118th Congress, 1st Session – – – – – – – – – – – – – – House Document 118–31

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES

TRANSMITTING

AMENDMENTS AND AN ADDITION TO THE FEDERAL RULES OF CRIMINAL PROCEDURE THAT HAVE BEEN ADOPTED BY THE SUPREME COURT, PURSUANT TO 28 U.S.C. 2072

APRIL 25, 2023.—Referred to the Committee on the Judiciary and ordered to be printed

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U.S. GOVERNMENT PUBLISHING OFFICE
39–011 WASHINGTON : 2023

SUPREME COURT OF THE UNITED STATES,
Washington, DC, April 24, 2023.

Hon. KEVIN MCCARTHY,
Speaker, House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: I have the honor to submit to the Congress amendments and an addition to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying the amended and additional rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 19, 2022; a blackline version of the rules with committee notes; an excerpt from the September 2022 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and excerpts from the May 2022 reports of the Advisory Committee on Criminal Rules.

Sincerely,

JOHN G. ROBERTS, Jr.,
Chief Justice.

April 24, 2023

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. The Federal Rules of Criminal Procedure are amended to include amendments to Rules 16, 45, and 56, and to add new Rule 62.

[*See infra* pp. ___ ___ ___.]

2. The foregoing amendments and addition to the Federal Rules of Criminal Procedure shall take effect on December 1, 2023, and shall govern in all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. THE CHIEF JUSTICE is authorized to transmit to the Congress the foregoing amendments and addition to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2074 of Title 28, United States Code.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16. Discovery and Inspection

* * * * *

(b) Defendant's Disclosure.

(1) ***Information Subject to Disclosure.***

* * * * *

(C) *Expert Witnesses.*

* * * * *

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

- states in the disclosure why the defendant could not obtain the witness's signature through reasonable efforts; or
- has previously provided under (B) a report, signed by the witness, that contains all the opinions and

the bases and reasons for them required by (iii).

* * * * *

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or 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, Memorial Day, Juneteenth National Independence Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

* * * * *

Rule 56. When Court Is Open

* * * * *

(c) Special Hours. A court may provide by local rule or order that its clerk's office will be open for specified hours on Saturdays or legal holidays other than those set aside by statute for observing New Year's Day, Martin Luther King Jr 's Birthday, Washington's Birthday, Memorial Day, Juneteenth National Independence Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

Rule 62. Criminal Rules Emergency

(a) Conditions for an Emergency. The Judicial Conference of the United States may declare a Criminal Rules emergency if it determines that:

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

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

(b) Declaring an Emergency.

(1) ***Content.*** The declaration must:

(A) designate the court or courts affected;

(B) state any restrictions on the authority granted in (d) and (e); and

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

(2) ***Early Termination.*** The Judicial Conference may terminate a declaration for one or more courts before the termination date.

(3) ***Additional Declarations.*** The Judicial Conference may issue additional declarations under this rule.

(c) Continuing a Proceeding After a Termination. Termination of a declaration for a court ends its authority under (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 would 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—defense counsel may sign for the defendant if the defendant consents on the record. Otherwise, defense counsel must file an affidavit attesting to the defendant's consent. If the defendant is pro se, the court may sign for the

defendant if the defendant consents on the record.

(3) ***Alternate Jurors.*** A court may impanel more than 6 alternate jurors.

(4) ***Correcting or Reducing a Sentence.*** Despite Rule 45(b)(2), if emergency conditions provide good cause, a court may extend the time to take action under Rule 35 as reasonably necessary.

(e) Authorized Use of Videoconferencing and Teleconferencing After a Declaration.

(1) ***Videoconferencing for Proceedings Under Rules 5, 10, 40, and 43(b)(2).*** This rule does not modify a court's authority to use videoconferencing for a proceeding under Rules 5, 10, 40, or 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 before and during those proceedings.

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

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

(B) the court finds that the defendant will have an adequate opportunity to

consult confidentially with counsel before and during the proceeding, and

(C) the defendant consents after consulting with counsel.

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

(A) the district's chief judge finds that emergency conditions substantially impair a court's ability to hold in-person felony pleas and sentencings in the district within a reasonable time;

(B) the defendant, before the proceeding and after consulting with counsel, consents in a writing signed by the

defendant that the proceeding be conducted by videoconferencing; and

(C) the court finds that further delay in that particular case would cause serious harm to the interests of justice.

(4) ***Teleconferencing by One or More Participants.*** A court may conduct a 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:

(i) videoconferencing is not reasonably available for any

person who would participate by teleconference; and

(ii) the defendant will have an adequate opportunity to consult confidentially with counsel before and during the proceeding if held by teleconference, and

(C) the defendant consents.

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE ROSLYNN R. MAUSKOPF
Secretary

October 19, 2022

MEMORANDUM

To: The Chief Justice of the United States
The Associate Justices of the Supreme Court

From: Judge Roslynn R. Mauskopf Roslyn R. Mauskopf

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit for the Court's consideration proposed amendments to Rules 16, 45, and 56, and new Rule 62 of the Federal Rules of Criminal Procedure, which have been approved by the Judicial Conference. The Judicial Conference recommends that the amended rules and new rule be adopted by the Court and transmitted to Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting (i) clean and blackline copies of the amended rules and new rule along with committee notes; (ii) an excerpt from the September 2022 report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) excerpts from the May 2022 reports of the Advisory Committee on Criminal Rules.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[1]

Rule 16. Discovery and Inspection[2]

* * * * *

(b) Defendant's Disclosure.

(1) ***Information Subject to Disclosure.***

* * * * *

(C) *Expert Witnesses.*

* * * * *

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

- states in the disclosure why the defendant could not obtain the

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[1] New material is underlined; matter to be omitted is lined through.

[2] The changes indicated are to the version of Rule 16 that is scheduled to go into effect on December 1, 2022 if Congress takes no contrary action.

witness's signature through reasonable efforts; or

- has previously provided under (~~F~~B) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

* * * * *

Committee Note

The amendment corrects the cross reference in Rule 16(b)(1)(C)(v), which refers to expert reports previously provided by the defense under Rule 16(b)(1)(B).

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[1]

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or 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, Memorial Day, Juneteenth National Independence Day, Independence Day, Labor Day, Columbus Day,

[1] New material is underlined

Veterans' Day, Thanksgiving Day, or Christmas Day;

* * * * *

Committee Note

The amendment adds "Juneteenth National Independence Day" to the list of legal holidays. See Juneteenth National Independence Day Act, P.L. 117-17 (2021) (amending 5 U.S.C. § 6103(a)).

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[1]

Rule 56. When Court Is Open

* * * * *

(c) **Special Hours.** A court may provide by local rule or order that its clerk's office will be open for specified hours on Saturdays or legal holidays other than those set aside by statute for observing New Year's Day, Martin Luther King~~,~~ Jr.'s Birthday, Washington's Birthday, Memorial Day, Juneteenth National Independence Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

Committee Note

The amendment adds "Juneteenth National Independence Day" to the list of legal holidays. See Juneteenth National Independence Day Act, P.L. 117-17 (2021) (amending 5 U.S.C. § 6103(a)). A stylistic change was made.

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[1] New material is underlined; matter to be omitted is lined through.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[1]

Rule 62. Criminal Rules Emergency

(a) Conditions for an Emergency. The Judicial Conference of the United States may declare a Criminal Rules emergency if it determines that:

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

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

(b) Declaring an Emergency.

(1) ***Content.*** The declaration must:

(A) designate the court or courts affected;

[1] New material is underlined.

(B) state any restrictions on the authority granted in (d) and (e); and

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

(2) ***Early Termination.*** The Judicial Conference may terminate a declaration for one or more courts before the termination date.

(3) ***Additional Declarations.*** The Judicial Conference may issue additional declarations under this rule.

(c) Continuing a Proceeding After a Termination. Termination of a declaration for a court ends its authority under (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 would 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—defense counsel may sign for the defendant if the defendant consents on the record. Otherwise, defense counsel must file an affidavit attesting to the defendant's consent. If the defendant is pro se, the court may sign for the

defendant if the defendant consents on the record.

(3) ***Alternate Jurors.*** A court may impanel more than 6 alternate jurors.

(4) ***Correcting or Reducing a Sentence.*** Despite Rule 45(b)(2), if emergency conditions provide good cause, a court may extend the time to take action under Rule 35 as reasonably necessary.

(e) Authorized Use of Videoconferencing and Teleconferencing After a Declaration.

(1) ***Videoconferencing for Proceedings Under Rules 5, 10, 40, and 43(b)(2).*** This rule does not modify a court's authority to use videoconferencing for a proceeding under Rules 5, 10, 40, or 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 before and during those proceedings.

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

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

(B) the court finds that the defendant will have an adequate opportunity to

consult confidentially with counsel before and during the proceeding; and

(C) the defendant consents after consulting with counsel.

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

(A) the district's chief judge finds that emergency conditions substantially impair a court's ability to hold in-person felony pleas and sentencings in the district within a reasonable time;

(B) the defendant, before the proceeding and after consulting with counsel, consents in a writing signed by the

defendant that the proceeding be conducted by videoconferencing; and

(C) the court finds that further delay in that particular case would cause serious harm to the interests of justice.

(4) ***Teleconferencing by One or More Participants.*** A court may conduct a 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:

(i) videoconferencing is not reasonably available for any

person who would participate by teleconference; and

(ii) the defendant will have an adequate opportunity to consult confidentially with counsel before and during the proceeding if held by teleconference, and

(C) the defendant consents.

Committee Note

Subdivision (a). This rule defines the conditions for a Criminal Rules emergency that would support a declaration authorizing a court to depart from one or more of the other Federal Rules of Criminal Procedure. Rule 62 refers to the other, non-emergency rules—currently Rules 1-61—as "these rules." This committee note uses "these rules" or "the rules" to refer to the non-emergency rules, and uses "this rule" or "this emergency rule" to refer to new Rule 62.

The rules have been promulgated under the Rules Enabling Act and carefully designed to protect constitutional and statutory rights and other interests. Any authority to depart from the rules must be strictly limited. Compliance with the rules cannot be cast aside because of cost or convenience, or without consideration of alternatives that would permit compliance to continue. Subdivision (a)

narrowly restricts the conditions that would permit a declaration granting emergency authority to depart from the rules and defines who may make that declaration.

First, subdivision (a) specifies that the power to declare a rules emergency rests solely with the Judicial Conference of the United States, the governing body of the judicial branch. To find that a rules emergency exists, the Judicial Conference will need information about the ability of affected courts to comply with the rules, as well as the existence of reasonable alternatives to continue court functions in compliance with the rules. The judicial council of a circuit, for example, may be able to provide helpful information it has received from judges within the circuit regarding local conditions and available resources.

Paragraph (a)(1) requires that before declaring a Criminal Rules emergency, the Judicial Conference must determine that circumstances are extraordinary and that they relate to public health or safety or affect physical or electronic access to a court. These requirements are intended to prohibit the use of this emergency rule to respond to other challenges, such as those arising from staffing or budget issues. Second, those extraordinary circumstances must substantially impair the ability of a court to perform its functions in compliance with the rules.

In addition, paragraph (a)(2) requires that even if the Judicial Conference determines the extraordinary circumstances defined in (a)(1), it cannot declare a Criminal Rules emergency unless it also determines that no feasible alternative measures would sufficiently address the impairment and allow the affected court to perform its functions in compliance with the rules within a reasonable time. For example, in the districts devastated by hurricanes Katrina and Maria, the ability of courts to function in

compliance with the rules was substantially impaired for extensive periods of time. But there would have been no Criminal Rules emergency under this rule because those districts were able to remedy that impairment and function effectively in compliance with the rules by moving proceedings to other districts under 28 U.S.C § 141. Another example might be a situation in which the judges in a district are unable to carry out their duties as a result of an emergency that renders them unavailable, but courthouses remain safe. The unavailability of judges would substantially impair that court's ability to function in compliance with the rules, but temporary assignment of judges from other districts under 28 U.S.C. § 292(b) and (d) would eliminate that impairment.

Subdivision (a) also recognizes that emergency circumstances may affect only one or a small number of courts—familiar examples include hurricanes, floods, explosions, or terroristic threats—or may have widespread impact, such as a pandemic or a regional disruption of electronic communications. This rule provides a uniform procedure that is sufficiently flexible to accommodate different types of emergency conditions with local, regional, or nationwide impact.

Paragraph (b)(1). Paragraph (b)(1) specifies what must be included in a declaration of a Criminal Rules emergency. Subparagraph (A) requires that each declaration of a Criminal Rules emergency designate the court or courts affected by the Criminal Rules emergency as defined in subdivision (a). Some emergencies may affect all courts, some will be local or regional. The declaration must be no broader than the Criminal Rules emergency. That is, every court identified in a declaration must be one in which extraordinary circumstances that relate to public health or safety or that affect physical or electronic access to the court

are substantially impairing its ability to perform its functions in compliance with these rules, and in which compliance with the rules cannot be achieved within a reasonable time by alternative measures. A court may not exercise authority under (d) and (e) unless the Judicial Conference includes the court in its declaration, and then only in a manner consistent with that declaration, including any limits imposed under (b)(1)(B).

Subparagraph (b)(1)(B) provides that the Judicial Conference's declaration of a Criminal Rules emergency must state any restrictions on the authority granted by subdivisions (d) and (e) to depart from the rules. For example, if the emergency arises from a disruption in electronic communications, there may be no reason to authorize videoconferencing for proceedings in which the rules require in-person appearance. But (b)(1)(B) does not allow a declaration to expand departures from the rules beyond those authorized by subdivisions (d) and (e).

Under (b)(1)(C), each declaration must state when it will terminate, which may not exceed 90 days from the date of the declaration. This sunset clause is included to ensure that these extraordinary deviations from the rules last no longer than necessary.

Paragraph (b)(2). If emergency conditions end before the termination date of the declaration for some or all courts included in that declaration, (b)(2) provides that the Judicial Conference may terminate the declaration for the courts no longer affected. This provision also ensures that any authority to depart from the rules lasts no longer than necessary.

Paragraph (b)(3) recognizes that the conditions that justified the declaration of a Criminal Rules emergency may

continue beyond the term of the declaration. The conditions may also change, shifting in nature or affecting more districts. An example might be a flood that leads to a contagious disease outbreak. Rather than provide for extensions, renewals, or modifications of an initial declaration, paragraph (b)(3) gives the Judicial Conference the authority to respond to such situations by issuing additional declarations. Each additional declaration must meet the requirements of subdivision (a), and must include the contents required by (b)(1).

Subdivision (c). In general, the termination of a declaration of emergency ends all authority to depart from the other Federal Rules of Criminal Procedure. It does not terminate, however, the court's authority to complete an ongoing trial with alternate jurors who have been impaneled under (d)(3), because the proceeding authorized by (d)(3) is the completed impanelment. In addition, subdivision (c) carves out a narrow exception for certain proceedings commenced under a declaration of emergency but not completed before the declaration terminates. If it would not be feasible to conclude a proceeding commenced before a declaration terminates with procedures that comply with the rules, or if resuming compliance with the rules would work an injustice, the court may complete that proceeding using procedures authorized by this emergency rule, but only if the defendant consents to the use of emergency procedures after the declaration ends. Subdivision (c) recognizes the need for some accommodation and flexibility during the transition period, but also the importance of returning promptly to the rules to protect the defendant's rights and other interests.

Subdivisions (d) and (e) describe the authority to depart from the rules after a declaration.

Paragraph (d)(1) addresses the courts' obligation to provide alternative access when emergency conditions have substantially impaired in-person attendance by the public at public proceedings. The term "public proceeding" is intended to capture proceedings that the rules require to be conducted "in open court," proceedings to which a victim must be provided access, and proceedings that must be open to the public under the First and Sixth Amendments. The rule creates a duty to provide the public with "reasonable alternative access," notwithstanding Rule 53's ban on the "broadcasting of judicial proceedings." Under appropriate circumstances, the reasonable alternative could be audio access to a video proceeding.

The duty arises only when the substantial impairment of in-person access by the public is caused by emergency conditions. The rule does not apply when reasons other than emergency conditions restrict access. The duty arises not only when emergency conditions substantially impair the attendance of anyone, but also when conditions would allow participants but not the public to attend, as when capacity must be restricted to prevent contagion.

Alternative access must be contemporaneous when feasible. For example, if public health conditions limit courtroom capacity, contemporaneous transmission to an overflow courthouse space ordinarily could be provided.

When providing "reasonable alternative access," courts must comply with the constitutional guarantees of public access and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771.

Paragraph (d)(2) recognizes that emergency conditions may disrupt compliance with a rule that requires the defendant's signature, written consent, or written waiver

If emergency situations limit the defendant's ability to sign, (d)(2) provides an alternative, allowing defense counsel to sign if the defendant consents. To ensure that there is a record of the defendant's consent to this procedure, the amendment provides two options: (1) defense counsel may sign for the defendant if the defendant consents on the record, or, (2) without the defendant's consent on the record, defense counsel must file an affidavit attesting to the defendant's consent to the procedure. The defendant's oral agreement on the record alone will not substitute for the defendant's signature. The written document signed by counsel on behalf of the defendant provides important additional evidence of the defendant's consent.

The court may sign for a pro se defendant, if that defendant consents on the record. There is no provision for the court to sign for a counseled defendant, even if the defendant provides consent on the record. The Committee concluded that rules requiring the defendant's signature, written consent, or written waiver protect important rights, and permitting the judge to bypass defense counsel and sign once the defendant agrees could result in a defendant perceiving pressure from the judge to sign. Requiring a writing from defense counsel is an essential protection when the defendant's own signature is not reasonably available because of emergency conditions.

It is generally helpful for the court to conduct a colloquy with the defendant to ensure that defense counsel consulted with the defendant with regard to the substance and import of the pleading or document being signed, and that the consent to allow counsel to sign was knowing and voluntary.

Paragraph (d)(3) allows the court to impanel more than six alternate jurors, creating an emergency exception to

the limit imposed by Rule 24(c)(1). This flexibility may be particularly useful for a long trial conducted under emergency conditions—such as a pandemic—that increase the likelihood that jurors will be unable to complete the trial. Because it is not possible to anticipate all of the situations in which this authority might be employed, the amendment leaves to the discretion of the district court whether to impanel more alternates, and if so, how many. The same uncertainty about emergency conditions that supports flexibility in the rule for the provision of additional alternates also supports avoiding mandates for additional peremptory challenges when more than six alternates are provided. Nonetheless, if more than six alternates are impaneled and emergency conditions allow, the court should consider permitting each party one or more additional peremptory challenges, consistent with the policy in Rule 24(c)(4).

Paragraph (d)(4) provides an emergency exception to Rule 45(b)(2), which prohibits the court from extending the time to take action under Rule 35 "except as stated in that rule." When emergency conditions provide good cause for extending the time to take action under Rule 35, the amendment allows the court to extend the time for taking action "as reasonably necessary." The amendment allows the court to extend the 14-day period for correcting a clear error in the sentence under Rule 35(a) and the one-year period for government motions for sentence reductions based on substantial assistance under Rule 35(b)(1). Nothing in this provision is intended to expand the authority to correct or reduce a sentence under Rule 35. This emergency rule does not address the extension of other time limits because Rule 45(b)(1) already provides the necessary flexibility for courts to consider emergency circumstances. It allows the court to extend the time for taking other actions on its own or on a party's motion for good cause shown.

Subdivision (e) provides authority for a court to use videoconferencing or teleconferencing under specified circumstances after the declaration of a Criminal Rules emergency. The term "videoconferencing" is used throughout, rather than the term "video teleconferencing" (which appears elsewhere in the rules), to more clearly distinguish conferencing with visual images from "teleconferencing" with audio only. The first three paragraphs in (e) describe a court's authority to use videoconferencing, depending upon the type of proceeding, while the last describes a court's authority to use teleconferencing when videoconferencing is not reasonably available. The defendant's consent to the use of conferencing technology is required for all proceedings addressed by subdivision (e).

Subdivision (e) applies to the use of videoconferencing and teleconferencing for the proceedings defined in paragraphs (1) through (3), for all or part of the proceeding, by one or more participants. But it does not regulate the use of video and teleconferencing technology for all possible proceedings in a criminal case. It does not speak to or prohibit the use of videoconferencing or teleconferencing for proceedings, such as scheduling conferences, at which the defendant has no right to be present. Instead, it addresses three groups of proceedings: (1) proceedings for which the rules already authorize videoconferencing; (2) certain other proceedings at which a defendant has the right to be present, excluding felony trials; and (3) felony pleas and sentencings. The new rule does not address the use of technology to maintain communication with a defendant who has been removed from a proceeding for misconduct.

Paragraph (e)(1) addresses first appearances, arraignments, and certain misdemeanor proceedings under Rules 5, 10, 40, and 43(b)(2), where the rules already provide for videoconferencing if the defendant consents. *See* Rules 5(f), 10(c), 40(d), and 43(b)(2) (written consent). This paragraph was included to eliminate any confusion about the interaction between existing videoconferencing authority and this rule. It clarifies that this rule does not change the court's existing authority to use videoconferencing for these proceedings, except that it requires the court to address emergency conditions that significantly impair the defendant's opportunity to consult with counsel. In that situation, the court must ensure that the defendant will have an adequate opportunity for confidential consultation before and during videoconference proceedings under Rules 5, 10, 40, and 43(b)(2). Paragraphs (e)(2) through (4) apply this requirement to all emergency video and teleconferencing authority granted by the rule after a declaration.

The requirement is based upon experience during the COVID-19 pandemic, when conditions dramatically limited the ability of counsel to meet or even speak with clients. The Committee believed it was essential to include this prerequisite for conferencing under Rules 5, 10, 40, and 43(b)(2), as well as conferencing authorized only during a declaration by paragraphs (e)(2), (3), and (4), in order to safeguard the defendant's constitutional right to counsel. The rule does not specify any particular means of providing an adequate opportunity for private communication.

Paragraph (e)(2) addresses videoconferencing authority for proceedings "at which a defendant has a right to be present" under the Constitution, statute, or rule, excluding felony trials and proceedings addressed in either (e)(1) or (e)(3). Such proceedings include, for example, revocations of release under Rule 32.1, preliminary hearings

under Rule 5.1, and waivers of indictment under Rule 7(b). During a declaration, an affected court may use videoconferencing for these proceedings, but only if the three circumstances are met.

First, subparagraph (e)(2)(A) restricts videoconferencing authority to affected districts in which the chief judge (or alternate under 28 U.S.C. § 136(e)) has found that emergency conditions substantially impair a court's ability to hold proceedings in person within a reasonable time. Recognizing that important policy concerns animate existing limitations in Rule 43 on virtual proceedings, even with the defendant's consent, this district-wide finding is not an invitation to substitute virtual conferencing for in-person proceedings without regard to conditions in a particular division, courthouse, or case. If a proceeding can be conducted safely in-person within a reasonable time, a court should hold it in person.

Second, subparagraph (e)(2)(B) conditions videoconferencing upon the court's finding that the defendant will have an adequate opportunity to consult confidentially with counsel before and during the proceeding. If emergency conditions prevent the defendant's presence, and videoconferencing is employed as a substitute, counsel will not have the usual physical proximity to the defendant during the proceeding and may not have ordinary access to the defendant before and after the proceeding.

Third, subparagraph (e)(2)(C) requires that the defendant consent to videoconferencing after consulting with counsel. Insisting on consultation with counsel before consent assures that the defendant will be informed of the potential disadvantages and risks of virtual proceedings. It also provides some protection against potential pressure to consent, from the government or the judge.

The Committee declined to provide authority in this rule to conduct felony trials without the physical presence of the defendant, even if the defendant wishes to appear at trial by videoconference during an emergency declaration. And this rule does not address the use of technology to maintain communication with a defendant who has been removed from a proceeding for misconduct. Nor does it address if or when trial participants other than the defendant may appear by videoconferencing.

Paragraph (e)(3) addresses the use of videoconferencing for a third set of proceedings: felony pleas and sentencings under Rules 11 and 32. The physical presence of the defendant together in the courtroom with the judge and counsel is a critical part of any plea or sentencing proceeding. Other than trial itself, in no other context does the communication between the judge and the defendant consistently carry such profound consequences. The importance of defendant's physical presence at plea and sentence is reflected in Rules 11 and 32. The Committee's intent was to carve out emergency authority to substitute virtual presence for physical presence at a felony plea or sentence only as a last resort, in cases where the defendant would likely be harmed by further delay. Accordingly, the prerequisites for using videoconferencing for a felony plea or sentence include three circumstances in addition to those required for the use of videoconferencing under (e)(2).

Subparagraph (e)(3)(A) requires that the chief judge of the district (or alternate under 28 U.S.C. § 136(e)) make a district-wide finding that emergency conditions substantially impair a court's ability to hold felony pleas and sentencings in person in that district within a reasonable time. This finding serves as assurance that videoconferencing may be necessary and that individual judges cannot on their own

authorize virtual pleas and sentencings when in-person proceedings might be manageable with patience or adaptation. Although the finding serves as assurance that videoconferencing might be necessary in the district, as under (e)(2), individual courts within the district may not conduct virtual plea and sentencing proceedings in individual cases unless they find the remaining criteria of (e)(3) and (4) are satisfied.

As protection against undue pressure to waive physical presence, subparagraph (e)(3)(B) states that, before the proceeding and after consultation with counsel, the defendant must consent in writing that the proceeding be conducted by videoconferencing. This requirement of writing is, like other requirements of writing in the rules, subject to the emergency provisions in (d)(2), unless the relevant emergency declaration excludes the authority in (d)(2). To ensure that the defendant consulted with counsel with regard to this decision, and that the defendant's consent was knowing and voluntary, the court may need to conduct a colloquy with the defendant before accepting the written request.

Subparagraph (e)(3)(C) requires that before a court may conduct a plea or sentencing proceeding by videoconference, it must find that the proceeding in that particular case cannot be further delayed without serious harm to the interests of justice. Examples may include some pleas and sentencings that would allow transfer to a facility preferred by the defense, or result in immediate release, home confinement, probation, or a sentence shorter than the time expected before conditions would allow in-person proceedings. A judge might also conclude that under certain emergency conditions, delaying certain guilty pleas under Rule 11(c)(1)(C), even those calling for longer sentences, may result in serious harm to the interests of justice.

Paragraph (e)(4) details conditions for the use of teleconferencing to conduct proceedings for which videoconferencing is authorized. Videoconferencing is always a better option than an audio-only conference because it allows participants to see as well as hear each other. To ensure that participants communicate through audio alone only when videoconferencing is not feasible, (e)(4) sets out four prerequisites. Because the rule applies to teleconferencing "in whole or in part," it mandates these prerequisites whenever the entire proceeding is held by teleconference from start to finish, or when one or more participants in the proceeding are connected by audio only, for part or all of a proceeding.

The first prerequisite, in (e)(4)(A), is that all of the conditions for the use of videoconferencing for the proceeding must be met before a court may conduct a proceeding, in whole or in part, by audio-only. For example, videoconferencing for a sentencing under Rule 32 requires compliance with (e)(3)(A), (B), and (C). No part of a felony sentencing proceeding may be held by teleconference, nor may any person participate in such a proceeding by audio only, unless those videoconferencing requirements have been met. Likewise, for a misdemeanor proceeding, teleconferencing requires compliance with (e)(1) and Rule 43(b)(2).

Second, (e)(4)(B)(i) requires the court to find that videoconferencing for all or part of the proceeding is not reasonably available before allowing participation by audio only. Because it focuses on what is "reasonably available," this requirement is flexible. It is intended to allow courts to use audio only connections when necessary, but not otherwise. For example, it precludes the use of teleconferencing alone if videoconferencing—though

generally limited—is available for all participants in a particular proceeding. But it permits the use of teleconferencing in other circumstances. For example, if only an audio connection with a defendant were feasible because of security concerns at the facility where the defendant is housed, a court could find that videoconferencing for that defendant in the particular proceeding is not reasonably available. Or, if the video connection fails for one or more participants during a proceeding started by videoconference and audio is the only option for completing that proceeding expeditiously, this rule permits the affected participants to use audio technology to finish the proceeding.

Third, (e)(4)(B)(ii) provides that the court must find that the defendant will have an adequate opportunity to consult confidentially with counsel before and during the teleconferenced proceeding. Opportunities for confidential consultation may be more limited with teleconferencing than they are with videoconferencing as when a defendant or a defense attorney has only one telephone line to use to call into the conference, and there are no "breakout rooms" for private conversations like those videoconferencing platforms provide. This situation may arise not only when a proceeding is held entirely by phone, but also when, in the midst of a videoconference, video communication fails for either the defendant or defense counsel. An attorney or client may have to call into the conference using the devices they had previously been using for confidential communication. Experiences like these prompted this requirement that the court specifically find that an alternative opportunity for confidential consultation is in place before permitting teleconferencing in whole or in part.

Finally, recognizing the differences between videoconferencing and teleconferencing, subparagraph

(e)(4)(C) provides that the defendant must consent to teleconferencing for the proceeding, even if the defendant previously requested or consented to videoconferencing. A defendant who is willing to be sentenced with a videoconference connection with the judge may balk, understandably, at being sentenced over the phone. Subparagraph (e)(4)(C) does not require that consent to teleconferencing be given only after consultation with counsel. By requiring only "consent," it recognizes that the defendant would have already met the consent requirements for videoconferencing for that proceeding, and it allows the court more flexibility to address varied situations. To give one example, if the video but not audio feed drops for the defendant or another participant near the very end of a videoconference, and the judge asks the defendant, "do you want to talk to your lawyer about finishing this now without the video?," an answer "No, I'm ok, we can finish now" would be sufficient consent under (e)(4)(C).

Excerpt from the September 2022 Report of the Committee on Rules of Practice and Procedure

* * * * *

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

* * * * *

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules recommended for final approval proposed amendments to Criminal Rules 16, 45, and 56, and new Criminal Rule 62.

Rule 16 (Discovery and Inspection)

The proposed amendment to Rule 16, the principal rule that governs discovery in criminal cases, would correct a typographical error in the Rule 16 amendments that are currently pending before Congress. Those amendments, expected to take effect on December 1, 2022, revise both the provisions governing expert witness disclosures by the government – contained in Rule 16(a)(1)(G) – and the provisions governing expert witness disclosures by the defense – contained in Rule 16(b)(1)(C). Subject to exceptions, both Rule 16(a)(1)(G)(v) and Rule 16(b)(1)(C)(v) require the disclosure to be signed by the expert witness. One exception applies if, under another subdivision of the rule (concerning reports of examinations and tests), the disclosing party has previously provided the required information in a report signed by the witness. This exception cross-references the subdivision concerning reports of examinations and tests.

In Rule 16(a)(1), the relevant subdivision is Rule 16(a)(1)(F), and Rule 16(a)(1)(G)(v) duly cross-references that subdivision (applying the exception if the government "has previously

provided under (F) a report, signed by the witness, that contains" the required information). In Rule 16(b)(1), the relevant subdivision is Rule 16(b)(1)(B); however, Rule 16(b)(1)(C)(v) as reported to Congress cross-references not "(B)" (as it should) but "(F)" (applying the exception if the defendant "has previously provided under (F) a report, signed by the witness, that contains" the required information). The proposed amendment would correct Rule 16(b)(1)(C)(v)'s cross-reference from (F) to (B). The Advisory Committee recommended this proposal for approval without publication because it is a technical amendment. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 45 (Computing and Extending Time) and Rule 56 (When Court is Open)

In response to the enactment of the Juneteenth Act, the Advisory Committee made technical amendments to Rules 45 and 56 to include Juneteenth National Independence Day in the list of legal public holidays in those rules. The Advisory Committee recommended final approval without publication because these are technical and conforming amendments. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 62 (Criminal Rules Emergency)

New Rule 62 is part of the package of proposed emergency rules drafted in response to Congress's directive in the CARES Act. Subdivisions (a) and (b) of Rule 62 contain uniform provisions shared by the Appellate, Bankruptcy, and Civil Emergency Rules. The uniform provisions address (1) who declares an emergency; (2) the definition of a rules emergency; (3) limitations in the declaration; and (4) early termination of declarations. Under the uniform provisions, the Judicial Conference has the sole authority to declare a rules emergency, which is defined as when "extraordinary circumstances relating to public health or safety, or affecting

physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with" the relevant set of rules.

Rule 62 includes an additional requirement not present in the Appellate, Bankruptcy, or Civil Emergency Rules. That provision is (a)(2), which – for Criminal Rules emergencies – requires a determination that "no feasible alternative measures would sufficiently address the impairment within a reasonable time." This provision ensures that the emergency provisions in subdivisions (d) and (e) of Rule 62 would be invoked only as a last resort, and reflects the importance of the rights protected by the Criminal Rules that would be affected in a rules emergency.

Subdivision (c) of Rule 62 addresses the effect of the termination of a rules emergency declaration. For proceedings that have been conducted under a declaration of emergency but that are not yet completed when the declaration terminates, the rule permits completion of the proceeding as if the declaration had not terminated if (1) resuming compliance with the ordinary rules would not be feasible or would work an injustice and (2) the defendant consents. This provision recognizes the need for some flexibility during the transition period at the end of an emergency declaration, while also recognizing the importance of returning promptly to compliance with the non-emergency rules.

Subdivisions (d) and (e) of Rule 62 address the court's authority to depart from the Criminal Rules once a Criminal Rules emergency is declared. These subdivisions would allow specified departures from the existing rules with respect to public access, a defendant's signature or consent, the number of alternate jurors, the time for acting under Rule 35, and the use of videoconferencing or teleconferencing in certain proceedings.

Paragraph (d)(1) specifically addresses the court's obligation to provide reasonable alternative access to public proceedings during a rules emergency if the emergency substantially

impairs the public's in-person attendance. Following the public comment period, the Advisory Committee considered several submissions commenting on the reference to "victims" in the committee note discussing (d)(1). The Advisory Committee revised the committee note to direct courts' attention to the constitutional guarantees of public access and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771. The Standing Committee made a minor wording change to this portion of the committee note (directing courts to "comply with" rather than merely "be mindful of" the applicable constitutional and statutory provisions).

As published, subparagraph (e)(3)(B) provided that a court may use videoconferencing for a felony plea or sentencing proceeding if, among other requirements, "the defendant, after consulting with counsel, requests in a writing signed by the defendant that the proceeding be conducted by videoconferencing." Public comments raised practical concerns about the requirement of an advance writing by the defendant requesting the use of videoconferencing. The Advisory Committee considered these comments as they pertained to the "request" language and the timing of the request, and ultimately elected to retain the language as published.

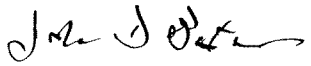
The Standing Committee made three changes relating to Rule 62(e)(3)(B). First, the Standing Committee voted (10 to 3) to insert "before the proceeding and" in subparagraph (e)(3)(B) to clarify the temporal requirement. Second, the Standing Committee voted (7 to 6) to substitute "consent" for "request" in subparagraph (e)(3)(B) The net result of these two changes is to require that the defendant, "before the proceeding and after consulting with counsel, consents in a writing signed by the defendant that the proceeding be conducted by videoconferencing." Third, the Standing Committee authorized the Advisory Committee Chair and Reporters to draft conforming changes to the committee note. After these deliberations, the Standing Committee voted unanimously to recommend final approval of new Criminal Rule 62.

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rules 16, 45, and 56, and proposed new Criminal

Rule 62, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,



John D. Bates, Chair

Elizabeth J. Cabraser	Troy A. McKenzie
Jesse M. Furman	Patricia Ann Millett
Robert J. Giuffra, Jr.	Lisa O. Monaco
Frank Mays Hull	Gene E.K. Pratter
William J. Kayatta, Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zipps
Carolyn B. Kuhl	

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Excerpt from the May 12, 2022 Report of the Advisory Committee on Criminal Rules

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on the Rules of Practice and Procedure

FROM: Hon. Raymond M. Kethledge, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: May 12, 2022

Introduction

The Advisory Committee on Criminal Rules met on April 28, 2022. We presented draft Rule 62 with the other reports on emergency rules. What remains for this report are one action item and several information items.

I. Action item: Juneteenth Amendments

On June 17, 2021, President Biden signed into law the Juneteenth National Independence Day Act, Pub. Law No. 117–17, 135 Stat. 287 (2021), which amends 5 U.S.C. § 6103(a) to add to the list of legal public holidays "Juneteenth National Independence Day, June 19."

The Committee has approved two amendments to incorporate the Juneteenth National

Independence Day into the holidays listed in the Rules of Criminal Procedure. At its fall meeting in 2021, the Committee approved an amendment adding Juneteenth to the definition of "legal holiday" in Rule 45(a)(6) (which governs time computation), and by a later email vote the Committee approved an amendment adding it to Rule 56(c), which allows courts to open the clerk's office except for certain listed federal holidays. The text of the proposed amendments and committee note appear at the end of this report.

* * * * *

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Raymond M. Kethledge, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules (Rule 62)

DATE: May 11, 2022

Last June, the Standing Committee approved for publication proposed Criminal Rule 62, the draft emergency rule. In April, the Criminal Rules Committee met to consider the public comments on the proposed rule, which numbered ten or so. After considerable discussion, the Committee chose not to revise the proposed rule, but approved two changes in the note dealing with alternative public access.

The Committee recommends that Rule 62, with the two changes in the note, be approved for transmittal to the Judicial Conference with the recommendation that the Conference transmit the rule to the Supreme Court.

A. The recommended changes in the committee note

The Committee recommends two amendments to the published note accompanying paragraph (d)(1), which requires courts to provide reasonable alternative access for the public. As amended, the note would read as follows:

> **Paragraph (d)(1)** addresses the courts' obligation to provide alternative access when emergency conditions have substantially impaired in-person attendance by the public at public proceedings. The term "public proceeding" ~~was~~ is[1] intended to capture proceedings that the rules require to be conducted "in open court," proceedings to which a victim must be provided access, and proceedings that must be open to the public under the First and Sixth Amendments. The rule creates a duty to provide the public~~, including victims,~~ with "reasonable alternative access," notwithstanding Rule 53's ban on the "broadcasting of judicial proceedings." Under appropriate circumstances, the reasonable alternative could be audio access to a video proceeding.
>
> The duty arises only when the substantial impairment of in-person access by the public is caused by emergency conditions. The rule does not apply when reasons other than emergency conditions restrict access. The duty arises not only when emergency conditions substantially impair the attendance of anyone, but also when conditions would allow participants but not the public to attend, as when capacity must be restricted to prevent contagion.
>
> Alternative access must be contemporaneous when feasible. For example, if public health conditions limit courtroom capacity, contemporaneous transmission to an overflow courthouse space ordinarily could be provided.
>
> When providing "reasonable alternative access," courts must be mindful of the constitutional guarantees of public access and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771.

a. Comments received

Three submissions commented on the reference to "victims" in the published committee note discussing (d)(1). They offered conflicting views.

The **Department of Justice (21-CR-0003-0008)** requested that the following sentence be added to the note: "When providing 'reasonable alternative access' courts must be mindful of victims' rights under the Crime Victims' Rights Act, 18 U.S.C. § 3771." It explained:

> ...without an explicit reference to the CVRA, the commentary's grouping of victims with the public for the purposes of providing "reasonable alternative access, contemporaneous if feasible" may result in courts providing reasonable alternative access that falls short of the CVRA's requirements. We believe a victim should be

[1] To keep the present tense consistent throughout the note, the Committee also accepted this stylistic change at the meeting. No change in meaning is intended.

> considered similar to a participant in the proceedings, and not the public. Most importantly, we think the CVRA must be scrupulously followed. When providing "reasonable alternative access," courts must account for a victim who wishes to exercise her right: 1) to be "reasonably heard" at any public court proceeding involving the "release, plea, sentencing," or parole of the accused; 2) to not be excluded from any such court proceeding subject to limited exceptions; and 3) to have reasonable, accurate, and timely notice of any public court proceeding involving the crime, release, or escape of the accused. 18 U.S.C. § 3771(a)(2)-(4). Non-contemporaneous access or access that allows a victim to watch or listen, but not participate in the public proceedings, may not satisfy the CVRA. To avoid confusion the Department recommends explicitly referencing courts' obligations to comply with CVRA in the commentary.

The **National Association of Criminal Defense Lawyers (NACDL) (21-CR-0003-0011)** strongly disagreed with DOJ's request, and it urged no change to the published note. NACDL argued:

> The current draft Note is entirely correct to group alleged victims with other members of the public for this purpose. The CVRA does not dictate the details of "victim" notice or access, and in some respects is superseded by Fed.R.Crim.P. 60. As to procedural implementation, then, under the principles of the Rules Enabling Act the CVRA's notice and attendance requirements are properly subordinated to the provisions of the new Rule (in the event of a qualifying emergency), just as it is to Rule 60(a) in ordinary times. The Department's suggested addition to the Committee Note would not "avoid confusion" but rather would engender it, by encouraging challenges by alleged "victims," either before or after the fact, to proceedings held in accordance with the Rule.

Professor Miller and the Federal Criminal Justice Clinic at the University of Chicago (FCJC) (21-CR-0003-0013) requested that the Committee eliminate the phrase "'including victims' from the phrase 'duty to provide the public, including victims, with 'reasonable alternative access.'" Alternatively, the FCJC suggested revising the note to reflect the Sixth Amendment's priority of access for the friends and family of the defendant, and to ensure reasonable press access.

In addressing this topic and several others discussed below, the FCJC argued that some of the language in the proposed rule and note is misleading or inconsistent with existing constitutional standards:

> The Note's express reference to victims and silence about friends and family of the defendant may be interpreted to suggest that courts should prioritize the access rights of victims over others when space is limited. The Note thus appears to conflict with Supreme Court precedent that requires courts to provide access for friends and family of the accused, *Oliver*, 333 U.S. at 272.

The FCJC stated that "access problems can be felt most acutely by friends and family of the accused," listing lack of technology or the knowledge to use it, "[i]mprecise instructions that impede their ability to access proceedings," and the importance of their contributions at detention hearings and sentencings, under 18 U.S.C. §§ 3142(g)(3)(A); 3553(a)(1)."

b. Committee deliberations

The Committee accepted the subcommittee's recommendation to revise the note to draw attention to the concerns about victim participation under the CVRA—and also the concerns raised by FCJC that any access comply with the First and Sixth Amendments—without suggesting a position on substantive issues of constitutional law, assigning priority to any particular group among the public, or attempting to recite the groups "included" in "the public." After deleting the phrase "including victims," the revision adds the following sentence to the note's discussion of (d)(1):

> When providing "reasonable alternative access," courts must be mindful of the constitutional guarantees of public access, and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771.

The phrase "any applicable statutory provision, including the Crime Victims' Rights Act" is intended to encompass any other existing or future statutory provision that might be applicable

The Committee agreed with the subcommittee's approach to the issues raised by public comments. But members extensively discussed two points concerning the precise wording of the new sentence: namely, whether to refer specifically to the First and Sixth Amendments, and whether to include a reference to the common law right of access.

As proposed by the subcommittee, the new sentence advised courts to be "mindful of the constitutional guarantees of public access in the First and Sixth Amendments." The proposal responded to the FCJC's concern that courts may overlook these rights during emergencies. At the April meeting, Judge Furman raised the question whether there might be other constitutional bases for a right of public access. No one had raised that issue before, and the reporters had not researched it. But members thought that defendants might turn to the Due Process Clause if the Sixth Amendment were not applicable, and they were reluctant to adopt language that might preclude such an approach.

Discussion focused on the benefits of drawing courts' attention to the extensive case law on the right of public access under the First and Sixth Amendments versus the potential for a negative implication that there were no other relevant constitutional rights. Members noted that the negative implication would be strengthened by the phrasing referring to statutory rights: "any applicable statutory provision, including the Crime Victims' Rights Act." There was some support for a revision to make the references to the constitutional and statutory provisions parallel, such as "the constitutional guarantees of public access, including the First and Sixth Amendments access and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771."

A majority of the Committee was persuaded that the better course was to refer generally to "the constitutional guarantees of public access," without a reference in the new sentence to the First and Sixth Amendments. Members who supported that view pointed out that the note as published already referred to these amendments. Just three paragraphs earlier, the note to (d)(1) provided:

> The term "public proceeding" was intended to capture proceedings that the rules require to be conducted "in open court," proceedings to which a victim must be provided access, and proceedings that must be open to the public under the First and Sixth Amendments.

With this reference already in the note accompanying the very provision in question, members thought the new reference to the constitutional guarantees of public access would be construed to include the First and Sixth Amendments, while avoiding the potential for a negative implication.

The discussion of this issue also addressed a second question, raised by Judge Bates at the meeting: whether the note should refer to a common law right of public access. This issue had not been raised during the drafting process, nor in any of the public comments, and the reporters had not researched it. During the meeting the reporters recalled, in general, that they had found support for a common law right of access while researching the issues raised by efforts to protect cooperators through methods such as sealing court records. In order to avoid any negative implication, members expressed support for the inclusion of a reference to the common law.

By a vote of seven to three, the Committee voted at the meeting to revise the addition to the note as follows:

> When providing "reasonable public access," courts must be mindful of the constitutional and common law guarantees of public access and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771.

After the meeting the reporters requested the assistance of the Rules Law Clerk, Mr. DeWitt, to determine whether there was a sufficient body of precedent on the common law right to physical presence at judicial proceedings to warrant an admonition that courts consider the common law in providing public access. His research found that only the Third Circuit had applied a common law right of access to proceedings, and all of the Third Circuit cases addressing the common law right of access did so while applying First and or Sixth Amendment rights to access as well.[2] None of these cases applied the common law right independently, or suggested that access under the common law right is any broader than access under the First or Sixth Amendment. The Eleventh Circuit, and several district courts from other circuits, mentioned a

---

[2] These cases from the Third Circuit enforce both the common law and constitutional rights simultaneously. Gov't of the V.I. v. Leonard A., 922 F.2d 1141, 1144-45 (3d Cir. 1991) (upholding district court decision to allow the daughter of a prosecution witness to remain in the courtroom); US Investigations Servs., LLC v. Callihan, No. 2:11-cv-0355, 2011 WL 1157256, at *1 (W.D. Pa. Mar. 29, 2011) (denying motion to close courtroom in civil case re trade secrets); Harris v. City of Philadelphia, No. CIV. A. 82-1847, 1995 WL 385102, at *2 (E.D. Pa. June 26, 1995) (declining to close courtroom). And this one finds an exception to both constitutional and common law right of access and closed certain proceedings: United States v. Sabre Corp., 452 F. Supp. 3d 97, 149-50 (D. Del. 2020) (Stark, J.), vacated as moot No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020).

common law right of access to judicial "proceedings and records" or "proceedings and documents" in cases addressing access to documents. Courts in other circuits by-and-large have not specifically addressed the issue, but turned to the common law only for discussion as to whether the public has a right to access certain documents.[3]

In light of this research, Judge Kethledge polled the Committee, which voted unanimously by email to delete the reference to "the . . . common law right" of access from the proposed addition to the committee note. The proposed addition provides:

> When providing "reasonable alternative access," courts must be mindful of the constitutional guarantees of public access, and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771

B. Provisions with public comments, no change recommended

1. Subdivision (a) – the role of the Judicial Conference

a. Comments received

Two comments addressed the language in subdivision (a) authorizing the Judicial Conference to declare a "judicial emergency." The comments state conflicting views. The **Federal Magistrate Judges Association (FMJA) (21-CR-0003-0006)** expressed concern that "the Judicial Conference might not be well suited to addressing regional or District-specific emergencies of the type more likely to present in the future." In contrast, the **Federal Bar Association (21-CR-0003-0009)** "agree[d] that the Judicial Conference exclusively, rather than specific circuits, districts, or judges, should be permitted to declare a rules emergency." It noted that "[c]onferring this authority to the Judicial Conference alone should help prevent a disjointed or balkanized response to unusual circumstances, including emergencies affecting only particular regions or other subsets of federal courts."

b. Committee deliberations

The Committee declined to revise the carefully crafted consensus about the authority of the Judicial Conference reflected in subdivision (a) as published. It was satisfied that the Judicial Conference has the ability to gather information and respond quickly to emergencies, through its executive committee if necessary. Moreover, it is important to have the Judicial Conference act as a national gatekeeper, charged with strictly limiting the authority to depart from the Rules of Criminal Procedure, which have been carefully designed to protect constitutional and statutory rights, as well as other interests.

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[3] The Sixth Circuit opinion in Brown & Williamson Tobacco Corp. v. F T C., 710 F.2d 1165, 1177-79 (6th Cir. 1983), for example, discussed the common law right of access to proceedings for a couple of paragraphs, but the issue in the case was sealing documents

2. Paragraph (d)(1) - deleting or revising references to requiring public access to be "contemporaneous if feasible"

As published, paragraph (d)(1) provided:

> **(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.

a. Comments received

Two comments expressed concern that the language "contemporaneous if feasible" in the text of (d)(1) and accompanying note did not convey adequately the importance of providing contemporaneous access and might be read as endorsing delayed access. They proposed different revisions to avoid this concern.

The **FMJA (21-CR-0003-0006)** requested that the Committee "eliminate the reference of contemporaneous if feasible" or revise the text to "indicate public access may only be denied if the interests of justice require a proceeding to go forward without public access." The FMJA expressed concern that this phrase "might actually lead to more frequent denial of public access."

The **FCJC (21-CR-0003-0013)** commented that the Committee should revise the proposed rule to "expressly provide that any limitations on public access during Rules Emergencies must satisfy *Waller*." Specifically, "the Rule should be amended to expressly state that courts must provide both contemporaneous and audio-visual public access except where closure complies with the constitutional standard." The FCJC objected to the statement in the note that "Under appropriate circumstances, the reasonable alternative could be audio access to a video proceeding." Also, the FCJC urged that "the Rule and Note should clarify that feasibility and appropriateness are likewise governed by the constitutional standard."

b. Committee deliberations

After extensive discussion (Draft Minutes, pp. 13-18), the Committee decided to retain the phrase "contemporaneous if feasible," and not to add references to particular Supreme Court decisions defining the constitutional standards for public access. There was general agreement that it would not be appropriate for the rule or note to attempt to spell out the substantive constitutional requirements. But members found the decision whether to retain, reword, or eliminate the phrase "contemporaneous if feasible" more challenging.

During the drafting process, this phrase had been added to recognize the importance of contemporaneous access but also the possibility that such access might not be possible under emergency conditions that could be foreseen. By itself, the phrase "reasonable alternative access" is very general, and under emergency circumstances there was a concern that courts might not be attentive to the need for contemporaneous access. Adding this phrase to the text (as well as the note) was intended to serve as a reminder of this important norm, which might otherwise be overlooked in emergency situations. At the April meeting, there was a consensus that contemporaneous access should be the norm.

On the other hand, members recognized the need for flexibility given the impossibility of foreseeing the kinds of rules emergencies that might occur in the future. For example, in a situation like 9/11, telephone lines and the Internet could be down, and physical access interrupted as well In that scenario, it might be impossible to provide public access contemporaneously.

But members also expressed concern that the limiting phrase, "contemporaneous *if feasible*" might, as the magistrate judges suggested, actually cause courts to provide less rather than more contemporary access. Members grappled with the tradeoff between the value of calling attention to the importance of contemporary access versus the possibility that the phrase might have such an unintended effect. Some possible compromises were discussed. The possibility of revising that phrase to the stronger wording of "contemporaneous if possible" was suggested, but several participants thought it would state too stringent a standard, potentially requiring herculean efforts. The possibility of deleting "contemporaneous if feasible" from the text but retaining it in the note was also considered. It was rejected because notes should not add requirements to the text, and they are also difficult for courts and litigants to access.

A member urged that when contemporaneous access cannot be provided proceedings should not occur, and she made a motion to revise the rule to require the court to provide "contemporaneous reasonable alternative access." She argued that contemporaneous access to a public hearing is critical to allow victims and family members to participate, and the press to hear as the proceeding is occurring. If some form of contemporary access cannot be provided, she thought proceedings should not go forward. But other participants disagreed, citing the need for flexibility and noting that it would be inappropriate to delay some proceedings. For example, if someone was due to be released on bond, the proceedings should not be delayed if there was no phone line or the Internet that people could use to allow public access.

When there was no second to the motion to revise the rule, the Committee accepted the language of the rule as published.

3. Paragraph (d)(1) - adding references to the constitutional tests and various requirements regarding public access

Several other changes were proposed to paragraph (d)(1), quoted above, or to the note accompanying it.

a. Comment received

The **FCJC (21-CR-0003-0013)** proposed a series of additions to the text of (d)(1) and/or the note: requiring court participants to be able to see the public, barring courts from conditioning public access on advance permission of the court, and requiring prominently placed, district-wide announcement of any public access limitations.

The FCJC urged the Committee to revise the rule and note to "expressly require that court participants be able to see the public unless *Waller* can be satisfied." Stating that during the pandemic at least 32 districts rendered spectators "effectively invisible" by reducing them to a phone number on a computer screen, the FCJC argued that the public should be visible to participants to the degree possible. It argued that "the presence of interested spectators may keep [the defendant's] triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller*, 467 U.S. at 46 (quoting *Gannett Co.*, 443 U.S. at 380). Without being seen, the

public may lose trust in the criminal justice system, the FCJC argued. Admitting that "*Waller* may well allow such restrictions based on technological capacity and courtroom decorum," the FCJC argued that "such closures should be analyzed and justified, not taken as the default."

The FCJC also asked the Committee to bar courts from conditioning public access on advance permission of the court, except as permitted by *Waller*. The submission states: "Eliminating advance registration requirements would bring public access during Rules Emergencies closer to the norm: The public could 'walk into' a courtroom at any time, with or without permission, unless the courtroom has been lawfully closed."

And the FCJC proposed adding to the rule the requirement of a prominently placed, district-wide announcement of any public access limitations that (a) details the scope of the limitation, (b) explains in plain language how the public can access court, and (c) contains necessary constitutional findings.

b. Committee deliberations

The Committee declined to add the proposed details to the rule or the note. If guidance this detailed is necessary, it should come from other sources, such as the Benchbook or the Committee on Court Administration and Case Management.

4. Paragraph (d)(1) - barring courthouse-only access to remote proceedings

a. Comment received

The **FCJC (21-CR-0003-0013)** also objected to language in the published note that states: "For example, if public health conditions limit courtroom capacity, contemporaneous transmission to an overflow courthouse space ordinarily could be provided." The FCJC argued that "[t]he Rule should prohibit courthouse-only [public] access to remote proceedings," and "should recommend that districts allow remote access to any proceedings remotely or partially remotely. That remote access should not be within the courthouse itself." Noting that several districts allowed only in-person public access, even to remote or partially remote hearings, the FCJC commented it is "debatable whether doing so during a deadly and contagious pandemic constitutes public access within the meaning of the First and Sixth Amendments." But in any event, the FCJC contended, such a restriction is "unwise." It explained. "when public health or safety is on the line—no one should have to choose between exercising their First or Sixth Amendment rights and risking their lives."

b. Committee deliberations

The Committee declined to revise the rule to prohibit court-house only alternative access to remote proceedings or to delete the language referring to overflow courthouse space from the note. Rule 53 generally bans broadcasting, and the norm is in-person attendance. The FCJC suggestion would limit how courts could navigate around the prohibition against broadcasting during emergencies, and would add an unprecedented prohibition regarding alternative in-person access. There was no support for making the proposed changes in the rule and note.

5. Paragraph (d)(2): written consents, waivers, and signatures of the defendant

This provision provides alternative signature requirements when emergency conditions limit a defendant's ability to sign. This was a particular problem for detained defendants who were unable to have in-person contact with counsel or receive and send documents electronically during the pandemic.

As published, (d)(2) states: "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—defense counsel may sign for the defendant if the defendant consents on the record." Paragraph (d)(2) also allows counsel to sign on behalf of a defendant who is not before the court at the time of consent; in that scenario, defense counsel must file an affidavit. The rule allows the judge to sign for the defendant only if the defendant is pro se and consents on the record.

As published, the note states:

> **Paragraph (d)(2)** recognizes that emergency conditions may disrupt compliance with a rule that requires the defendant's signature, written consent, or written waiver. If emergency situations limit the defendant's ability to sign, (d)(2) provides an alternative, allowing defense counsel to sign if the defendant consents. To ensure that there is a record of the defendant's consent to this procedure, the amendment provides two options: (1) defense counsel may sign for the defendant if the defendant consents on the record, or, (2) without the defendant's consent on the record, defense counsel must file an affidavit attesting to the defendant's consent to the procedure. The defendant's oral agreement on the record alone will not substitute for the defendant's signature. The written document signed by counsel on behalf of the defendant provides important additional evidence of the defendant's consent.
>
> The court may sign for a pro se defendant, if that defendant consents on the record. There is no provision for the court to sign for a counseled defendant, even if the defendant provides consent on the record. The Committee concluded that rules requiring the defendant's signature, written consent or written waiver protect important rights, and permitting the judge to bypass defense counsel and sign once the defendant agrees could result in a defendant perceiving pressure from the judge to sign. Requiring a writing from defense counsel is an essential protection when the defendant's own signature is not reasonably available because of emergency conditions.
>
> It is generally helpful for the court to conduct a colloquy with the defendant to ensure that defense counsel consulted with the defendant with regard to the substance and import of the pleading or document being signed, and that the consent to allow counsel to sign was knowing and voluntary.

a. Comments received

Judge Denise Cote (21-CR-0003-0005) recommended that (d)(2) be revised to provide that "defense counsel or the court may sign for the defendant." She explained "it may be difficult

and create unnecessary delay for the attorney to affix the defendant's name to a signature line and then provide that document to the court." She argued Rule 62 should focus exclusively on creating an unambiguous record of the defendant's consent, regardless of who affixes the defendant's signature. Describing her court's experience during emergencies including the pandemic, Judge Cote noted that it regularly conducted proceedings where everyone participated remotely from different locations, and it was both useful and important for the court to be able to sign documents on the defendant's behalf with proper safeguards:

> Defense counsel were provided an opportunity to consult confidentially with the defendant and the judge confirmed on the record that the consultation had occurred, that the issue requiring the defendant's signature had been discussed, and that the defendant had knowingly and voluntarily given consent. Defense counsel often ask the judge to add the defendant's signature to the form or express relief when we volunteer to do so. Again, what is essential is that the consultation has occurred, that consent has been knowing and voluntary, and that there is an adequate contemporaneous record of this consultation and assent.

The **FMJA (21-CR-0003-0006)** agreed that the court should be able to sign for a defendant if the court can obtain "oral consent on the record." It urged that:

> Flexibility during emergencies is the key to ensuring a defendant can be seen promptly by the Court, especially when first arrested. Many members of the FMJA had to obtain oral consent on the record during the pandemic and believe the flexibility to do this was critical to ensuring that initial presentments, in particular, went forward without delay.

b. Committee deliberations

Allowing counsel to sign for the defendant was first suggested at the 2020 miniconference by defense attorneys, who said it was working well. The Committee discussed the issue again at its November 2020 meeting. There, in response to a suggestion that the judge should be permitted to sign for a defendant who consented on the record, Judge Dever (who then chaired the Emergency Rules subcommittee) noted that the written signature by counsel on the defendant's behalf is an "extra piece of evidence to the extent someone later says, 'I didn't really consent, or the judge misunderstood me'. . . ." Minutes, at 19. Judge Dever raised an additional concern "that the judge might get in between that relationship, and that having the lawyer sign was better than allowing the judge to say, 'you consent—don't you?—and we're going to do this today.'" *Id.* at 28. The Committee declined to revise the rule to allow the court to sign for a represented defendant.

At its April 2022 meeting, the Committee gave this question plenary consideration. The Committee's discussion revealed little support for claims that defense counsel wanted judges to be able to sign for their clients. Nor was there much evidence that defense counsel have been unable themselves to sign on their clients' behalf. To the contrary, every defense member, as well as many judicial members, said that defense counsel have been able to sign and submit those documents without problems. One member summed it up this way: "it is a matter of expediency that maybe isn't worth the possible infringement on rights if we have the judge get involved. The defense attorney should be doing the advising." Draft Minutes, at p. 24.

6. Paragraph (d)(4): Rule 35 deadlines

Rule 62(d)(4) allows a court to extend the time to take action under Rule 35 as reasonably necessary when emergency conditions provide good cause to do so. The published committee note states the rationale for this provision:

> **Paragraph (d)(4)** provides an emergency exception to Rule 45(b)(2), which prohibits the court from extending the time to take action under Rule 35 "except as stated in that rule." When emergency conditions provide good cause for extending the time to take action under Rule 35, the amendment allows the court to extend the time for taking action "as reasonably necessary." The amendment allows the court to extend the 14-day period for correcting a clear error in the sentence under Rule 35(a) and the one-year period for government motions for sentence reductions based on substantial assistance under Rule 35(b)(1). Nothing in this provision is intended to expand the authority to correct or reduce a sentence under Rule 35. This emergency rule does not address the extension of other time limits because Rule 45(b)(1) already provides the necessary flexibility for courts to consider emergency circumstances. It allows the court to extend the time for taking other actions on its own or on a party's motion for good cause shown.

a. Comment received

The **Department of Justice (21-CR-0003-0008)** recommended that the Committee add to the note accompanying this paragraph the following language to make it clear that the extension is "limited to sentences imposed immediately prior to or during the criminal rules emergency." It explained:

> The extension of time to take action under Rule 35 only applies to sentences imposed within 14 days immediately prior to the declaration of a criminal rules emergency or to sentences imposed during the criminal rules emergency. Nothing in this rule is intended to provide relief for a defendant who had the benefit of a full 14-day period under Rule 35, but failed to take action.

b. Committee deliberations

The Department did not raise this proposed addition during the drafting process. It did previously suggest limiting language for the note. At the Department's suggestion the Committee approved the sentence that reads: "Nothing in this provision is intended to expand the authority to correct or reduce a sentence under Rule 35."

The subcommittee recommended that the Committee reject the new addition suggested by the Department. The subcommittee concluded that the rule was clear and no additional language in the note was needed to address any frivolous motions seeking relief, including motions by those who had the benefit of a full 14-day period under Rule 35 before the emergency declaration but failed to take action.

At the April Committee meeting, Mr. Wroblewski said the Department was satisfied with

these deliberations by the subcommittee, and that he did not intend to renew the request for new note language. Draft Minutes, at p. 42.

7. Paragraphs (e)(1), (2), and (3): consultation opportunities with counsel

Subdivision (e) provides authority to use virtual conferencing technology when emergency conditions limit the physical presence of participants at criminal proceedings. The Advisory Committee concluded that, given the critical interests served by holding proceedings in court, any authority to substitute virtual for physical presence must extend no further than necessary.

Paragraph (e)(1) addresses proceedings that courts may already conduct by videoconference with the defendant's consent under existing Rules 5, 10, 40, and 43(b)(2) (initial appearances, arraignments, and certain misdemeanor proceedings). The committee note explains that paragraph (e)(1) –

> does not change the court's existing authority to use videoconferencing for these proceedings, except that it requires the court to address emergency conditions that significantly impair the defendant's opportunity to consult with counsel. In that situation, the court must ensure that the defendant will have an adequate opportunity for confidential consultation before and during videoconference proceedings under Rules 5, 10, 40, and 43(b)(2).

Paragraphs (e)(2) and (3), addressing the use of videoconferencing in other proceedings, also require that the court must ensure that the defendant will have an adequate opportunity for confidential consultation before and during videoconference proceedings.

a. Comments received

Three of the comments received by the Committee addressed the language requiring an adequate opportunity to consult confidentially with counsel.

The **FMJA (21-CR-0003-0006)** recommended deleting from paragraph (e)(1) the requirement "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 before and during those proceedings." That paragraph addresses videoconferencing authorized by current Rules 5, 10, 40, and 43(b)(2). The FMJA expressed concern that this requirement "appears to impose a duty on the Court only in emergency situations," and implies that this obligation does not exist in the non-emergency times.

Judge Cote (21-CR-0003-0005) recommended revising the proposed consultation requirements in (e)(1) and (2) so that they require that the defendant have an "adequate opportunity" to consult with counsel "confidentially either before ~~and~~ or during" certain videoconference proceedings. She explained:

> Our experience . . . has been that consultation between the defendant and defense counsel might be very difficult to arrange, particularly if a defendant is

incarcerated. If the record created by the judge during the proceeding establishes that an adequate opportunity for consultation has been provided for the particular proceeding (that is, for whatever the defendant must understand from that proceeding and do at it), that should be sufficient.

A third comment from **NACDL (21-CR-0003-0011)** supported retaining the requirement as published but recommended adding to the note more explanation of what an "adequate opportunity" would entail. NACDL expressed strong support for the requirement of an adequate opportunity to consult with counsel before (as well as during) proceedings under proposed Rule 62(e). During the pandemic, NACDL's members were "often unable to consult with clients—a critical aspect of rendering effective assistance of counsel—as frequently, for as long, or with sufficient privacy, as is required for us to establish a proper attorney-client relationship and fulfill our professional duties and constitutional mission." NACDL urged an addition to the committee note stating that "an 'adequate opportunity' will ordinarily require an unhurried and confidential meeting between the accused and counsel that occurs well before—and whenever feasible, not on the same day as—the proceeding itself." Noting that the current note is silent on what "before" means, NACDL urged that it should not be sufficient to have only a few minutes of contact just before the proceeding, while the other participants are waiting.

b. Committee deliberations

At the April 2022 meeting, members did not share the FMJA's concern that the requirement in (e)(1) that the court ensure an adequate opportunity for confidential consultation for proceedings under Rules 5, 10, 40, and 43(b) would somehow imply that the same obligation is absent in non-emergency times. The requirement, the subcommittee had concluded, is clearly conditioned on the impairment of consultation opportunities by emergency conditions—and will not suggest that courts can dispense with consultation opportunities in non-emergency times.

Members were similarly unpersuaded by Judge Cote's suggestion to require only an adequate opportunity before *or* during the proceeding. Arguably the top priority for the defense bar with respect to the emergency rule has been to ensure an adequate opportunity to consult with clients. Members likewise emphasized the importance of these consultations, and saw no practical reason to dilute this requirement.

As for NACDL's request for added language defining when consultation would be adequate, the subcommittee recommendation to the Committee was that no change to the rule or note as published be made, and no Committee member opted to discuss this issue further.

8. Paragraph (e)(3): defendant's written request for videoconferencing for pleas and sentencings

This provision prompted lengthy discussion at the Committee's April meeting. Paragraph (e)(3), like the CARES Act, imposes more restrictions on the use of videoconferencing at pleas and sentencings than it imposes on its use in other proceedings. In addition to the consultation requirement, videoconferencing for pleas or sentencings are permissible only if (1) the chief judge of the district makes a district-wide finding that emergency conditions substantially impair a court's ability to hold felony pleas and sentencings in person in that district, (2) "the defendant, after consulting with counsel, requests in a writing signed by the defendant that the proceeding be conducted by videoconferencing," and (3) the court finds "that further delay in that particular case would cause serious harm to the interests of justice."

As published, the committee note accompanying this provision states:

> **Paragraph (e)(3)** addresses the use of videoconferencing for a third set of proceedings: felony pleas and sentencings under Rules 11 and 32. The physical presence of the defendant together in the courtroom with the judge and counsel is a critical part of any plea or sentencing proceeding. Other than trial itself, in no other context does the communication between the judge and the defendant consistently carry such profound consequences. The importance of defendant's physical presence at plea and sentence is reflected in Rules 11 and 32. The Committee's intent was to carve out emergency authority to substitute virtual presence for physical presence at a felony plea or sentence only as a last resort, in cases where the defendant would likely be harmed by further delay. Accordingly, the prerequisites for using videoconferencing for a felony plea or sentence include three circumstances in addition to those required for the use of videoconferencing under (e)(2).
>
> Subparagraph (e)(3)(A) requires that the chief judge of the district (or alternate under 28 U.S.C. § 136(e)) make a district-wide finding that emergency conditions substantially impair a court's ability to hold felony pleas and sentencings in person in that district within a reasonable time. This finding serves as assurance that videoconferencing may be necessary and that individual judges cannot on their own authorize virtual pleas and sentencings when in-person proceedings might be manageable with patience or adaptation. Although the finding serves as assurance that videoconferencing might be necessary in the district, as under (e)(2), individual courts within the district may not conduct virtual plea and sentencing proceedings in individual cases unless they find the remaining criteria of (e)(3) and (4) are satisfied.
>
> Subparagraph (e)(3)(B) states that the defendant must request in writing that the proceeding be conducted by videoconferencing, after consultation with counsel. The substitution of "request" for "consent" was deliberate, as an additional protection against undue pressure to waive physical presence. This requirement of writing is, like other requirements of writing in the rules, subject to the emergency provisions in (d)(2), unless the relevant emergency declaration excludes the

authority in (d)(2). To ensure that the defendant consulted with counsel with regard to this decision, and that the defendant's consent was knowing and voluntary, the court may need to conduct a colloquy with the defendant before accepting the written request.

Subparagraph (e)(3)(C) requires that before a court may conduct a plea or sentencing proceeding by videoconference, it must find that the proceeding in that particular case cannot be further delayed without serious harm to the interests of justice. Examples may include some pleas and sentencings that would allow transfer to a facility preferred by the defense, or result in immediate release, home confinement, probation, or a sentence shorter than the time expected before conditions would allow in-person proceedings. A judge might also conclude that under certain emergency conditions, delaying certain guilty pleas under Rule 11(c)(1)(C), even those calling for longer sentences, may result in serious harm to the interests of justice.

a. Comments received

The Committee received comments from **Judge Denise Cote (21-CR-0003-0005)** and **Judge Mark R. Hornak (21-CR-0003-0012)** on this portion of the rule.

Judge Cote recommended omitting the requirement that felony pleas and sentencing can occur by videoconferencing only if the defendant, after consulting with counsel, requests in writing that the proceeding be conducted by videoconferencing. She urged that the rule be revised to allow videoconferencing if "the court finds during the proceeding that the defendant, following consultation with counsel, has requested that the proceeding be conducted by videoconferencing."

Judge Cote contended there is no need for a written request received *before* the proceeding, and if a written request is required, the rule should allow signature by the defendant, defense counsel, *or the court* on behalf of and with authorization from the defendant on the record. She urged that the focus should be on whether there is consent, based on consultation with defense counsel, and that the record adequately reflect informed and voluntary consent. She stressed practical difficulties:

> During an emergency it may be particularly difficult for a defendant to sign and transmit any writing to his/her counsel or the court. A defendant, particularly an incarcerated defendant, may lack access to the technology needed to sign and electronically transmit a request to his/her counsel or the court, and during an emergency such as a pandemic, defense counsel and the court may not be able to receive a signed writing by mail. Even if the Rule envisions that defense counsel may sign the written request on behalf of the defendant, defense counsel may in many emergencies find it difficult to create the writing and to transmit it.

Judge Hornak concurred in this portion of Judge Cote's comment. Based on his court's experience, he concluded:

> the requirement of an advance writing signed by the defendant (1) would likely be inconsistent with the circumstances generating the emergency that would warrant such proceedings in the first place, (2) would generate a procedure that would be functionally impractical in most every case during an emergency, (3) would create a precondition for which there does not appear to be empirical or anecdotal evidence of necessity, and (4) addresses a concern which may be readily addressed in alternative ways.

Judge Hornak stated that in his court the defendant's consent has been placed on the record and then confirmed in a colloquy with the defendant and counsel at each video-conference proceeding. He concluded that "imposing the 'written request signed by the defendant' requirement is almost certainly inconsistent with the existence of the emergency that would require it in the first place." Difficulties of access "will be particularly acute for those in detention, but even for defendants on bond/conditions of release, physical or other access in order to exchange and process written and signed request documents will likely be most challenging and difficult for their own reasons."

Judge Hornak also stated that in his experience the courts have been conducting "a detailed on-the-record colloquy to confirm the counseled consent and desire of the defendant to proceed via videoconferencing, and in those in which I have presided, there has been no doubt about that counseled consent and desire before the hearing proceeded." In his role as chief judge, he had received no formal or informal concerns about the counseled voluntary nature of the defendants' consent. Moreover, he argued, imposing this requirement is inconsistent with the type and level of judgments that district judges make in every plea proceeding. Finally, he concluded that allowing counsel to sign the required writing would not solve the problem because the existence of the emergency would almost always impede counsel's access.

Accordingly, Judge Hornak recommended either retaining the current consent procedures under the CARES Act, or requiring confirmation of counseled consent and a desire to proceed by videoconferencing via a judicial colloquy with the defendant at the beginning of the proceeding in question.

b. Committee deliberations.

To the extent these comments reflected concern about any inability of defendants themselves to sign, that concern is already addressed in (d)(2). The Committee's discussion as to (e)(3) itself focused on whether the rule meant that the written request must be submitted *in advance* of the videoconference in which the plea proceeding takes place, or whether instead the defendant can somehow make that written request during a videoconference proceeding.

Throughout the discussion of (e)(3), Judge Kethledge and other members stressed the Committee's animating concern for the requirement that any request for remote pleas or sentencings originate from the *defendant*, in writing. That concern is that some judges do not share the Committee's view that conducting a plea or sentencing remotely is truly a last resort. Instead, some judges have emphasized convenience or efficiency more than whether the defendant himself would prefer an in-person proceeding. As Judge Kethledge explained (Draft Minutes, at p. 36):

> Institutionally we come with a different perspective. He remembered from his early days on the Committee where we would get these requests, it seemed once a year. He recalled one from a judge in another district who had a lake house in Maine, and he wanted to sentence people when he was in Maine. The Committee has received these requests every year for remote pleas and sentencing. Institutionally it has a sense that there are many judges who want to do this more often than they should.
>
> And . . . the defense bar never came to us with this. The defense bar never came saying, "We're having a problem. My guy wants to make it a plea and he can't." We have never heard a peep along those lines from the defense bar. The Department of Justice hasn't come to us. It has always been judges who wanted this, and we're a little paranoid about that. This is the most important thing that happens in a courtroom. It is much more important than what happens in our appellate courtrooms. That, he said, was the concern.

Similar comments at the meeting included statements describing judges who had expressed "frustration and anger about not being able to force a defendant to go forward virtually" and attorneys "being pressured by the courts to get their clients . . . pled, and out of whatever jail system they were in . . . having that barrier between the client and the court is a very important protection." Judge Kethledge reiterated that "there are many judges who want to do a lot of remote pleas and sentencings . . . . That's the concern."

Request v. Consent

The requirement that the *request* for a video proceeding come from the defendant—after consultation with counsel—is aimed to prevent a defendant from feeling pressured to *consent* to a remote plea or sentencing if that were suggested by the judge. The Committee's concern was "that the judge could be really nice about it and not say anything objectionable when you read the record, but a criminal defendant might feel pressured to agree to do these proceedings remotely" when the person who will sentence him is asking. Draft Minutes, at p. 26.

Judge Bates asked whether his district's practice of including a consent to video in the plea agreement would comply with the requirement of "request" in proposed rule. He asked if the idea of holding a plea or sentence by video could come initially from the prosecution instead of the defendant. Judge Kethledge's response was yes, so long as in the document submitted to the court, the defendant says, "I request" or "I want my proceeding to be remote," rather than just "I agree" or "I consent." It can't be the judge saying to the defendant, "Do you have a problem with this?"

A judicial member echoed this understanding: "...[W]e're all experiencing during the pandemic some slippage into Zoom court appearances and Zoom arguments. This language signals this last line, that when it comes to plea discussions and sentencings, that should be done in person unless the defendant affirmatively requests it." Draft Minutes, at p. 27. This member described her interpretation of the rule:

> . . . . [S]he did not read the rule as requiring that the defendant has to be the initiator of the idea. If the defendant is not going to serve a whole lot more time and the logistical difficulties are such that everybody's motivated to get the plea agreement on the record as

> soon as possible, the prosecutor could go to defense counsel and say, "Hey, is he interested in doing it by video? Maybe we need to talk about that? Can you go talk to your client about that?" It doesn't matter who initiated the discussion so long as the request is initiated by the defendant as far as the court is concerned. There has to be a formal request rather than having it come up impromptu during the middle of discussion. In that sense, this requirement, in context, is very different than just consent. This is something that after careful consideration and discussion with counsel, the defendant asks that the court go forward with the video conferencing.

Id. at 28.

Timing of the request

The comments of both Judge Cote and Judge Hornak assumed that the written request must be submitted prior to the plea or sentencing proceeding. They opposed that requirement. Judge Furman shared that opposition to a requirement that the written request be filed in advance. He did not read the language of the rule to require that the request be filed in advance. He thus urged the Committee to add language to the note stating two things: first, that the preferred approach would be to schedule a video plea or sentence only if the defense had already filed a request to that effect with the court; but second, the rule as written would permit a court to convert an ongoing videoconference—originally convened for some other purpose—to a remote plea or sentencing if the defense wrote out a request to that effect and held it up to the camera for the judge to see. Judge Furman said that this process was frequently used in his district.

Judge Bates and some Committee members read the rule to allow what Judge Furman described, but most did not. They thought that the nature of a written request to a court is that the court must have the request in hand for the request to be effective. Judge Kethledge and some members also thought that any process that allows judges to accept a defendant's mid-hearing request for a remote plea or sentence would open the door to actual or perceived pressure by the judge upon the defendant to make that request—which is precisely what this requirement seeks to avoid.

Ultimately, no member of the Committee moved to add the note language that Judge Furman requested. A member did move to amend the rule expressly to require that the defendant's request for videoconferencing be "filed," but the motion was withdrawn because of uncertainty about whether that revision would require republication.

9. Adding a new subdivision on grand juries

The **Department of Justice (21-CR-0003-0008)** also recommended adding a new paragraph (d)(5) to allow courts to extend the term of sitting grand juries during judicial emergencies. In its submission **NACDL (21-CR-0003-0011)** opposed this proposal.

Because this new provision could not be added without republication of the whole rule, derailing the accelerated schedule set by the Standing Committee for all of the emergency rules, the Committee treated this as a new suggestion. It is discussed as an information item in the Committee's general report.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Raymond M. Kethledge, Chair
Advisory Committee on Criminal Rules

RE: Corrective Technical Amendment to Rule 16

DATE: May 16, 2022

Although Rule 16's new amendments on expert discovery are on track to take effect this December, the Department of Justice recently brought to our attention a typographical error in the amendments. This memo adds an action item to the Standing Committee's June 7th agenda, to approve a technical and conforming amendment to correct the error.

The Rule 16 amendments revise both the provision governing expert witness disclosures by the government – 16(a)(1)(G) – and the provision governing disclosures by the defense – 16(b)(1)(C). Both new (a)(1)(G) and (b)(1)(C) contain two exceptions to a new requirement that the expert must approve and sign the disclosure. One exception applies if the disclosing party had previously provided the information in a report signed by the witness.

The text for **government disclosures** – 16(a)(1)(G)(v) – has the correct cross reference. It states that a witness need not approve and sign the disclosure if the government "previously provided **under (F)** a report, signed by the witness, that contains all the opinions and the bases and reasons for them . . . ." 16(a)(1)(F) is titled "Reports of Examinations and Tests."

The text for **defense disclosures** – 16(b)(1)(C)(v) – has identical language, but should have referred to a report previously provided **under (B)**, not (F). 16(b)(1)(B) is the subparagraph titled "Reports of Examinations and Tests" for defendant's disclosures.

The technical amendment, approved by email vote of the Committee, would correct this typo as shown below:

> **(v) Signing the Disclosure.** The witness must approve and sign the disclosure, unless the defendant
>
> * * * * *
>
> - has previously provided under (~~F~~B) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

As a technical and conforming amendment, this correction would not need to be published. However, it would not take effect until December 1, 2023.

The delay before the correction takes effect is not likely to cause significant problems. The structure of the rule makes it clear that the correct reference should be to (B). Indeed, there is no (F) in the defense disclosure rule; the only (F) is in the prosecution disclosure section. Additionally, we expect that the Department of Justice and the Federal Defenders will inform their attorneys about the error. Finally, if the issue were litigated, judges could apply the doctrine of scrivener's error to apply the rule as intended, despite the typographical error.