

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

RULE PROMULGATION ORDER 24-03

(Amending Super. Ct. Crim. R. 16, 45, and 62)

WHEREAS, pursuant to D.C. Code § 11-946 (2012 Repl.), the Board of Judges of the Superior Court approved amendments to Superior Court Rules of Criminal Procedure 16, 45, and 62; and

WHEREAS, pursuant to D.C. Code § 11-946 (2012 Repl.), the amendments to these rules, to the extent that they modify the federal rules, have been approved by the District of Columbia Court of Appeals; it is

ORDERED, that Superior Court Rules of Criminal Procedure 16, 45, and 62 are hereby amended as set forth below; and it is further

ORDERED, that the amendments shall take effect immediately and shall govern all proceedings hereafter commenced and, insofar as just and practicable, all pending proceedings.

Rule 16. Discovery and Inspection

(b) DEFENDANT'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.*

(i) *Duty to Disclose.* At the government's request, the defendant must disclose to the government, in writing, the information required by Rule 16(b)(1)(C)(iii) for any expert testimony that the defendant intends to use as evidence during the defendant's case-in-chief at trial, if—

- the defendant requests disclosure under Rule 16(a)(1)(G) and the government complies; or
- the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

(ii) *Time to Disclose.* The court must set a time for the defendant to make the defendant's disclosures. The time must be sufficiently before trial to provide a fair opportunity for the government to meet the defendant's evidence.

(iii) *Contents of the Disclosure.* The disclosure for each expert witness must contain:

- a complete statement of all opinions that the defendant will elicit from the witness in its case-in-chief;
- the bases and reasons for them;
- the witness's qualifications, including a list of all publications authored in the previous 10 years; and
- a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.

(iv) *Information Previously Disclosed.* If the defendant previously provided a report under Rule 16(b)(1)(B) that contained information required by Rule 16(b)(1)(C)(iii), that information may be referred to, rather than repeated, in the expert-witness disclosure.

(v) Signing the Disclosure. The witness must approve and sign the disclosure, unless the defendant:

- states in the disclosure why it could not obtain the witness's signature through reasonable efforts; or
- has previously provided under Rule 16(b)(1)(B) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by Rule 16(b)(1)(C)(iii).

(vi) Supplementing and Correcting a Disclosure. The defendant must supplement or correct its disclosures in accordance with Rule 16(c).

(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.

COMMENT TO 2024 AMENDMENTS

Subsection (b)(1)(C)(v) has been amended to incorporate the 2023 amendments to *Federal Rule of Criminal Procedure 16* which corrected the reference in subsection (b)(1)(C)(v) to expert reports previously provided by the defense under subsection (b)(1)(B).

COMMENT TO 2023 AMENDMENTS

Subsections (a)(1)(G) and (b)(1)(C) of this rule have been amended to incorporate the 2022 amendments to *Federal Rule of Criminal Procedure 16* regarding the parties' obligations to disclose information about expert testimony.

Rule 45. Computing and Extending Time

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

(6) *“Legal Holiday” Defined.* “Legal holiday” means:

(A) the day set aside by statute for observing New Year’s Day, Martin Luther King Jr.’s Birthday, Washington’s Birthday, District of Columbia Emancipation Day, Memorial Day, Juneteenth National Independence Day, Independence Day, Labor Day, Columbus Day, Veterans’ Day, Thanksgiving Day, or Christmas Day; and

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

COMMENT TO 2024 AMENDMENTS

Subsection (a)(6)(A) has been amended to include District of Columbia Emancipation Day and Juneteenth National Independence Day in the definition of legal holiday.

Rule 62. Criminal Rules Emergency

(a) CONDITIONS FOR AN EMERGENCY.

(1) *In General.* The Chief Judge may declare or extend a Criminal Rules emergency for a period that totals 14 days or less when the Chief Judge determines that:

(A) extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to the court, substantially impair the court's ability to perform its functions in compliance with the other criminal rules; and

(B) no feasible alternative measures would sufficiently address the impairment within a reasonable time.

(2) *Extended Time Period.* The Chief Judge may declare a rules emergency for a period of more than 14 days, or an extension of a rules emergency past the 14th day after the start of the rules emergency, if:

(A) the Chief Judge makes the findings required by Rule 62(a)(1)(A) and (B); and

(B) the Joint Committee consents.

(b) DECLARING AN EMERGENCY.

(1) *Content.* The declaration of a rules emergency or an extension of that rules emergency must:

(A) state which provisions in Rule 62(d) and (e) are effective during the particular rules emergency; and

(B) be limited to a stated period of no more than 90 days.

(2) *Early Termination.* The Chief Judge must terminate a declaration before the termination date when the Chief Judge finds that a rules emergency no longer exists.

(3) *Additional Declarations.* The Chief Judge may issue additional declarations consistent with Rule 62(a).

(c) **CONTINUING A PROCEEDING AFTER A TERMINATION.** Termination of a declaration ends the court's authority under Rule 62(d) and (e). But if a particular proceeding is already underway and resuming compliance with these rules for the rest of the proceeding would not be feasible or work an injustice, it may be completed with the defendant's consent as if the declaration had not terminated.

(d) AUTHORIZED DEPARTURES FROM THESE RULES AFTER A DECLARATION.

(1) *Public Access to a Proceeding.* If emergency conditions substantially impair the public's in-person attendance at a public proceeding, the court must provide reasonable alternative access, contemporaneous if feasible.

(2) *Signing or Consenting for a Defendant.* If any rule, including this rule, requires a defendant's signature, written consent, or written waiver—and emergency conditions limit a defendant's ability to sign—the court may sign for the defendant if the defendant, after consultation with counsel, consents on the record. If the defendant is pro se, the court may sign for the defendant if the defendant consents on the record.

(3) *Issuing a summons.* When these rules require the court to issue an arrest warrant on misdemeanor charges only, the court may issue a summons instead if it finds that:

(A) because of the emergency conditions, the use of a warrant would create a significant risk to health or safety that outweighs the risk of dangerousness to any other person or the community; and

(B) the government has not demonstrated good cause for issuing a warrant instead of the summons.

(4) *Alternate Jurors*. The court may impanel more than 6 alternate jurors and, consistent with Rule 24(c)(4), may allow additional preemptory challenges proportionate to the number of additional alternates.

(e) AUTHORIZED USE OF VIDEOCONFERENCING AND TELECONFERENCING AFTER A DECLARATION.

(1) *Videoconferencing for Plea, Trial, and Sentencing Proceedings Under Rule 43(b)(2)*. This rule does not modify the court's authority to use videoconferencing for a proceeding under Rule 43(b)(2), except that if emergency conditions substantially impair the defendant's opportunity to consult with counsel, the court must ensure that the defendant will have an adequate opportunity to do so confidentially immediately before, during, and at the conclusion of that proceeding.

(2) *Videoconferencing for Certain Proceedings at Which the Defendant Has a Right to Be Present*. Except for felony trials and as otherwise provided under Rule 62(e)(1) and (3), for a proceeding at which a defendant has a right to be present, the court may use videoconferencing if:

(A) the Chief Judge finds that emergency conditions substantially impair the court's ability to hold in-person proceedings within a reasonable time;

(B) the court finds that the defendant will have an adequate opportunity to consult confidentially with counsel immediately before, during, and at the conclusion of the proceeding; and

(C) the defendant consents on the record after consulting with counsel.

(3) *Videoconferencing for Felony Pleas and Sentencings*. For a felony proceeding under Rule 11 or 32, the court may use videoconferencing only if, in addition to the requirements in Rule 62(e)(2)(A) and (B):

(A) the Chief Judge finds that emergency conditions substantially impair the court's ability to hold in-person felony pleas and sentencings; and

(B) the defendant consents on the record after consulting with counsel.

(4) *Teleconferencing by One or More Participants*. The court may conduct the proceeding, in whole or in part, by teleconferencing if:

(A) the requirements under any applicable rule, including this rule, for conducting the proceeding by videoconferencing have been met;

(B) the court finds that videoconferencing is not reasonably available for any person who would participate by teleconference; and

(C) the defendant consents on the record after consulting with counsel.

COMMENT TO 2024 AMENDMENTS

This rule was amended to incorporate provisions of new *Federal Rule of Criminal Procedure 62*, an earlier draft of which the Superior Court adopted in relevant part in 2021 during the pandemic. The changes between the draft federal rule adopted by the Superior Court in 2021 and the final federal rule were largely technical and semantic. For example, former subsection (b)(2)(A) dealing with both additional declarations and early termination was split into separate subsections (b)(2) and (b)(3), consistent with the final federal rule. Likewise, former section (e) pertaining to the effect of termination now appears at section (c) and adopts the new requirement in the final federal rule that the defendant consent to continuing a proceeding under the emergency provisions after

a declaration ends. However, this amendment did not remove the summons provision (formerly in subsection (c)(3), now in subsection (d)(3)) which was stricken from the final federal rule, because it is appropriate to Superior Court practice in emergency circumstances.

COMMENT TO 2021 AMENDMENTS

This new rule gives the Chief Judge the ability to declare a rules emergency and authorize the court to depart from certain provisions in other criminal rules. The Joint Committee must consent if the Chief Judge declares a rules emergency for a period of more than 14 days or an extension of a rules emergency past the 14th day after the start of the rules emergency. The Chief Judge's declaration must specify which provisions in sections (c) and (d) are effective during the rules emergency. The provisions in section (d), if included in the declaration, are not intended to modify the court's authority to use videoconferencing for a proceeding under Rules 5 and 10.

Rule 16. Discovery and Inspection

(b) DEFENDANT'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.*

(i) *Duty to Disclose.* At the government's request, the defendant must disclose to the government, in writing, the information required by Rule 16(b)(1)(C)(iii) for any expert testimony that the defendant intends to use as evidence during the defendant's case-in-chief at trial, if—

- the defendant requests disclosure under Rule 16(a)(1)(G) and the government complies; or
- the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

(ii) *Time to Disclose.* The court must set a time for the defendant to make the defendant's disclosures. The time must be sufficiently before trial to provide a fair opportunity for the government to meet the defendant's evidence.

(iii) *Contents of the Disclosure.* The disclosure for each expert witness must contain:

- a complete statement of all opinions that the defendant will elicit from the witness in its case-in-chief;
- the bases and reasons for them;
- the witness's qualifications, including a list of all publications authored in the previous 10 years; and
- a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.

(iv) *Information Previously Disclosed.* If the defendant previously provided a report under Rule 16(b)(1)(B) that contained information required by Rule 16(b)(1)(C)(iii), that information may be referred to, rather than repeated, in the expert-witness disclosure.

(v) Signing the Disclosure. The witness must approve and sign the disclosure, unless the defendant:

- states in the disclosure why it could not obtain the witness's signature through reasonable efforts; or
- has previously provided under Rule 16(b)(1)(B) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by Rule 16(b)(1)(C)(iii).

(vi) Supplementing and Correcting a Disclosure. The defendant must supplement or correct its disclosures in accordance with Rule 16(c).

(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.

COMMENT TO 2024 AMENDMENTS

Subsection (b)(1)(C)(v) has been amended to incorporate the 2023 amendments to *Federal Rule of Criminal Procedure 16* which corrected the reference in subsection (b)(1)(C)(v) to expert reports previously provided by the defense under subsection (b)(1)(B).

COMMENT TO 2023 AMENDMENTS

Subsections (a)(1)(G) and (b)(1)(C) of this rule have been amended to incorporate the 2022 amendments to *Federal Rule of Criminal Procedure 16* regarding the parties' obligations to disclose information about expert testimony.

Rule 45. Computing and Extending Time

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

(6) *“Legal Holiday” Defined.* “Legal holiday” means:

(A) the day set aside by statute for observing New Year’s Day, Martin Luther King Jr.’s Birthday, Washington’s Birthday, District of Columbia Emancipation Day, Memorial Day, Juneteenth National Independence Day, Independence Day, Labor Day, Columbus Day, Veterans’ Day, Thanksgiving Day, or Christmas Day; and

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

COMMENT TO 2024 AMENDMENTS

Subsection (a)(6)(A) has been amended to include District of Columbia Emancipation Day and Juneteenth National Independence Day in the definition of legal holiday.

Rule 62. Criminal Rules Emergency

(a) CONDITIONS FOR AN EMERGENCY.

(1) *In General.* The Chief Judge may declare or extend a Criminal Rules emergency for a period that totals 14 days or less when the Chief Judge determines that:

(A) extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to the court, substantially impair the court's ability to perform its functions in compliance with the other criminal rules; and

(B) no feasible alternative measures would sufficiently address the impairment within a reasonable time.

(2) *Extended Time Period.* The Chief Judge may declare a rules emergency for a period of more than 14 days, or an extension of a rules emergency past the 14th day after the start of the rules emergency, if:

(A) the Chief Judge makes the findings required by Rule 62(a)(1)(A) and (B); and

(B) the Joint Committee consents.

(b) DECLARING AN EMERGENCY.

(1) *Content.* The declaration of a rules emergency or an extension of that rules emergency must:

(A) state which provisions in Rule 62(d) and (e) are effective during the particular rules emergency; and

(B) be limited to a stated period of no more than 90 days.

(2) *Early Termination.* The Chief Judge must terminate a declaration before the termination date when the Chief Judge finds that a rules emergency no longer exists.

(3) *Additional Declarations.* The Chief Judge may issue additional declarations consistent with Rule 62(a).

(c) **CONTINUING A PROCEEDING AFTER A TERMINATION.** Termination of a declaration ends the court's authority under Rule 62(d) and (e). But if a particular proceeding is already underway and resuming compliance with these rules for the rest of the proceeding would not be feasible or work an injustice, it may be completed with the defendant's consent as if the declaration had not terminated.

(d) AUTHORIZED DEPARTURES FROM THESE RULES AFTER A DECLARATION.

(1) *Public Access to a Proceeding.* If emergency conditions substantially impair the public's in-person attendance at a public proceeding, the court must provide reasonable alternative access, contemporaneous if feasible.

(2) *Signing or Consenting for a Defendant.* If any rule, including this rule, requires a defendant's signature, written consent, or written waiver—and emergency conditions limit a defendant's ability to sign—the court may sign for the defendant if the defendant, after consultation with counsel, consents on the record. If the defendant is pro se, the court may sign for the defendant if the defendant consents on the record.

(3) *Issuing a summons.* When these rules require the court to issue an arrest warrant on misdemeanor charges only, the court may issue a summons instead if it finds that:

(A) because of the emergency conditions, the use of a warrant would create a significant risk to health or safety that outweighs the risk of dangerousness to any other person or the community; and

(B) the government has not demonstrated good cause for issuing a warrant instead of the summons.

(4) *Alternate Jurors*. The court may impanel more than 6 alternate jurors and, consistent with Rule 24(c)(4), may allow additional preemptory challenges proportionate to the number of additional alternates.

(e) AUTHORIZED USE OF VIDEOCONFERENCING AND TELECONFERENCING AFTER A DECLARATION.

(1) *Videoconferencing for Plea, Trial, and Sentencing Proceedings Under Rule 43(b)(2)*. This rule does not modify the court's authority to use videoconferencing for a proceeding under Rule 43(b)(2), except that if emergency conditions substantially impair the defendant's opportunity to consult with counsel, the court must ensure that the defendant will have an adequate opportunity to do so confidentially immediately before, during, and at the conclusion of that proceeding.

(2) *Videoconferencing for Certain Proceedings at Which the Defendant Has a Right to Be Present*. Except for felony trials and as otherwise provided under Rule 62(e)(1) and (3), for a proceeding at which a defendant has a right to be present, the court may use videoconferencing if:

(A) the Chief Judge finds that emergency conditions substantially impair the court's ability to hold in-person proceedings within a reasonable time;

(B) the court finds that the defendant will have an adequate opportunity to consult confidentially with counsel immediately before, during, and at the conclusion of the proceeding; and

(C) the defendant consents on the record after consulting with counsel.

(3) *Videoconferencing for Felony Pleas and Sentencings*. For a felony proceeding under Rule 11 or 32, the court may use videoconferencing only if, in addition to the requirements in Rule 62(e)(2)(A) and (B):

(A) the Chief Judge finds that emergency conditions substantially impair the court's ability to hold in-person felony pleas and sentencings; and

(B) the defendant consents on the record after consulting with counsel.

(4) *Teleconferencing by One or More Participants*. The court may conduct the proceeding, in whole or in part, by teleconferencing if:

(A) the requirements under any applicable rule, including this rule, for conducting the proceeding by videoconferencing have been met;

(B) the court finds that videoconferencing is not reasonably available for any person who would participate by teleconference; and

(C) the defendant consents on the record after consulting with counsel.

COMMENT TO 2024 AMENDMENTS

This rule was amended to incorporate provisions of new *Federal Rule of Criminal Procedure 62*, an earlier draft of which the Superior Court adopted in relevant part in 2021 during the pandemic. The changes between the draft federal rule adopted by the Superior Court in 2021 and the final federal rule were largely technical and semantic. For example, former subsection (b)(2)(A) dealing with both additional declarations and early termination was split into separate subsections (b)(2) and (b)(3), consistent with the final federal rule. Likewise, former section (e) pertaining to the effect of termination now appears at section (c) and adopts the new requirement in the final federal rule that the defendant consent to continuing a proceeding under the emergency provisions after

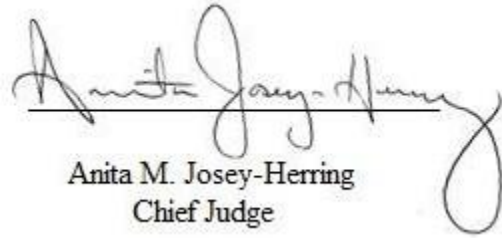
a declaration ends. However, this amendment did not remove the summons provision (formerly in subsection (c)(3), now in subsection (d)(3)) which was stricken from the final federal rule, because it is appropriate to Superior Court practice in emergency circumstances.

COMMENT TO 2021 AMENDMENTS

This new rule gives the Chief Judge the ability to declare a rules emergency and authorize the court to depart from certain provisions in other criminal rules. The Joint Committee must consent if the Chief Judge declares a rules emergency for a period of more than 14 days or an extension of a rules emergency past the 14th day after the start of the rules emergency. The Chief Judge's declaration must specify which provisions in sections (c) and (d) are effective during the rules emergency. The provisions in section (d), if included in the declaration, are not intended to modify the court's authority to use videoconferencing for a proceeding under Rules 5 and 10.

* * *

SO ORDERED.



Anita M. Josey-Herring
Chief Judge

Date: June 10, 2024

Copies to:

Judicial Officers
Executive Officer
Clerk of the Court
Office of General Counsel
Division Directors
District of Columbia Bar
Daily Washington Law Reporter
Library