Clerk shall reply in response to inquiries concerning the existence of arrest records which may have been sealed pursuant to this Rule that no records are available.~~

~~(i) Appeal. -- An aggrieved party may note an appeal from a final order entered pursuant to this Rule in accordance with Rule 4(II)(b)(1) of the General Rules of the District of Columbia Court of Appeals.~~

COMMENT TO 2017 AMENDMENTS

Rule 118 has been deleted because the sealing of arrest records is addressed comprehensively by statute. *See* D.C. Code § 16-801 et seq. (2012 Repl. & 2017 Supp.).

* * *

By the Court:

Date: 3/29/17

Robert E. Morin
Chief Judge

Copies to:

All Judges
All Magistrate Judges
All Senior Judges
Dan Cipullo, Director, Criminal Division
Library
Daily Washington Law Reporter
Laura Wait, Assistant General Counsel