VIRGIN ISLANDS RULES OF CRIMINAL PROCEDURE

Rule 1. Title and Application

(a) Title and Citation. These rules shall be known as the Virgin Islands Rules of Criminal Procedure and may be cited in short-form as V.I. R. CRIM. P.

(b) Effective Date. These rules shall take effect as provided in a promulgation order by the Supreme Court of the Virgin Islands.

(c) Proceedings Governed.

(1) *Scope.* These rules govern the procedure in all criminal proceedings – including procedures following arrest, with or without a warrant (including extradition or rendition-related) – in the Superior Court of the Virgin Islands (the "Superior Court" or "court") except as otherwise stated in these rules, or other rules promulgated by the Supreme Court, and except as otherwise provided by law. Proceedings not governed by these rules include:

(A) a civil property forfeiture proceedings;

(B) collection of a fine or penalty; and

(C) a proceeding under a statute governing juvenile delinquency to the extent the procedure is inconsistent with the statute, unless Rule 20(d) provides otherwise;

(2) *Application*. These rules, and subsequent amendments, govern:

(A) proceedings in any action commenced after their effective date; and

(B) proceedings in any action pending on the effective date of the rules or amendments, unless:

(i) the Supreme Court of the Virgin Islands specifies otherwise by order; or

(ii) the Superior Court makes an express finding that applying them in a particular previously-pending action would be infeasible or would work an injustice.

(d) Interpretation. These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.

(e) Magistrate Judge Functions. A magistrate judge, as defined in Rule 2 of these Rules of Criminal Procedure, is authorized to perform judicial functions in proceedings as set forth in these Rules, including preliminary proceedings in first degree murder cases, such as advice of rights, probable cause hearings, issuance of arrest and search warrants, motions for reduction of bail or detention, and arraignment proceedings.

(f) Procedures Not Addressed. When procedure is not prescribed by these Virgin Islands Rules of Criminal Procedure, precedent from the Supreme Court of the Virgin Islands, or the Virgin Islands Code, a judge may regulate practice in a criminal proceeding in any manner consistent with law of the Virgin Islands.

Effective December 1, 2017 (Promulgation Order 2017-010); amended effective January 1, 2020 (Promulgation Order 2019-013)

REPORTER'S NOTE

The Virgin Islands Rules of Criminal Procedure (V.I. R. CRIM. P.) govern the procedure in all criminal proceedings in the Superior Court of the Virgin Islands except as otherwise stated in these rules, or other rules promulgated by the Supreme Court, and except as otherwise provided by law. Proceedings not governed by these rules include: (A) extradition and rendition of a fugitive; (B) a civil property forfeiture proceedings; (C) collection of a fine or penalty; and (D) a proceeding under a statute governing juvenile delinquency to the extent the procedure is inconsistent with the statute, unless Rule 20(d) provides otherwise;

Subpart (c)(2) notes that the Rules proceedings in any action commenced after their effective date and proceedings in any action pending on the effective date of the rules or amendments, unless the Supreme Court orders otherwise or the Superior Court in a particular case makes a finding that applying them in a particular previously-pending action would be infeasible or would work an injustice. Likewise, subpart (d) calls for interpretation of the Rules so as to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay. Indeed, a key purpose of the modern criminal rules on which these provisions are based is not to erect hurdles for the prosecution in securing a conviction space – space they are intended to prevent the conviction of persons whose guilt has not been established beyond a reasonable doubt. United States v. Debrow, 346 U.S. 374 (1953).

Subpart (f) states that – if procedure is not prescribed by these Rules, precedent from the Supreme Court, or the Virgin Islands Code, a judge may regulate practice in a criminal proceeding in any manner consistent with law of the Virgin Islands.

Rule 2. Definitions.

The following definitions apply to these rules.

"*Attorney for the government*" means:

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

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

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

"*Judge*" means a judge of the Superior Court of the Virgin Islands or a magistrate judge performing functions authorized by law. "Judge" also refers to a sitting judicial officer appointed by the Governor with the advice and consent of the Legislature in accordance with 4 V.I.C. § 72(a) or appointed or designated pursuant to other statutory authority.

"*Magistrate Judge*" refers to a sitting judicial officer appointed by the Presiding Judge in accordance with 4 V.I.C. § 122(a) or other statutory authority.

"*Oath*" includes an affirmation.

"*Organization*" means a corporation, association, firm, partnership, trust or other form of business organization not a natural person.

"*Telephone*" means any technology for transmitting live electronic voice communication. "Victim" means a "crime victim" as defined in applicable statutes.

"*Virgin Islands*" refers to the United States Virgin Islands.

Effective December 1, 2017 (Promulgation Order 2017-010)

REPORTER'S NOTE

These definitions apply throughout the Virgin Islands Rules of Criminal Procedure.

Rule 3. The Information.

(a) Generally. The information is a written statement of the essential facts constituting a charged felony offense and is signed by the Attorney General or an authorized representative of that office. A complaint is an information used to commence prosecution of a misdemeanor.

(b) Content. The information must be a plain, concise, and definite written statement of the essential facts constituting the offense. It need not contain a formal introduction or conclusion. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated. Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the information or to reverse a conviction.

(c) Surplusage. Upon the defendant's motion, the court may strike surplusage from the information.

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

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

Effective December 1, 2017 (Promulgation Order 2017-010)

REPORTER'S NOTE

In accord with statutory provisions and established practice, an "information" is the written statement of the essential facts constituting a charged felony offense, signed by an authorized representative of the Attorney General. A "complaint" is an information used to commence prosecution of a misdemeanor. The initial charging document serves as a basis for an application for an arrest warrant, and assists the reviewing judicial officer in determining whether there is probable cause to support the arrest of an individual. Where arrest is made without a warrant, the information initiates the criminal process and is considered in determining whether the detention of the defendant should continue. Provisions of F.R.Civ.P. 7 are incorporated into this Rule 3.

Subpart (b) states the general standard that the information must be a plain, concise, and definite written statement of the essential facts constituting the offense. For each count, the information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated. A statement of the charge in the words of a statute satisfies the requirement that the charging instrument state facts constituting the offense. Jaben v. United States, 381 U.S. 214 (1965).

Subpart (c) confirms that – on a motion by a defendant – the court may strike surplusage from the information. Subpart (d) authorizes the court to permit amendment of an information at any time before verdict or finding, with a caveat that amendment is not permitted to add an additional or different offense or a substantial right of the defendant is prejudiced.

Subpart (e) provides that the court may direct the government to file a bill of particulars on timely motion of the defendant.

Rule 4. Arrest Warrant or Summons on an Information.

(a) Issuance. If one or more affidavits filed with the information establish probable cause to believe that an offense has been committed and that the defendant committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. A summons instead of a warrant may issue if the prosecuting attorney filing the information has reason to believe that the defendant will appear in response thereto, or if the defendant is an organization. In any case in which it is lawful to arrest a person without a warrant, the officer may give such person a summons instead. If a defendant who has been duly summoned fails to appear, or if there is reasonable cause to believe that defendant will fail to appear, a warrant to arrest may issue. More than one warrant or summons may issue on the same information. If a defendant fails to appear in response to a summons, a judge or magistrate judge may issue a warrant.

The finding of probable cause may be based upon hearsay evidence in whole or in part.

(b) Form.

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

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

(B) describe the offense charged in the information;

(C) command that the defendant be arrested and brought without unnecessary delay before the court;

(D) be signed by a judge;

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

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

(2) *Summons.* A summons must be in the same form as a warrant except that it must require the defendant to appear before the court at a stated time and place. The summons shall be directed to the defendant named in the information and shall describe the offense charged in the information. The summons shall require the defendant to appear before the court in which the information is filed at a time and place stated therein and shall inform the defendant that failure to so appear will result in issuance of an arrest warrant.

(c) Execution or Service, and Return.

(1) *By Whom.* Only a peace officer as defined in 5 V.I.C. § 3561 or other authorized officer may execute a warrant or serve a summons.

(2) *Territorial Limits*. The warrant may be executed or the summons served at any place within this territory. The officer arresting a defendant in a judicial division other than the one in which the warrant was issued shall make a return thereon and, if the defendant desires to give bail forthwith, take the defendant without unnecessary delay before a judge of the Superior Court sitting in the division in which the arrest occurred, who may admit the defendant to bail conditioned for appearance before the court in the judicial division in which the warrant was issued at the time stated in the bond or recognizance. Otherwise, the defendant may be turned over to the arresting officers for transportation to the other judicial division without arraignment before the local judge. The court shall forward the bail forthwith to the clerk of the court for the judicial division in which the warrant was issued.

(3) *Time Limit*. [Reserved.]

(4) *Manner*.

(A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the warrant, or a copy thereof, must show it to the defendant. The officer need not possess the warrant at the time of the arrest, but upon request shall show the warrant to the defendant as soon as possible. If not in possession of the warrant at the time of the arrest, the officer shall then inform the defendant of the offense charged and of the fact that a warrant has been issued.

(B) A summons is served on an individual defendant by delivering a copy to the defendant personally.

(C) Service of a summons upon a defendant organization shall be made in the same manner as provided in Rule 4 of the Virgin Islands Rules of Civil Procedure. In

addition, a copy must also be mailed to the organization's registered or resident agent and to the organization's last known address within the Virgin Islands or to its principal place of business elsewhere in the United States. If the summons shall be returned "not served" and it shall be made to appear to the satisfaction of the judge that the summons could not be served, the judge shall order the defendant corporation to cause its appearance and plea to be entered by a day certain. A copy of such order shall, within five days after the making thereof, be published in a newspaper, published in the area where the offense took place, at least once a week for four weeks; and also by mailing, prior to the last publication, a copy of the summons and order to the defendant, prepaid to the address where it usually received its mail unless it shall appear by affidavit that such place is unknown and cannot be ascertained after inquiry. If the defendant corporation shall not appear within the time limited by the order, the judge, on being satisfied that publication and service has been made in accordance with the provisions of this rule, shall enter an appearance and a plea of "not guilty" for the defendant corporation and further proceedings may then be had thereon in the same manner as if the said corporation had appeared and pleaded not guilty thereto. A plea or appearance by a defendant corporation must be made by an attorney at law of this territory.

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

(e) Defective Warrant or Summons.

(1) *Amendment*. No person arrested under a warrant or appearing in response to a summons shall be discharged from custody nor may the charges be dismissed because of any informality in the warrant or summons, but the warrant or summons may be amended so as to remedy any such informality.

(2) *Issuance of New Warrant or Summons*. If during the initial appearance of any person arrested under a warrant or appearing in response to a summons, it appears that the warrant or summons does not properly name or describe the defendant, or the offense charged, the judge shall not dismiss the charges, but shall permit the prosecution to present a revised warrant or summons to cure the defect in the document at a time directed by the judge, but no later than the date of the arraignment.

(f) Appearance tickets. Procedures for use of appearance tickets shall conform to the requirements and procedures set forth in 5 V.I.C. § 3570 – § 3575.

Effective December 1, 2017 (Promulgation Order 2017-010)

REPORTER'S NOTE

Rule 4 (a) authorizes two mechanisms to bring a suspect to court: an arrest warrant or a summons.

When an arrest is made without a warrant, the procedures of Rule 3 must be followed. Prior practice with respect to issuance of warrants is continued, and a summons may be used if the prosecuting attorney has reason to believe that the defendant will appear in response thereto, or if the defendant is an organization. More than one warrant or summons may issue

on the same information. If a defendant fails to appear in response to a summons, a judge or magistrate judge may issue a warrant.

Subpart (a-1) confirms that the finding of probable cause may be based upon hearsay evidence in whole or in part.

Subpart (a-2) requires that upon arrest for violation of conditions of release or probation, the violator must be brought before the court without unnecessary delay.

Subpart (b) details the contents of an arrest warrant and, in (2) establishes requirements for the summons.

Subpart (c) confirms that, as in the past, only a peace officer as defined in 5 V.I.C. § 3561 or other authorized officer may execute a warrant or serve a summons, which may be accomplished anywhere in the Virgin Islands. Special provision is made for cases where the arrest takes place outside the division that issued the warrant. Other provisions address service of a summons on an individual personally, and on an organization.

Subpart (d) makes cross-reference to Rule 4.1, confirming that a judge may issue a warrant or summons based on information communicated by telephone or other reliable electronic means.

Subpart (e) deals with amendment of warrants or summonses, an issuance of new or replacement process to cure a defect, up to the date of arraignment.

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

(a) In General. The court may consider information communicated by telephone or other reliable electronic means when reviewing an information or deciding whether to issue a warrant or summons.

(b) Procedures. If the court decides to proceed under this rule, the following procedures apply:

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

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

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

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

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

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

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

(iv) make sure that the exhibits are filed.

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

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

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

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

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

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

(A) sign the original documents;

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

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

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

Effective December 1, 2017 (Promulgation Order 2017-010)

REPORTER'S NOTE

Rule 4.1 spells out conditions and requirements for consideration of information communicated by telephone or other reliable electronic means when reviewing an information or deciding whether to issue a warrant or summons.

Subpart (b) indicates that the judge considering a telephonic warrant application must place under oath—and may examine—the applicant and any person on whose testimony the application is based. Where the initial written affidavit is sufficient, it is acknowledged by the judge. If additional testimony or exhibits are considered the testimony must be recorded verbatim electronically or by a court reporter, transcribed and certified as an accurate record. The warrant applicant must prepare a proposed warrant or summons, and must read or otherwise transmit its contents verbatim to the judge. Detailed provisions deal with changes required by the judge, signing of original or duplicate warrants, and filing.

Subpart (c), tracking provisions used in other jurisdictions, provides that – absent a finding of bad faith – evidence obtained from a warrant issued under this rule is not subject to suppression on the ground that the use of telephonic or other remote procedures is unreasonable.

Rule 5. Initial Appearance.

(a) Appearance Upon an Arrest.

(1) A law enforcement officer within the Virgin Islands making an arrest shall take the arrested person promptly and without unnecessary delay before the court.

(2) If a person arrested without a warrant is brought before the court, a sworn statement prepared by a law enforcement officer supporting probable cause for the arrest shall be filed with the court.

(2A) In cases of extradition or rendition, the person arrested must be brought before a judge with all practicable speed, regardless of whether a complaint under oath has been prepared by the date of arrest. Either at the initial appearance of the person arrested, or as soon as practicable thereafter, a complaint under oath must be made against the person arrested, setting forth the ground for the arrest as provided in 5 V.I.C. § 3813 and § 3814. Further proceedings in fugitive, extradition or rendition cases shall comply with statutory requirements of Chapter 331 of Title 5 of the Virgin Islands Code and with Rule 40-1 of these Rules of Criminal Procedure.

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

(b) Determination of Probable Cause.

(1) *Probable Cause Finding.*

The court shall consider any affidavit or information then filed, and shall examine the arresting officer, and/or any other witnesses to the crime under oath at the Initial Appearance Hearing. The defendant may cross-examine witnesses against him. If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the judge or magistrate shall forthwith hold the defendant to answer the complaint. The finding of probable cause may be based upon hearsay evidence in whole or in part.

(2) *Probable Cause Not Found.*

If the judge or magistrate judge determines at the Initial Appearance hearing that there is no probable cause to believe that any offense has been committed or that the accused committed it, the court shall dismiss the proceeding, discharge the accused, and exonerate any bail posted. The discharge of the accused shall not preclude the Government from instituting a subsequent prosecution for the same offense based on additional facts or evidence.

(c) Advice of Rights.

If probable cause is found, the court shall inform the defendant of the complaint against him and advise the accused of rights, including the following:

(i) The right to remain silent and that if a voluntary statement is made, it could be used against the accused;

(ii) the right to counsel;

(iii) if unable to hire a lawyer, one would be provided without cost if the affidavit by the accused or the accused's parents, etc., satisfies the court of this need;

(iv) the right to consult with a lawyer before answering any questions and to have the lawyer present during any questioning;

(v) if willing to make a statement, defendant has a right to stop at any time;

(vi) the right to bail; and

(vii) the right to obtain the court's assistance in serving witnesses on defendant's behalf.

(d) Preliminary Bail and Scheduling Arraignment.

At the initial appearance hearing, the court shall set such bail as is appropriate consistent with Rule 5-1 and shall schedule the matter for arraignment which shall be held not later than 10 days from initial appearance if defendant is in custody, nor later than 20 days from initial appearance if defendant is not in custody, except for good cause shown. Time limits specified in this rule may be extended with the consent of the defendant and the court, or by the court without the consent of the defendant, but only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

(f) Video Teleconferencing. Video teleconferencing may be used to conduct an appearance under this Rule.

Effective December 1, 2017 (Promulgation Order 2017-010);); amended effective January 1, 2020 (Promulgation Order 2019-013)

REPORTER'S NOTE

Rule 5 provides an expeditious process by which a defendant who has been arrested will have an opportunity to appear before the court for a determination of whether there was probable cause for the arrest, and for advice of the defendant's constitutional rights in the criminal proceeding. Subpart (a) embodies the basic requirement that a person arrested must be taken promptly and without unnecessary delay before the court (prompt booking, fingerprinting and similar processing steps are permitted). In an arrest without a warrant, a sworn statement prepared by a law enforcement officer supporting probable cause for the arrest must be filed with the court.

Subpart (b) sets forth the requirement for the court's consideration of any affidavit or information then filed, examination of the arresting officer or other witnesses, subject to defense cross-examination. Applying the traditional standard, if from the evidence (which may include hearsay at this stage) it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the judge or magistrate must hold the defendant to answer the complaint. If probable cause is not found the court will dismiss the proceeding, discharge the accused, and exonerate any bail posted. The discharge will not preclude the Government from instituting a subsequent prosecution "for the same offense based on additional facts or evidence."

Subpart (c) addresses the advice of rights required where the court finds probable cause, and specifies items to be included in the advice given by the court.

Subpart (d) states that at the initial appearance hearing, the court shall set such bail as is appropriate consistent with Rule 5-1 and shall schedule the matter for arraignment which shall be held not later than 10 days from initial appearance if defendant is in custody, nor later than 20 days from initial appearance if defendant is not in custody, except for good cause shown.

Subpart (f) authorizes the use of video teleconferencing in conducting an appearance under this Rule.

Rule 5-1. Bail

(a) Generally. Subject to any specific statutory provisions, before conviction all persons shall be bailable on conditions approved by the court.

(b) Forms of Bail or Release Conditions. Excessive bail shall not be required. The court shall impose the least restrictive of the following non-exhaustive range of conditions of release that will reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process; or, if no single condition gives that assurance, shall impose any combination of the following conditions:

(1) *Personal Recognizance*. Pre-trial release based upon the promise that the person will appear for trial or any proceeding in connection therewith as ordered by the court. This type of bail is used in place of a bail bond when the judge is satisfied that the defendant will appear without the need for a surety bond or other form of security.

(2) *Unsecured Bail Bond*. Where the court finds unsecured personal recognizance inadequate, a bail bond in an amount for which the defendant is fully and personally liable upon failure to appear in court when ordered to do so or upon breach of a material condition of release, but which is not secured by any deposit of or lien upon property.

(3) *Travel and/or Residence Restrictions*. Where appropriate, placement of restrictions on the travel, association, or place of abode of the defendant during the period of release;

(4) *Custody of Designated Person or Organization*. Where appropriate, placement of the defendant in the custody of a designated person or organization agreeing to supervise the defendant;

(5) *Surety Bond.* Where personal recognizance, an unsecured bond and other conditions listed in (3) and (4) above are found inadequate, an undertaking by the defendant and sureties, jointly or severally, that the defendant shall appear for trial or any related proceeding as ordered and upon failure to do so defendant and the sureties shall pay the Virgin Islands Government the amount set by the court as bail, or the property used to secure the defendant's release may be forfeited to the extent of the bail. Every surety, except a corporate surety, shall justify by affidavit and shall be required to describe in the affidavit the property by which the surety proposes to be justified and the encumbrances thereon, the number and amount of other recognizances and undertakings for bail entered into by the surety and remaining undischarged, and all of the surety's other liabilities. No recognizance shall be approved unless the surety thereon shall be qualified.

(6) *Cash Bail Bond.* Where none of the foregoing forms of bail is found adequate by the court to assure the presence of the defendant for trial, protect the community from risk of physical harm to persons, or assure the integrity of the judicial process, a sum of money designated in an order fixing bail and posted with the court by a defendant or by another

person on defendant's behalf upon condition that such money will be forfeited if the defendant: (1) does not comply with the directions of the court requiring appearance at the criminal trial or related proceedings and (2) does not otherwise render the defendant amenable to the orders and processes of the court.

(7) *Additional bail*. As provided in 5 V.I.C. § 3506, when proof is made to the judge that a person previously admitted to bail on a criminal charge is about to abscond, and that bail is insufficient, the judge shall require such person to give better security, or, for default thereof, cause the person to be committed; and an order for the person's arrest may be indorsed on the former commitment, or a bench warrant therefor may be issued, setting forth the cause thereof. The bench warrant shall be issued by the clerk, upon direction of the judge.

(c) Form and Place of Deposit. Unless otherwise ordered by the court, a person admitted to bail shall, together with any sureties, except a corporate surety, shall sign and execute before the person authorized to admit to bail a recognizance conditioned upon the person's appearance at all stages of the proceedings until final determination of the cause. One or more sureties may be required. Cash may be accepted, and in proper cases, no security need be required. A corporate surety must be one registered with the Lieutenant Governor and acceptable to the court after review of its financial ability to satisfy all pending surety obligations.

(d) Third Party Custodian. In addition to the foregoing, the court may require a third party custodian to further ensure compliance with the terms of the release and the appearance of the defendant in each of the foregoing instances. Each custodian must fully execute under oath the Third Party Custodian Consent Form before a defendant may be released.

(e) Authority to Admit to Bail.

(1) In the absence of the judge, a person arrested and charged with a criminal offense which may be tried by the Superior Court, may, before appearance before the judge, be admitted to bail by the clerk of the Court; and in the absence of the judge and the clerk, may be admitted to bail by the chief of police or a public official, other than the arresting officer, designated for such purposes by the judge.

(2) In any case in which the judge may admit to bail, the judge may authorize the taking of the bail by the clerk or deputy clerk of the court or the chief of police or a public official, other than the arresting officer, in the amount fixed by the judge.

(f) Bail for a Witness. The judge may, when the ends of justice so require, bind with sufficient surety all persons who give testimony against one accused of a criminal offense punishable by death or imprisonment in the penitentiary for more than one year, whether the offender be arrested, imprisoned, bailed or not.

(g) Motions to Modify Terms of Release. If either the attorney for the defendant or the prosecution seeks any modification of the conditions of a defendant's release, the party making the motion must first confer with the opposing party or give reasons for not so conferring. The motion must indicate whether the opposing party has any objection.

(h) Forfeiture.

(1) *Declaration.* If there is a breach of a condition of release, the court having jurisdiction may declare a forfeiture of the bail, in accord with 5 V.I.C. § 3505.

(2) *Setting aside*. The court may direct that a forfeiture be set aside upon such condition as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(3) *Enforcement.* When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a surety bond, the obligors submit to the jurisdiction of the court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to the last known addresses.

(4) *Remission.* After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (b) of this rule.

(i) **Exoneration**. When the condition of the recognizance has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of the recognizance or by a timely surrender of the defendant into custody. Cash bail shall be returned by the court by check payable to the person whose name is on the receipt for the cash bail, except where that person executes an affidavit authorizing the Court to return the bail to someone else.

Effective December 1, 2017 (Promulgation Order 2017-010)

REPORTER'S NOTE

Rule 5-1 modernizes former Superior Court Rules 141 through 147 on the setting of bail.

Subpart (b) is based on a general principle that the least onerous bail conditions that will protect society and assure the presence of a defendant at trial should be employed. To that end, a descending priority statement of bail options is provided, beginning with personal recognizance, and progressing through unsecured bonds, travel or residence restrictions, custody of a defendant by a designated person or organization, surety bonds and then cash bail bonds. As provided in 5 V.I.C. § 3506, upon a showing that a person previously admitted to bail on a criminal charge is about to abscond, additional actions may be taken by the court.

Subpart (c) addresses the details of the form and place of deposit for monetary bail and corporate security bonds.

Subpart (d) confirms that – apart or in addition to other forms of bail required – the court may require a third party custodian to further ensure compliance with the terms of the release and the appearance of the defendant in each of the foregoing instances.

Subpart (e) addresses situations where the clerk is authorized to participate in the release of certain detainees on bail.

Subpart (f) authorizes the setting of bail for a witness.

Subpart (g) requires counsel to confer to resolve issues before initiating motion practice.

Subpart (h) sets for the requirements applicable where there is a breach of condition of a recognizance, and the court having jurisdiction shall declare a forfeiture of the bail, in accord

with 5 V.I.C. § 3505. There are provisions for setting aside a forfeiture, and for enforcing a forfeiture.

Subpart (i) provides that – when the condition of the recognizance has been satisfied or the forfeiture thereof has been set aside or remitted – the court will exonerate the obligors and release any bail, and cash bail will be returned.

Rules 6 – 7 [Reserved.]

Rule 8. Joinder of Offenses and of Defendants.

(a) Joinder of Offenses. The information may charge a defendant in separate counts with two or more offenses if the offenses charged—whether felonies or misdemeanors or both—are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. The information may charge two or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

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REPORTER'S NOTE

Rule 8 addresses the requirements for joinder of defendants and offenses for trial. In the interest of judicial efficiency and economy, the law favors joinder. As long as the charges relate to the same act or series of acts constituting an offense, joinder is permissible. Under Rule 8(a) an information may charge a defendant in separate counts with two or more offenses if they are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. Subpart (b) provides that an information may charge two or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. Thus, unlike the requirement for joinder of offenses, joinder of defendants requires that they are alleged to have participated in the same acts or series of acts, not merely similar acts.

Rule 9. [Reserved].

Rule 10. Arraignment.

(a) **In General.** An arraignment must be conducted in open court and must consist of:

(1) entry of an appearance by counsel for the defendant;

(2) ensuring that the defendant has a copy of the information;

(3) reading the information to the defendant or stating to the defendant the substance of the charge, unless the defendant waives formal reading of the information; and then

(4) asking the defendant to plead to the information.

(b) Waiving Appearance. A defendant need not be present for the arraignment if:

(1) the defendant, in a written waiver signed by both the defendant and defense counsel, has waived appearance and has affirmed that the defendant received a copy of the information and that the plea is not guilty; and

(2) the court accepts the waiver.

(c) Video Teleconferencing. Video teleconferencing may be used in conducting an arraignment under this Rule.

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REPORTER'S NOTE

Under Rule 10 arraignment must be conducted in open court and must consist of the four steps listed in subpart (a). This process guarantees that a defendant will be advised in open court of the charges that have been filed, and will be given an opportunity to plead to those charges. Subpart (a) specifies that entry of an appearance by defense counsel is an inherent part of the arraignment process as implemented in the Virgin Islands.

As provided in subpart (b), if the court agrees, a defendant need not be present for the arraignment if charged with a misdemeanor or if the defendant and defense counsel has signed a written waiver.

Subpart (c) confirms that video teleconferencing may be used in conducting an arraignment.

Rule 11. Pleas.

(a) Entering a Plea.

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

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

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

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

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

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

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

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

(C) the right to a jury trial;

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

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

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

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

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

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution; (L)-(M) [Reserved]

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and

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

(2) *Ensuring That a Plea Is Voluntary*. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement). As part of this inquiry, the court may inquire of the defendant whether there has been an adequate opportunity to consult with counsel, and whether the defendant is satisfied with the services of that counsel.

(c) Plea Agreement Procedure.

(1) *In General.* An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions, without the consent of the parties. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

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

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

(C) agree that a specific sentence or sentencing range which the defendant and defendant's counsel agree to have imposed is the appropriate disposition of the case (such a recommendation or request binds the court once the court accepts the plea agreement).

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

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

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

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

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

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

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

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

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

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

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

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

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

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

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

(e) [Reserved]

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

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

(2) a plea of nolo contendere;

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

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

However, such a statement is admissible:

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

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

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

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

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REPORTER'S NOTE

Rule 11 governs the types of pleas that may be entered and the court's procedures for accepting those pleas. It follows traditional practice in authorizing a defendant to plead not guilty, guilty, or (with the court's consent) nolo contendere. The purpose of this rule is to ensure that any plea entered is done knowingly, voluntarily, and with the defendant's understanding of the consequences of the plea. Conditional pleas reserving a right of appellate review of suppression decisions are permitted.

Subpart (b) requires a colloquy before the court accepts a plea of guilty or nolo contendere, in which the defendant is placed under oath and addressed personally in open court. A large number of topics about which the court must inform the defendant are listed in the subpart of the Rule. Before accepting a plea of guilty or nolo contendere, the court must also determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement). In modernized wording, this subpart of the Rule indicates that as part of this inquiry the court may inquire of the defendant whether there has been an adequate opportunity to consult with counsel, and whether the defendant is satisfied with the services of that counsel.

Subpart (c) addresses plea agreement procedures, including discussions among the parties, participation by the court in such discussions, forms of recommendations or agreements that may be included in such agreements, and judicial consideration of the plea agreement—which may include accepting the agreement, rejecting it, or deferring a decision for preparation of a presentence report. Specific provisions in this subpart address advice the court must provide to

a defendant about rights that would apply or be lost if the court does not follow the recommendation or request. Detailed provisions guide proceedings if the court rejects a plea agreement.

Subpart (d) authorizes withdrawal of a plea of guilty or nolo contendere, with varying standards depending on whether the court has determined whether to accept a plea, whether sentence has been imposed, and other criteria.

Subpart (f), which parallels V.I. Rule of Evidence 410, provides that withdrawn pleas – and statements made in the court of plea proceedings, are not admissible against the defendant who made the plea or was a participant in the plea discussions, with limited exceptions spelled out in this subpart of the Rule.

Subpart (g) requires that plea proceedings be recorded by a court reporter or by a suitable recording device.

Rule 12. Pleadings and Pretrial Motions.

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

(b) Pretrial Motions.

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

(2) *Motions that may be made at any time.* A motion that the court lacks jurisdiction may be made at any time while the case is pending.

(3) *Motions That Must Be Made Before Trial*. The following must be raised before trial:

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

(i) improper venue;

(ii) pre-information delay;

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

(iv) selective or vindictive prosecution; and

(v) an error in the preliminary hearing;

(B) a motion alleging a defect in the information, such as:

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

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

(iii) lack of specificity;

(iv) improper joinder; and

(v) failure to state an offense;

(C) a motion to suppress evidence;

(D) a Rule 14 motion to sever charges or defendants; and

(E) a Rule 16 motion for discovery.

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

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

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

(c) Deadline for a pretrial motion; consequences of not making a timely motion.

(1) *Setting the deadline.* The court may, at the arraignment or as soon afterward as practicable, set a schedule for discovery and other proceedings, and may establish a deadline for the parties to make pretrial motions and may also schedule a motion hearing. If the court does not set a deadline for making motions, such motions must in any event be made by the start of trial.

(2) *Extending or resetting the deadline.* At any time before trial, the court may extend or reset the deadline for pretrial motions for good cause or in the interests of justice.

(3) *Consequences of not making a timely motion under Rule 12(b)(3).* If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request upon a showing of good cause or in the interests of justice.

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

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

(f) Recording the Proceedings. All proceedings at a motion hearing, including any findings of fact and conclusions of law made orally by the court, must be recorded by a court reporter or a suitable recording device.

(g) Defendant's Continued Custody or Release Status. If the court grants a motion to dismiss based on a defect in instituting the prosecution in the information, it may order the defendant to be released or detained under applicable law for a specified time until a new information is filed. This rule does not affect any statutory period of limitations.

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

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REPORTER'S NOTE

Rule 12 specifies that the pleadings in a criminal proceeding are the information, and the pleas of not guilty, guilty, and nolo contendere. This rule is designed to ensure that trials will be efficient and not based on tactical delay is in filing challenges to charges or evidence in criminal cases. Thus, certain objections must be filed prior to trial or they will be deemed waived.

Subpart (b) identifies a range of pretrial motions that may raise any defense, objection, or request that the court can determine without a trial on the merits. While a motion contending that the court lacks jurisdiction may be made at any time while the case is pending, several other motions are listed which must be raised before trial. Motions regarding the use of specified evidence – whether made by the government or the defense – are also addressed.

Subpart (c) recognizes the modern Virgin Islands practice that at the arraignment – or as soon afterward as practicable – the court will usually set a discovery schedule and establish a deadline for the parties to make pretrial motions and may also schedule a motion hearing. If the court does not set a deadline for making motions, such motions must in any event be made by the start of trial. Subpart (c) also deals with the consequences of not making a timely motion.

Subpart (d) requires that the court decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. The Rule provides that when factual issues are involved in deciding a motion, the court must state its essential findings on the record.

Subpart (e) states that a party waives any Rule 12(b)(3) defense, objection, or request not raised at the time required by Rule 47 or by any extension the court provides, although in the interests of justice or for good cause, the court may grant relief from the waiver.

Subpart (f) requires that all motion proceedings, including any findings of fact and conclusions of law made orally by the court, must be recorded by a court reporter or a suitable recording device.

Subpart (g) indicates that if the court grants a motion to dismiss based on a defect in instituting the prosecution in the information, it may order the defendant to be released or detained under applicable law for a specified time until a new information is filed.

Subpart (h) states that the production of witness statements under Rule 26.2 applies at a suppression hearing under Rule 12(b)(3)(C).

Rule 12.1. Notice of an Alibi Defense.

(a) Government's Request for Notice and Defendant's Response.

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

(2) *Defendant's Response.* Unless otherwise provided in an order under subpart (d) of this Rule, within 14 days after the request, or at some other time the court sets, the defendant must serve written notice on an attorney for the government of any intended alibi defense. The defendant's notice must state:

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

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

(b) Disclosing Government Witnesses.

(1) *Disclosure.*

(A) In General. Unless otherwise provided in an order under subpart (d) of this Rule, if the defendant serves a Rule 12.1(a)(2) notice, an attorney for the government must disclose in writing to the defendant or the defendant's attorney:

(i) the name of each witness -- and the address and telephone number of each witness other than a victim -- that the government intends to rely on to establish that the defendant was present at the scene of the alleged offense; and

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

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

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

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

(2) Time to Disclose. Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within 14 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 14 days before trial.

(c) Continuing Duty to Disclose.

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

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

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

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

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

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

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

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REPORTER'S NOTE

The prosecution has the right to demand from the defendant notice of an alibi defense. Rule 12.1 implements the standard alibi-defense rule used in federal courts and many states. It calls for a government request for notice of an intended alibi defense, and a defense response within 14 days or another period specified by the court. Details of the required disclosure are listed in subpart (a).

Subpart (b) relating to disclosing government witnesses, makes a reciprocal provision that except as provided in an or order under subpart (d), on request of the defendant the government must disclose listed information about its witnesses, with 14 days of a defense request, or at another time ordered by the court.

Subpart (c) recognizes a "continuing duty to disclose" information responsive to requests under this rule, and to make prompt updates. Subpart (d) allows the court to grant an exception to any requirement of Rule 12.1(a)-(c). Subpart (e) specifies that if a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the defendant's alibi. It further states, however that this provision "does not limit the defendant's right to testify."

Subpart (f) specifies that if an alibi defense is withdrawn, evidence of an intention to rely on that defense, including statements made in connection with that intention, are not admissible in any later civil or criminal proceeding.

Rule 12.2. Notice of an Insanity Defense; Mental Examination.

(a) Notice of an Insanity Defense. A defendant who intends to assert a defense of insanity at the time of the alleged offense must so notify an attorney for the government in writing within the time provided for filing a pretrial motion, or at any later time the court sets, and file a copy of the notice with the clerk. A defendant who fails to do so cannot rely on an insanity defense. The court may, for good cause, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.

(b) Notice of Expert Evidence of a Mental Condition. If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on the issue of guilt, the defendant must—within the time provided for filing a pretrial motion or at any later time the court sets—notify an attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow the defendant to file the notice late, grant the parties additional trial-preparation time, or make other appropriate orders.

(c) Mental Examination.

(1) *Authority to Order an Examination; Procedures.* In an appropriate case the court may, upon motion of the prosecutor or upon its own initiative, order the defendant to submit to one or more mental examinations by a psychiatrist or other expert designated for this purpose in the order of the court.

(2) *Inadmissibility of a Defendant's Statements.* No statement made by a defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant has introduced evidence requiring notice under paragraphs (a) or (b) of this rule.

(d) Failure to Comply. The court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt if the defendant fails to:

(1) give notice under Rule 12.2(b); or

(2) submit to an examination when ordered under Rule 12.2(c).

(e) Inadmissibility of Withdrawn Intention. Evidence of an intention as to which notice was given under Rule 12.2(a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

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REPORTER'S NOTE

Rule 12.2 sets forth the requirements for giving notice of an insanity or mental condition defense. The purpose of the rule is to avoid surprise defenses during trial and to ensure that both sides have an opportunity to have the defendant examined by mental health experts before trial. In subpart (a) of the insanity defense rule, it is provided that a defendant who intends to assert a defense of insanity at the time of the alleged offense must notify the government in writing within the time provided for filing a pretrial motion, or at any later time the court sets.

Subpart (b), which also follows the federal rule model, specifies that where a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition bearing on the issue of guilt, the defendant must—within the time provided for filing a pretrial motion or at any later time the court sets—notify an attorney for the government in writing. However, the court may, for good cause, allow the defendant to file the notice late, grant the parties additional trial-preparation time, or make other appropriate orders.

The government may introduce expert testimony if the defendant has raised the issue of his or her mental condition. Subpart (c) authorizes the court upon motion of the prosecutor or upon its own initiative, to order the defendant to submit to one or more mental examinations by a psychiatrist or other expert designated for this purpose in the order of the court. Statements made during such an examination, and the expert's testimony, are admissible only on an issue regarding mental condition on which the defendant has introduced evidence requiring notice under paragraphs (a) or (b) of this rule.

The court has wide discretion in deciding what sanction to apply if the defendant does not comply with the notice and examination requirements of Rule 12.2. Rule 12.2 Subpart (d) states that if the defense fails to give proper notice, or fails to submit to an ordered examination, the court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt.

Subpart (e) provides that if an intention as to which notice was given under Rule 12.2(a) or (b), later withdrawn, information about the request is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

Rule 12.3. Notice of a Public-Authority Defense

(a) Notice of the Defense and Disclosure of Witnesses.

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

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

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

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

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

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

(4) *Disclosing Witnesses.*

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

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

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

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

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

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

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

(b) Continuing Duty to Disclose.

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

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

(B) the witness should have been disclosed under Rule 12.3(a)(4) if the disclosing party had known of the witness earlier.

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

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

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

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

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REPORTER'S NOTE

Because of the frequency of claims that defendants were covertly involved with the government at the time of the offenses charged against them, A rule 12.3 was developed to give the government notice of the proposed defense, and adequate time to investigate it. Rule 12.3 requires that if a defendant intends to assert a defense of actual or believed exercise of public authority on behalf of a law enforcement agency or federal intelligence agency at the time of the alleged offense, the defendant must so notify an attorney for the government in writing and must file a copy of the notice with the clerk within the time provided for filing a pretrial motion, or at any later time the court sets. The rule provides for sealing of the notice in some circumstances, and specifies what a notice must contain. It also specifies that the government must respond within 14 days, and what that response must contain. Provision is then included

for a request by the government for identification of each witness the defendant intends to rely on to establish a public-authority defense.

Subpart (b) imposes a continuing duty to disclose regarding responses about witnesses under this rule. Subpart (c) states that if a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the public-authority defense. Subpart (d) indicates that Rule 12.3 does not limit the court's authority to issue appropriate protective orders or to order that any filings be under seal. Subpart (e) provides that evidence of an intention as to which notice was given under Rule 12.3(a), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

Rule 12.4. Disclosure Statement

(a) Who Must File.

(1) *Nongovernmental Corporation.* Any nongovernmental corporate party must file a statement identifying the party's parent corporation and subsidiaries and any publicly held corporation that holds 10% or more of its stock.

(2) *Partnership.* Any partnership that is a party must file a statement identifying all partners, including silent partners.

(3) *Organizational Victim.* If an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1) to the extent it can be obtained through due diligence.

(b) Time for Filing; Supplemental Filing. A party must:

(1) file the Rule 12.4(a) statement upon the defendant's initial appearance; and

(2) promptly file a supplemental statement upon any change in the information that the statement requires.

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REPORTER'S NOTE

Rule 12.4, first adopted for federal practice in 2002, is designed to assist judges in determining whether they must recuse themselves because of a financial interest in the subject matter in controversy. By requiring full disclosure of the names of corporate parties with an interest in the case, the court can better evaluate whether it needs to recuse itself. Rule 12.4 requires a disclosure statement from any nongovernmental corporate party identifying the party's parent corporation and subsidiaries and any publicly held corporation that holds 10% or more of its stock. It also applies to partnerships. Further subparts provide that if an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1) to the extent it can be obtained through due diligence.

Subpart (b) of this rule requires the filing of a disclosure statement at the time of the defendant's initial appearance, and requires prompt supplementation upon any change in the information that the statement requires.

Rule 13. Joint Trial of Separate Cases

The court may order that two or more informations be tried together if all defendants and offenses could properly have been joined in a single information, regardless of the number of defendants. In all other cases, with the consent of the persons charged, a judge may, for convenience, consolidate informations for trial.

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REPORTER'S NOTE

Rule 13 authorizes the court to order that two or more informations be tried together if the offenses arose out of the same facts and circumstances, regardless of the number of defendants. In general, the test is whether the defendants or offenses could have been joined together. In all other cases, with the consent of the persons charged, a judge may, for convenience, consolidate informations for trial. In exercising its discretion the court may look beyond the face of the information to determine whether joinder is proper. It must consider both the efficiency and judicial economy of joinder, as well as the potential prejudice to the defendants from a joint trial.

Rule 14. Relief from Prejudicial Joinder

(a) Relief. If the joinder of offenses or defendants in an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

(b) Defendant's Statements. Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.

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REPORTER'S NOTE

Rule 14 addresses when a trial judge may sever offenses or defendants if there joinder, even if proper initially, becomes prejudicial to either the defendant or the government. Subpart (a) of Rule 14 allows the court – upon a showing that joinder of offenses or joinder of defendants appears to prejudice a defendant or the government – to order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

Subpart (b) provides that, before ruling on a defenses motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence. This addresses the important consideration of the extent to which evidence from one account or one defendant would be properly admissible improving another count or another defendant's guilt.

Rule 15. Depositions

(a) When Taken.

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

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

(b) Notice.

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

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

(c) Defendant's Presence.

(1) *Defendant in Custody*. The officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:

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

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

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

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

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

(2) the costs of the deposition transcript.

(e) Manner of Taking. Unless these rules or a court order provides otherwise, a deposition must be taken and filed in the same manner as a deposition in a civil action, except that:

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

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

(3) the government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial.

(f) Use as Evidence. A party may use all or part of a deposition as provided by the law of evidence.

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

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

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REPORTER'S NOTE

Rule 15 continues substantially prior practice with regard to limited deposition practice. Unlike in civil cases where depositions are taken as a matter of course, depositions in criminal cases are rare and are subject to order of the court. The Rule embodies in subpart (a) the standard that the court may grant leave for a deposition to preserve testimony for trial upon "exceptional circumstances and in the interest of justice." Thus, depositions are not to be used as a routine discovery tool. Exceptional circumstances may exist when a witness will be unavailable to testify at trial and that witnesses testimony is necessary to preserve the fairness of the trial because it is highly material to an issue in the case. The showing of exceptional circumstances must be made in each case. In deciding whether to grant a Rule 15 motion, courts consider (1) the materiality of the witness's testimony, (2) the unavailability of the witness at trial, and (3) any countervailing factors that would make a deposition unjust. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is not privileged, including any book, paper, document, record, recording, or data.

Subpart (b) deals with the notice mechanics where a deposition has been authorized.

Subpart (c) makes provisions for the presence of defendant at a deposition, and grounds for proceeding without such presence.

Subpart (d) specifies that the if the deposition was requested by the government, the court may—or if the defendant is unable to bear the deposition expenses, the court must—order the government to pay certain costs.

Subpart (e) indicates that a deposition must be taken and filed in the same manner as a deposition in a civil action, except that the scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial. Further, the government must provide to the defendant or the defendant's attorney, for use at the deposition, any

statement of the deponent in the government's possession to which the defendant would be entitled at trial.

Subpart (f) states that a party may use all or part of a deposition as provided by the law of evidence. Subpart (g) indicates that a party objecting to deposition testimony or evidence must state the grounds for the objection during the deposition.

Subpart (h) states that – with consent of the court – the parties may by agreement take and use a deposition.

Rule 16. Discovery and Inspection.

(a) Government's Disclosure.

(1) *Information Subject to Disclosure.* The government shall timely produce any material required by the Constitution ("Brady material"), and shall produce witness statements as required under Rule 26.2. In addition, the government shall provide discovery as set forth below after entry of a scheduling order by the court:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) *Information Not Subject to Disclosure.* Except as Rule 16(a)(1) or an order of the court provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in Rule 26.2.

(b) Defendant's Disclosure.

(1) *Information Subject to Disclosure.* In addition to the production of witness statements as required by Rule 26.2, the defendant shall provide disclosure as follows, subject to any scheduling order entered by the court:

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

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

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

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

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

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

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

(i) the government has made disclosure as required under Rule 16(a)(1)(G); or

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

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

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

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

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

(i) the defendant;

(ii) a government or defense witness; or

(iii) a prospective government or defense witness.

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

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

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

(d) Regulating Discovery.

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

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

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

(B) grant a continuance;

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

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

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REPORTER'S NOTE

Rule 16 is the primary provision governing pretrial discovery in criminal cases. Under Rule 16(a) the government must timely produce any material required by the Constitution ("Brady material"), and witness statements as required under Rule 26.2. In addition, as revised for practice in the Virgin Islands today, the government must provide – without requiring or awaiting a demand by the defendant for disclosure – discovery concerning defendant's oral or written statements, the defendant's prior record, and – on request of the defendant --- the government must permit inspection and copying of books, papers, documents, data, photographs, tangible objects, buildings or places, if (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant. Provisions are also included for the defendant to inspect and copy test results.

Further, the government must give to the defendant a written summary of any expert testimony that it intends to use during its case-in-chief at trial. If the government requests discovery under Rule 16(b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, give to the defendant a written summary of expert testimony that the government intends to use as evidence at trial on the issue of the defendant's mental condition. However Rule 16 does not generally authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in Rule 26.2.

Subpart (b) relates to disclosures by the defense, providing that – in addition to witness statements as required by Rule 26.2 – the defendant shall provide disclosure (if the government has made its required disclosures) of books, papers, documents, data, photographs, tangible objects, buildings or places, as well as the results or reports of any physical or mental examination and of any scientific test or experiment. The defendant must also, at the government's request, give to the government a written summary of any expert testimony that the defendant intends to use as evidence at trial, under specified conditions.

Subpart (c) prescribes a continuing duty for both sides to disclose material governed by Rule 16.

Subpart (d) authorizes the court – for good cause – to deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal. The Rule also provides remedies that apply if a party fails to comply with this rule.

Rule 16-1. Disclosure of Personnel Records of Law Enforcement Agents

(a) Defendant's Motion. A defendant seeking disclosure of personnel and/or internal affairs files of a particular law enforcement officer must first confer with the Attorney General in an effort to reach agreement on the scope of any such disclosure to be made. If agreement cannot be reached, the defendant may move for a court order requiring disclosure such files. Such motion must:

(1) include a report of the parties' efforts to resolve the issue, or give reasons for not so conferring; and

(2) show reasonable grounds to believe that the records sought may contain discoverable information.

(b) Attorney General's Response; Protective Order Application. If the Attorney General believes that some or all of the information requested in a motion under this Rule should not be disclosed – and if agreement cannot be reached with defense counsel on the scope of any such disclosure – as part of its response to the defendant's motion the government may request a protective order under Virgin Islands Rule of Criminal Procedure 16(d)(1) for some or all of the information sought. The Attorney General shall estimate in the response the time required to conduct the search and review of records sought by the defendant.

(c) Directions by the Court. After considering the response by the government to a defendant's motion under this Rule, the court may order the Attorney General of the Virgin Islands to search for, review and produce to the defendant all personnel and internal affairs files relating to such officer's employment in the Virgin Islands and – if reasonably available – records of any federal agency employing such officer. The court may direct disclosure of:

(1) the substance of all disciplinary reports;

(2) citizen complaints;

(3) departmental and/or agency complaints, including any disposition;

(4) medical and/or psychological information which could reasonably bear on the officer’s ability to observe, perceive or relate events, or which could affect such officer’s credibility;

(5) positive drug and/or alcohol testing results;

(6) criminal charges whether prosecuted or not;

(7) the substance of all internal affairs investigative files including all allegations and dispositions;

(8) all misconduct complaints and reports; and

(9) any other acts and information, whether substantiated or not, which could reasonably bear on the officer’s credibility or character for truthfulness.

The court shall set a timetable for such disclosure and may impose such conditions or limitations upon the disclosure as the court deems necessary and may, in the exercise of its discretion, conduct in camera inspection of all or part of the records prior to disclosure to the defendant.

(d) Search Description. If a search and review of records pursuant to an order issued under subsection (c) reveals nothing to be disclosed for one or more of the categories the court has ordered produced, the Attorney General must file a statement including the following

information: that a search was conducted for the specified categories of records, the extent of the search, the existence of any protective order governing the scope of such search, and that there is no information not subject to a protective order that is material to the preparation of the defense in the specified categories.

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REPORTER'S NOTE

Rule 16-1, adapted for Virgin Islands practice from a local federal district court rule, allows a defendant seeking disclosure of personnel and/or internal affairs files of a particular law enforcement officer to first confer with the Attorney General in an effort to reach agreement on the scope of any such disclosure to be made. If agreement cannot be reached, the defendant may move for a court order requiring disclosure such files, showing reasonable grounds to believe that the records sought may contain discoverable information.

Subpart (b) provides that if the Attorney General believes that some or all of the information requested in a motion under this Rule should not be disclosed – and if agreement cannot be reached with defense counsel on the scope of any such disclosure – the government may request a protective order for some or all of the information sought. The Attorney General must estimate in the response the time required to conduct the search and review of records sought by the defendant.

Subpart (c) authorizes the court to order the Attorney General of the Virgin Islands to search for, review and produce to the defendant all personnel and internal affairs files relating to such officer's employment in the Virgin Islands and – if reasonably available – records of any federal agency employing such officer. It specifies nine categories of potentially producible information that the court may order disclosed. The court will set a timetable for disclosure and may impose such conditions or limitations upon the disclosure as the court deems necessary and may, in the exercise of its discretion, conduct in camera inspection of all or part of the records prior to disclosure to the defendant.

Subpart (d) of this rule requires that – where no responsive material is found – the Attorney General must file a statement giving the specified categories of records sought, the extent of the search, the existence of any protective order governing the scope of such search, and stating that there is no information not subject to a protective order that is material to the preparation of the defense in the specified categories.

Rule 17. Subpoena

(a) Content. A subpoena must state the court's name and the title of the proceedings, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk of court must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the Virgin Islands.

(b) Defendant Unable to Pay. Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay

the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.

(c) Producing Documents and Objects.

(1) *In General.* A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.

(2) *Quashing or Modifying the Subpoena.* On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

(3) *Subpoena for Personal or Confidential Information About a Victim.* After an information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

(d) Service. A Virgin Islands Marshal, a deputy marshal, or any person not a party to the action who is at least 18 years old may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the prosecuting authority or a defendant unable to pay has requested the subpoena.

(e) Place of Service. A subpoena requiring a witness to attend a hearing or trial may be served at any place within the Virgin Islands or at any place outside of the Virgin Islands where the standards of 5 V.I.C. § 3863 are met.

(f) Issuing a Deposition Subpoena.

(1) *Issuance.* A court order to take a deposition authorizes the clerk of the Superior Court to issue a subpoena for the person named or described in the order.

(2) *Place.* After considering the convenience of the witness and the parties, the court may order—and the subpoena may require—the witness to appear anywhere the court designates.

(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court.

(h) Information Not Subject to a Subpoena. No party may subpoena a statement of a witness or of a prospective witness under this rule. Rule 26.2 governs the production of the statement.

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REPORTER'S NOTE

Rule 17 governs subpoenas, for testimony (subpoenas ad testificandum) or tangible evidence (subpoenas duces tecum), at hearings, trials or depositions authorized by the court. The rule sets forth the procedures for obtaining subpoenas, the appropriate manner of service of subpoenas, and consequences for failure to comply with subpoenas. Subpart (a) of the subpoena rule describes requirements for the contents of a subpoena, and the mechanisms by which the clerk or an attorney may issue a subpoena.

Subpart (d) allows the court – upon a showing of an inability to pay the witness's fees for a witness necessary for an adequate defense – to order issuance of the subpoena and payment in the same manner as for witnesses the government subpoenas.

Subpart (c) recognizes that a subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates, and that a motion to quash or modify the subpoena may be entertained. A motion to quash should be made to the court supervising the proceeding in which the witness has been called to testify. Unlike in civil cases, parties in criminal cases have been permitted to make a motion to quash on behalf of a witness. Special provision is included requiring a court order based on a showing of exceptional circumstances where a subpoena would require production of personal or confidential information about a victim may be served on a third party only by court order.

Subpart (d) provides that the Virgin Islands Marshal, a deputy marshal, or any person not a party to the action who is at least 18 years old may serve a subpoena by delivering it and tendering one day's witness- attendance fee and the legal mileage allowance.

Subpart (e) states that a subpoena requiring a witness to attend a hearing or trial may be served at any place within the Virgin Islands or at any place outside of the Virgin Islands where the standards of 5 V.I.C. § 3863 are met. This provision implements § 3 of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings.

Subpart (f) addresses orders needed when a deposition is authorized.

Subpart (g) provides that the failure of any person to obey a subpoena – without substantial excuse – may be deemed a contempt of the court.

Subpart (h) states that no party may subpoena a statement of a witness or of a prospective witness under this rule. Rule 26.2 governs the production of the statement.

Rules 17.1 – 22. [Reserved].

Rule 23. Jury or Nonjury Trial

(a) Jury Trial. As provided in 5 V.I.C. § 3601, no person shall be denied the right to trial by jury if demanded. If no jury is demanded the case shall be tried by the judge without a jury, except that the court may, on its own motion, order a jury for the trial of any criminal action. If the defendant is entitled to a jury trial, the trial must be by jury unless:

(1) the defendant waives a jury trial in writing and orally in open court;

(2) the government consents; and

(3) the court approves.

(b) Jury Size.

(1) *In General.* The trial jury in a criminal case shall consist of 12 persons unless the parties consent to a lesser number, as provided in 5 V.I.C. § 3602.

(2) *Stipulation for a Smaller Jury.* At any time before the verdict, the parties may, with the court's approval, stipulate in writing that:

(A) the jury may consist of fewer than 12 persons; or

(B) a jury of fewer than 12 persons may return a verdict if the court finds it necessary to excuse a juror for just cause after the trial begins.

(c) Nonjury Trial. In a case tried without a jury, the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or in a written decision or opinion.

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REPORTER'S NOTE

Rule 23 carries forward the provisions in 5 V.I.C. § 3601 stating that no person shall be denied the right to trial by jury if demanded. If no jury is demanded the case shall be tried by the judge without a jury, except that the court may, on its own motion, order a jury for the trial of any criminal action. Conditions for a defendant's waiver of the right to a jury trial are specified.

Although not constitutionally required, subpart (b) continues existing practice regarding criminal case juries consisting of 12 persons unless the parties consent to a lesser number, as provided in 5 V.I.C. § 3602. Subpart (c) states that – in a case tried without a jury – the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or in a written decision or opinion.

Rule 24. Trial Jurors

(a) Examination.

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

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

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

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

(b) Peremptory Challenges.

(1) *Number of Peremptory Challenges.* As provided in 5 V.I.C. § 3603, each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly.

(A) Felony Cases. The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year.

(B) Misdemeanor Cases. Each side has 3 peremptory challenges when the defendant is charged with a crime punishable by fine, imprisonment of one year or less, or both.

(C) Procedure. All peremptory challenges must be made at the bench.

(c) Alternate Jurors.

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

(2) *Procedure.*

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

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

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

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

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

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

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

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REPORTER'S NOTE

Rule 24 addresses the examination of prospective jurors (voir dire), the allocation and use of peremptory challenges, and the selection and role of alternate jurors. Subpart (a) of Rule 24, following established practice, states that the court may examine prospective jurors or may permit the attorneys for the parties to do so. The purpose of juror examination is to identify potential bias of prospective jurors and to enable the parties to exercise their peremptory challenges in a meaningful manner. If the court examines the jurors, it must permit the attorneys for the parties to ask or submit further questions.

Subpart (b) provides, in accord with 5 V.I.C. § 3603, the number of peremptory challenges to which each side is allowed.

Subpart (c) authorizes the court to impanel up to six alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties. It specifies the procedure for selection and retention of alternates, and provides the number of additional challenges for cause that are allowed. One him of the most significant changes in modern criminal rules was the adoption in 1999 of the provisions in federal Rule 24(c), carried forward here in the Virgin Islands Criminal Rules, which allows the trial court to retain alternate jurors after the jury retires to begin deliberating, and to substitute them during deliberations if a regular juror becomes incapacitated.

Rule 25. Disability of Judge or Magistrate Judge

(a) During Trial. Any judge regularly sitting in or assigned to the court may complete a jury trial if:

(1) the judge before whom the trial began cannot proceed. because of death, sickness, or other disability; and

(2) the judge completing the trial certifies familiarity with the trial record.

(b) After a Verdict or Finding of Guilty.

(1) *In General.* After a verdict or finding of guilty, any judge or magistrate judge (if authorized by law) regularly sitting in or assigned to the court may complete the court's duties if the judge or magistrate judge who presided at trial cannot perform those duties because of absence, death, sickness, or other disability.

(2) *Granting a New Trial.* The successor judge or magistrate judge may grant a new trial if satisfied that:

(A) a judge or magistrate judge other than the one who presided at the trial cannot perform the post-trial duties; or

(B) a new trial is necessary for some other reason.

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REPORTER'S NOTE

Rule 25 is a standard provision regarding the circumstances where the judge before whom a trial began cannot proceed. because of death, sickness, or other disability. The present wording of the rule was designed to clarify that a new trial should only be granted when no other judge can perform the posttrial duties, or a new trial is otherwise necessary. If the disability occurs during trial, another judge from the court may continue the trial after certifying familiarity with the trial record. If the disability occurs after a verdict, a new judge may rule on post-trial matters, including sentencing. Subpart (b) specifies that – after a verdict or finding of guilty – any judge or magistrate judge (if authorized by law) regularly sitting in or assigned to the court may complete the court's duties if the judge or magistrate judge who

presided at trial cannot perform those duties because of absence, death, sickness, or other disability.

Rule 26. Taking Testimony

(a) Generally. In every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when a statute or these rules otherwise provide, by the Virgin Islands Rules of Evidence.

(b) Video Recorded Admissions. As provided in 5 V.I.C. § 3509, a video recorded admission or confession, if otherwise admissible, is admissible as evidence in any criminal proceeding.

(c) Video Testimony by Certain Minors. As provided in 5 V.I.C. § 3510, testimony of minors who are the victims of sexual or child abuse, in certain proceedings the testimony of a minor 16 years of age or younger may be taken by contemporaneous examination and cross-examination in a room near the courtroom and out of the presence of the jury, defendant and public, and communicated contemporaneously to the courtroom by means of two-way closed-circuit television, if the procedures required by the statute are followed, the required findings are made by the court, the specified conditions are implemented, and a video recording is made of the proceedings.

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REPORTER'S NOTE

Rule 26(a) states the tradition that testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by these rules. It bears noting that the federal Advisory Committee developed proposals reviewed by the United States Supreme Court in 2002 to permit courts to use remote transmission of live testimony. However, the Supreme Court rejected that proposal because of constitutional concerns over the defendant's constitutional right of confrontation. In a statement issued for the Court, Justice Scalia wrote that "virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to attack real ones."

Subpart (b) authorizes, as provided in 5 V.I.C. § 3509, a video recorded admission or confession, if otherwise admissible, is admissible as evidence in any criminal proceeding.

Subpart (c) implements 5 V.I.C. § 3510, which provides that testimony of minors who are the victims of sexual or child abuse, in certain proceedings the testimony of a minor 16 years of age or younger may be taken by contemporaneous examination and cross-examination in a room near the courtroom and out of the presence of the jury, defendant and public, and communicated contemporaneously to the courtroom by means of two-way closed-circuit television, if the procedures required by the statute are followed, the required findings are made by the court, the specified conditions are implemented, and a video recording is made of the proceedings.

Rule 26.1. Foreign Law Determination

A party intending to raise an issue of foreign law must provide the court and all parties with reasonable written notice. Issues of foreign law are questions of law, but in deciding such issues a court may consider any relevant material or source—including testimony—without regard to the law of evidence.

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REPORTER'S NOTE

On rare occasions, courts must consider issues regarding the laws of foreign countries during a criminal proceeding. Rule 26.1 gives the power to the court to make these determinations, allowing it to use whatever materials are available for its review. Rule 26.1 requires that a party intending to raise an issue of foreign law provide the court and all parties with reasonable written notice. It also specifies that such issues of law may be determined by any relevant material or source—including testimony—without regard to the law of evidence.

Rule 26.2. Producing a Witness's Statement

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

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

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

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

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

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

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

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

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

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

(1) Rule 32(i)(2) (sentencing); and

(2) Rule 32.1(e) (hearing to revoke or modify probation).

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REPORTER'S NOTE

Rule 26.2 embodies the "Jencks Act" concept that – after a witness other than the defendant has testified on direct examination – the court, on motion of a party who did not call the witness, must order production for examination and use any statement the party calling the witness has in their possession and that relates to the subject matter of the witness's testimony. The rule establishes the same procedure for disclosure of defense witness statements as is provided for disclosure of prosecution witness statements in federal practice him pursuant to 28 U.S.C. § 3500 (the Jencks Act). The purpose of the rule is to ensure that each side has an opportunity to examine the statements made by witnesses of the other side and use them in cross- examination. Subpart (b) provides that if the entire statement relates to the subject matter of the witness's testimony, it must be produced. Subpart (c) provides mechanical procedures for use of a redacted statement. Subpart (d) confirms the power of the court to recess the proceedings to allow time for a party to examine the statement and prepare for its use. Subpart (e) provides sanctions applicable where the party who called the witness disobeys an order to produce or deliver a statement, including striking the witness's testimony from the record. For purposes of Rule 26.2, a "statement" means a written statement that the witness makes and signs, or otherwise adopts or approves; or a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording; or the witness's statement to a grand jury, however taken or recorded, or a transcription of such a statement. Subpart (g) confirms that this statement-production obligation applies at trial, at a suppression hearing under Rule 12, and to the extent specified in the rules that govern preliminary hearings, sentencing and revocation or modification of probation.

Rule 26.3. Mistrial

Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives. The judge shall state the reasons for such ruling on the record.

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REPORTER'S NOTE

Rule 26.3 specifies that – before ordering a mistrial – the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives. The United States Supreme Court adopted this rule for federal practice in 1993, to assure that judges would listen to input from both sides before declaring a mistrial. Rule 26.3 also prescribes that the judge must state the reasons for such ruling on the record. The rule does not, however, change (or attempt to articulate) the standards for granting a mistrial, or the effects of such a ruling. See Najawicz v. People, 58 V.I. 315, 335-37 (V.I. 2013.

Rule 27. Reserved

Rule 28. Interpreters

As provided in 4 V.I.C. § 323, the court may select, appoint, and approve the compensation for an interpreter. The compensation must be paid from funds provided by law or by the government, as the court may direct.

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REPORTER'S NOTE

Rule 28 simply confirms that the court may select, appoint, and approve the compensation for an interpreter. The judge has the discretion and responsibility to provide interpreters in cases where either the defendant or witnesses are non-English speaking. The compensation must be paid from funds provided by law or by the government, as the court may direct. Title 4 V.I.C. § 323 is applicable.

Rule 29. Motion for a Judgment of Acquittal

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

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

(c) After Jury Verdict or Discharge.

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

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

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

(d) Conditional Ruling on a Motion for a New Trial.

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

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

(3) *Appeal.*

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

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

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REPORTER'S NOTE

Rule 29 on motions for judgment of acquittal is adopted from federal practice without substantive change. If the defense does not believe the government has proven its case, it may move for a judgment of acquittal after the presentation of the government's evidence. Subpart (a) authorizes the court to enter a judgment of acquittal as to any offense for which the evidence is insufficient to sustain a conviction. The standard the court will use in deciding a motion for a judgment of acquittal is whether any reasonable jury, viewing the evidence in the light most favorable to the government, could find the defendant guilty beyond a reasonable doubt. This standard applies whether the evidence is direct or circumstantial. No special language is needed for this motion, and it may be made orally or in writing.

Subpart (b) specifies that the court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. The purpose of Rule 29(b) is to

permit the defendant to put on evidence without fear that some portion of that evidence will be used to bolster the government's case when the court subsequently rules on the motion acquittal. Thus the provisions in subpart (b) further specify that if the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

Subpart (c) allows a defendant to move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later. No prior motion by the defendant is required. If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal, and if the jury has failed to return a verdict, the court may enter a judgment of acquittal.

Subpart (d) allows a "conditional ruling" on a motion for new trial, which does not affect the finality of the judgment of acquittal, but determines whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed.

Rule 29.1. Closing Argument

Closing arguments proceed in accord with 5 V.I.C. § 3631 in the following order:

(a) the government argues;

(b) the defense argues; and

(c) the government rebuts.

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REPORTER'S NOTE

The rule follows the statutory provisions and traditional Virgin Islands practice. Because the government bears the burden of proof, the prosecution goes 1st with closing argument and gets the last argument in rebuttal.

Rule 30. Jury Instructions

(a) In General. Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time that the court reasonably sets. When the request is made, the requesting party must furnish a copy to every other party.

(b) Ruling on a Request. The court must inform the parties before closing arguments how it intends to rule on the requested instructions.

(c) Time for Giving Instructions. The court may instruct the jury before or after the arguments are completed, or at both times.

(d) Objections to Instructions. A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to

object out of the jury's hearing and, on request, out of the jury's presence. Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).

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REPORTER'S NOTE

Rule 30 provides that before the jury retires to deliberate, the judge must instruct the jury as to the law it must apply. The purpose of this rule is to give the parties an opportunity to request that particular instructions be given, and to object to the instructions given and the instructions not given. In doing so the rule also permits the trial court an opportunity to correct any error or omission in its charge to the jury before the jury begins deliberations. Traditional practice is confirmed in Rule 30: Jury instruction requests must be made at the close of the evidence or at any earlier time that the court reasonably sets. When the request is made, the requesting party must furnish a copy to every other party.

Subpart (b) requires that the court inform the parties – before closing arguments – as to how it intends to rule on the requested instructions.

Subpart (c) allows the court to instruct the jury before or after the arguments are completed, or at both times.

Subpart (d) specifies that a party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. As in other jurisdictions, "[a]n opportunity must be given to object out of the jury's hearing and, on request, out of the jury's presence." The Rule alerts practitioners that failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).

Rule 31. Jury Verdict

(a) Return. The jury must return its verdict to a judge in open court. The verdict must be unanimous.

(b) Partial Verdicts, Mistrial, and Retrial.

(1) *Multiple Defendants.* If there are multiple defendants, the jury may return a verdict at any time during its deliberations as to any defendant about whom it has agreed.

(2) *Multiple Counts.* If the jury cannot agree on all counts as to any defendant, the jury may return a verdict on those counts on which it has agreed.

(3) *Mistrial and Retrial.* If the jury cannot agree on a verdict on one or more counts, the court may declare a mistrial on those counts. The government may retry any defendant on any count on which the jury could not agree.

(c) Lesser Offense or Attempt. A defendant may be found guilty of any of the following:

(1) an offense necessarily included in the offense charged;

(2) an attempt to commit the offense charged; or

(3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right.

(d) Jury Poll. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.

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REPORTER'S NOTE

Rule 31 sets forth the procedure and requirements for returning verdicts in criminal cases, including verdicts in multiple defendant cases. It confirms traditional practice that the jury must be unanimous as to each count of the information, and must return its verdict to a judge in open court.

Subpart (b) addresses verdict mechanics where there are multiple defendants or multiple counts. It also contains provision for mistrial and retrial if a jury cannot agree on a verdict on one or more counts.

Subpart (c) deals with lesser offenses, and provides that a defendant may be found guilty of an offense necessarily included in the offense charged; an attempt to commit the offense charged; or an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right. The prosecution or defense may request a verdict on a lesser included offense if all of the elements of the lesser offense are included in the charged offense, and the charged offense requires at least one additional element. However, where the lesser offense is not a subset or requires an element not required by the greater offense, no instruction is given under Rule 31(c).

Subpart (d) states that – at a party's request – after a verdict is returned but before the jury is discharged, the court must poll the jurors individually. In keeping with traditional practice, if the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.

Rule 32. Sentencing and Judgment.

(a) [Reserved]

(b) Time of Sentencing.

(1) *In General.* Sentence shall be imposed immediately after a defendant has been found guilty or has pleaded guilty, unless the court, for good cause shown, shall postpone the imposition of sentence for a period not to exceed 15 days. The court may postpone imposition of a sentence for a period not to exceed 120 days when the court has requested a pre-sentence investigation from the probation officer. Pending sentence, the court may commit the defendant or continue or alter the bail. Before imposing sentence, the court shall afford the defendant or defense counsel an opportunity to make a statement in the defendant's behalf and to present any information in mitigation of punishment. Where a

sentence has been opened and vacated, the defendant shall be re-sentenced forthwith, except where a new trial is granted.

(2) *Changing Time Limits*. The court may, for good cause, change any time limits prescribed in this rule.

(c) Presentence Investigation.

(1) *Required Investigation*.

(A) In General. The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:

(i) a statute of the Virgin Islands requires otherwise; or

(ii) the court expressly finds that the information in the record enables it to meaningfully exercise its sentencing authority.

(B) Restitution. If the law permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

(2) *Interviewing the Defendant.* The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.

(d) Presentence Report. The report of the presentence investigation must contain:

(1) any prior criminal record of the defendant;

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

(3) any applicable victim impact statement, or information that assesses any financial, social, psychological, and medical impact on any victim;

(4) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(5) when the law provides for restitution, information sufficient for a restitution order; and

(6) such other information as may be required by the court.

(e) Disclosing the Report and Recommendations.

(1) *Time to Disclose* . The court must make available to the defendant through the defendant's attorney and to the attorney for the government a copy of the report of the presentence investigation a reasonable time before imposing sentence. The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) *Diagnostic Information.* To the extent that the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons, the court may withhold any such portions of the presentence investigation report.

(3) *Sentence Recommendation.* By order the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

(4) *Disclosure to All Parties* . Any material disclosed to the one party must also be disclosed to the adverse party.

(f) – (h) [Reserved]

(i) Sentencing.

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

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

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

(C) may, for good cause, allow a party to make a new objection at any time before sentence is imposed.

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

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

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

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

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

(4) *Opportunity to Speak.*

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

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

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

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

(B) By a Victim. Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to speak or submit any information about the sentence.

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

(j) Defendant's Right to Appeal.

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

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

(B) Appealing a Sentence. After sentencing—regardless of the defendant's plea—the court must advise the defendant of any right to appeal the sentence.

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

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

(k) Judgment. A judgment of conviction shall set forth the information, the plea, the findings, the adjudication and sentence. It shall contain the number of the section and the title or a reasonably short description of the statute or ordinance under which conviction was had. The court must sign the judgment, the clerk must enter it, and it must be transmitted to the authority taking custody of or having supervision over the defendant. If the defendant is found not guilty or for any other reason is entitled to be discharged, the judgment shall be entered accordingly

If a corporation shall be convicted of the violation of any law or ordinance, the judge may give judgment thereon, and shall cause such judgment to be enforced in the same manner as a judgment in a civil action.

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REPORTER'S NOTE

Rule 32 follows prior practice for the scheduling and imposition of sentence. It sets forth the procedures for imposing sentence following conviction, and is constructed so that both sides have an opportunity to assist the court in deciding the factual and legal issues relevant to determining sentencing.

Subpart (c) and (d) make provision for the preparation and consideration of a presentence report, specifying six required subjects to be covered.

Subpart (e) addresses the making available of the report a reasonable time before imposing sentence. As implemented here, this subpart contains provisions authorizing the trial court to withhold specific portions of a presentence report that might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.

Subpart (i) provides a detailed roadmap to procedures upon sentencing, specifying the steps that must be taken by the court, the possibility of introduction of evidence, and then the court's "acceptance" or ruling on "disputed" portions of the report. Its determinations must be appended to any copy of the presentence report made available to the Bureau of Corrections. Provisions for opportunities to address the court are included, for parties and for any victim.

Subpart (j) deals with a defendant's right to appeal, and the advice that must be provided to a defendant, whether the defendant pled guilty or not guilty.

Subpart (k) specifies that the judgment of conviction must set forth the information, the plea, the findings, the adjudication and sentence. It also must contain the number of the section and the title or a reasonably short description of the statute or ordinance under which conviction was had. The rule adds that the judgment must be transmitted to the authority taking custody of the defendant.

Rule 32.1. Revoking or Modifying Probation

(a) Initial Appearance.

(1) *Person In Custody*. A person held in custody for violating probation or supervised release must be taken without unnecessary delay before the court.

(2) *Upon a Summons.* When a person appears in response to a summons for violating probation or supervised release, the court must proceed under this rule.

(3) *Advice.* The judge must inform the person of the following:

(A) the alleged violation of probation or supervised release;

(B) the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and

(C) the person's right, if held in custody, to a preliminary hearing under Rule 32.1(b)(1).

(4) – (5) [Reserved]

(6) *Release or Detention.* The court may release or detain the person pending further proceedings. The burden of establishing by clear and convincing evidence that the person will not flee or pose a danger to any other person or to the community rests with the person.

(b) Revocation.

(1) *Preliminary Hearing.*

(A) In General. If a person is in custody for violating a condition of probation, the court must promptly conduct a hearing to determine whether there is probable cause to believe that a violation occurred. The person may waive the hearing.

(B) Requirements. The hearing must be recorded by a court reporter or by a suitable recording device. The court must give the person:

(i) notice of the hearing and its purpose, the alleged violation, and the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel;

(ii) an opportunity to appear at the hearing and present evidence; and

(iii) upon request, an opportunity to question any adverse witness, unless the judge determines that the interest of justice does not require the witness to appear.

Whenever the alleged violation of probation is based on an arrest for a criminal offense allegedly committed while on probation, a preliminary hearing held pursuant to Rule 5.1 may serve as the preliminary revocation hearing required by this subparagraph if the provisions of this subparagraph have been fully satisfied.

If the judge finds probable cause, the judge must conduct a revocation hearing. If the judge does not find probable cause, the judge must dismiss the proceeding.

(2*) Revocation Hearing*. Unless waived by the person, the court must hold the revocation hearing within a reasonable time. The person is entitled to:

(A) written notice of the alleged violation;

(B) disclosure of the evidence against the person;

(C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear;

(D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and

(E) an opportunity to make a statement and present any information in mitigation.

(c) Modification.

(1) *In General.* If either the attorney for the defendant or the prosecution seeks any modification of the conditions of a defendant's release, the party making the motion must first confer with the opposing party or give reasons for not so conferring. The motion must indicate whether the opposing party has any objection. Before modifying the conditions of probation, the court must hold a hearing, at which the person has the right to counsel and an opportunity to make a statement and present any information in mitigation.

(2) *Exceptions.* A hearing is not required if:

(A) the person waives the hearing; or

(B) the relief sought is favorable to the person and does not extend the term of probation; and

(C) an attorney for the government has received notice of the relief sought, has had a reasonable opportunity to object, and has not done so.

(d) [Reserved]

(e) Producing a Statement. Rule 26.2(a)-(d) and (f) applies at a hearing under this rule. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony

Effective December 1, 2017 (Promulgation Order 2017-010)

REPORTER'S NOTE

Rule 32.1 on revoking or modifying probation calls for a prompt initial presentation of the person to the court, accompanied by an advice of rights. It provides that the court may release or detain the person pending further proceedings. The burden of establishing by clear and

convincing evidence that the person will not flee or pose a danger to any other person or to the community rests with the person.

Subpart (b) contemplates a preliminary hearing in revocation proceedings, and if the person is in custody for violating a condition of probation, the court must, within the time limits set forth in Rule 32.1(a)(3), conduct a hearing to determine whether there is probable cause to believe that a violation occurred.

Detailed provisions are included stating the requirements for the hearing, which must be recorded. These include notice and an opportunity to participate in the hearing. If probable cause is found, the judge must conduct a revocation hearing, for which the Rule also specifies several enumerated requirements.

Subpart (c) recognizes that a person on probation or supervised release may apply to the court for modification of its terms or conditions. It requires that counsel confer before motion practice in order to reach agreement if possible and avoid unnecessary motion practice. Before modifying conditions of probation – the court must hold a hearing, at which the person has the right to counsel and an opportunity to make a statement and present any information in mitigation.

Subpart (e) states that the witness-statement-production requirements of Rule 26.2(a)-(d) and (f) apply at a hearing under this rule, and if a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

Rule 32.2. Criminal Forfeiture [Reserved].

Rule 33. New Trial

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

(b) Time to File.

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

(2) *Other Grounds.* Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty, or within such further time as the court may fix. In no event shall this rule be construed to limit the right of a defendant to apply to the court for a new trial on the ground of fraud or lack of jurisdiction.

Effective December 1, 2017 (Promulgation Order 2017-010)

REPORTER'S NOTE

Rule 33 permits the court to prevent a miscarriage of justice by setting aside a verdict and ordering a new trial Subpart (a) of Rule 33 provides that – on motion of a defendant – the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

Subpart (b) specifies that motions predicated solely on the ground of newly discovered evidence must be filed within three years after the verdict or finding of guilty. Where other grounds are relied upon, a motion for a new trial must be filed within 14 days after the verdict or finding of guilty, or within such further time as the court may fix.

Rule 34. Arresting Judgment

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

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

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

(b) Time to File. The defendant must move to arrest judgment within 30 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere.

Effective December 1, 2017 (Promulgation Order 2017-010)

REPORTER'S NOTE

Rule 34, on arresting judgment, recognizes that a motion to arrest judgment will lie if either the information does not charge an offense, or the court does not have jurisdiction of the charged offense. The purpose of this rule is to allow the trial court an opportunity to rule upon whether an information was legally sufficient before a defendant appeals a conviction based upon that charging instrument. Subpart (b) allows a defendant to make this motion within 30 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere.

Rule 35. Correcting or Reducing a Sentence or Collateral

(a) Correcting Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after any order or other mandate issued upon affirmance of the judgment or dismissal of the appeal, received by the court has become final by reason of the expiration of the time limited for further appeal or review.

(b) Reducing a Sentence for Substantial Assistance.

(1) *In General.* Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.

(2) *Later Motion.* Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:

(A) information not known to the defendant until one year or more after sentencing;

(B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or

(C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

(3) *Evaluating Substantial Assistance*. In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.

Effective December 1, 2017 (Promulgation Order 2017-010)

REPORTER'S NOTE

Rule 35 addresses when a court may correct or reduce a sentence. Under subpart (a) the court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. Following a timetable that has applied under former Superior Court Rules, the court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after any order or other mandate issued upon affirmance of the judgment or dismissal of the appeal, received by the court has become final by reason of the expiration of the time limited for further appeal or review.

Subpart (b) authorizes a motion, within one year of sentencing – or thereafter – in which the government may ask the court to reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person. In evaluating "substantial assistance" the court may consider the defendant's presentence assistance.

Rule 36. Clerical Error

After giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record not including the transcript, or correct an error in the record arising from oversight or omission. No changes in any transcript may be made by the court except on notice to the attorney for the government and counsel for the

defendant. Where changes are made in the transcription of proceedings, the corrections and deletions shall be shown.

Effective December 1, 2017 (Promulgation Order 2017-010)

REPORTER'S NOTE

Rule 36 provides for correction of clerical error "at any time," but limits changes in transcripts by requiring notice to the attorneys for the government and the defense. Clerical mistakes are minor, ministerial errors arising from simple oversight or omission, rather than substantive, factual, or legal errors. Where an error lies in accurately reducing the court's original intentions to paper, a Rule 36 motion is appropriate.

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

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

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the Supreme Court of the Virgin Islands remands for that purpose or that the motion raises a substantial issue.

(b) Notice to the Supreme Court. The movant must promptly notify the Supreme Court of the Virgin Islands if the Superior Court states that it would grant the motion or that the motion raises a substantial issue.

(c) Remand. The Superior Court may decide the motion if the Supreme Court remands for that purpose.

Effective December 1, 2017 (Promulgation Order 2017-010)

REPORTER'S NOTE

This rule, also applicable in federal practice and several other jurisdictions, authorizes the Superior Court to enter a ruling on a motion for relief that is barred by a pending appeal which divests the trial court of subject matter jurisdiction. While the court is not obligated to make a ruling on an application for relief that it lacks authority to resolve because of a pending appeal, it has the option to state either that it would grant the motion if the Supreme Court of the Virgin Islands remands for that purpose or that the motion raises a substantial issue. The movant must promptly notify the Supreme Court if the Superior Court states that it would grant the motion or that the motion raises a substantial issue. The Superior Court may decide the motion if the Supreme Court remands for that purpose.

Rule 38. Staying a Sentence

(a) [Reserved].

(b) Place of Confinement. The court may recommend to the Bureau of Corrections that the defendant be confined near the place of the trial or appeal for a period reasonably necessary to permit the defendant to assist in preparing the appeal.

(c) Fine. If the defendant appeals, the Superior Court or the Supreme Court of the Virgin Islands may stay a sentence to pay a fine or a fine and costs. The court may stay the sentence on any terms considered appropriate and may require the defendant to:

(1) deposit all or part of the fine and costs into the Superior Court's registry pending appeal;

(2) post a bond to pay the fine and costs; or

(3) submit to an examination concerning the defendant's assets and, if appropriate, order the defendant to refrain from dissipating assets.

(d) Probation. If the defendant appeals, the court may stay a sentence of probation. The court must set the terms of any stay.

(e) Restitution and Reparation.

(1) *In General.* If the defendant appeals, the court, or the Supreme Court of the Virgin Islands, may stay—on any terms considered appropriate— any sentence providing for restitution or reparation.

(2) *Ensuring Compliance.* The court may issue any order reasonably necessary to ensure compliance with a restitution or reparation order after disposition of an appeal, including:

(A) a restraining order;

(B) an injunction;

(C) an order requiring the defendant to deposit all or part of any monetary restitution or reparation into the court's registry; or

(D) an order requiring the defendant to post a bond.

Effective December 1, 2017 (Promulgation Order 2017-010)

REPORTER'S NOTE

Under subpart (b) of Rule 38, the court may recommend to the Bureau of Corrections that the defendant be confined near the place of the trial or appeal for a period reasonably necessary to permit the defendant to assist in preparing the appeal.

Subpart (c) specifies that – in the event the defendant appeals – a sentence to pay a fine (or a fine or costs) may be stayed by either the Superior Court or the Supreme Court of the Virgin Islands, and several options are provided.

Subpart (d) authorizes the court to stay a sentence of probation if the defendant appeals.

Subpart (e) allows either the Superior Court or the Supreme Court of the Virgin Islands to stay—on any terms considered appropriate— any sentence providing for restitution or reparation.

Rules 39 – 40. [Reserved].

Rule 40-1. Extradition.

(a) Warrants of Arrest for Crimes Allegedly Committed in Other Jurisdictions.

(1) *Governor's Warrant*. A warrant for the arrest of a person found in the Virgin Islands who is alleged to have committed an offense in another jurisdiction may be issued pursuant to 5 V.I.C. §§ 3801 – 3808 and other provisions of Chapter 331 of Title 5 of the Virgin Islands Code, by the Governor or any person performing the functions of the Governor by authority of the laws of the Virgin Islands.

(2) *Superior Court Arrest Warrant*. A warrant may issue from the Superior Court pursuant to 5 V.I.C. § 3813 and § 3806 and other provisions of Chapter 331 of Title 5 of the Virgin Islands Code, to bring a defendant before the court to answer an information on oath of any credible witness setting forth:

(A) that the defendant has committed a specified offense in any other jurisdiction;

(B) that the defendant is a fugitive from justice as provided in 5 V.I.C. § 3813, or is subject to arrest as provided in 5 V.I.C. § 3806;

(C) that the defendant is within the Virgin Islands;

(D) that the defendant is liable by the Constitution and laws of the United States Virgin Islands to be delivered over upon the demand of the executive authorities in such other jurisdiction; and (E) such other matters as are necessary to bring the case within the provisions of law.

(3) *Initial Appearance After Arrest on Warrant*. Any person arrested on a warrant issued under subparts (a)(1) and (2) of this Rule, and the statutes those subparts implement, shall be taken before the court for an initial appearance promptly and without unnecessary delay, regardless of whether a complaint under oath has been prepared by the date of arrest. Either at the initial appearance of the person arrested, or as soon as practicable thereafter, a complaint under oath must be made against the person arrested, setting forth the ground for the arrest as provided in 5 V.I.C. § 3813 and § 3814. Further proceedings in fugitive, extradition or rendition cases shall comply with statutory requirements of Chapter 331 of Title 5.

(b) Arrest Without a Warrant; Appearance in Court With All Practicable Speed. As provided in 5 V.I.C. § 3814, a person may be arrested without a warrant upon reasonable information that he or she stands charged in the courts of another jurisdiction with a crime punishable by death or imprisonment for a term exceeding one year; provided, however, that in all such cases the person arrested must be taken before a judge in the Virgin Islands with all practicable speed, regardless of whether a complaint under oath has been prepared by the date of arrest. Either at the initial appearance of the person arrested, or as soon as practicable thereafter, a complaint under oath must be made against the person arrested, setting forth the ground for the arrest as provided in 5

V.I.C. § 3813 and § 3814. Further proceedings in fugitive, extradition or rendition cases shall comply with statutory requirements of Chapter 331 of Title 5.

(c) Initial Extradition Appearance.

(1) *Advice to the Arrested Person*. At the initial extradition appearance the court shall advise the arrested person concerning:

(A) The charge alleged to be pending in the other jurisdiction;

(B) The arrested person's right to a determination by the Virgin Islands court as to whether there is reasonable information on which to conclude:

(i) that an offense has occurred in the other jurisdiction that provides a lawful basis for extradition, and

(ii) that the arrested person is the individual sought by the other jurisdiction for that crime;

(C) The right to remain silent, and that if a voluntary statement is made, it could be used against him or her;

(D) The right to demand and procure legal counsel as provided in 5 V.I.C. § 3810; and

(E) That if the arrested person or his/her counsel desire to test the legality of the arrest, the court will fix a reasonable time in which to apply for a writ of habeas corpus, on notice to the Attorney General of the Virgin Islands and to the Governor or executive authority of the other jurisdiction.

(2) *Waiver By Arrested Person*. The person arrested may waive, in writing or orally before the court, all objections to extradition – and upon such waiver and consent to extradition the court shall proceed to issue a commitment warrant under subpart (c)(5) of this Rule and to consideration of bail under subpart (c)(6).

(3) *Determination by the Court*. If the person arrested does not consent to extradition by effectively waiving objection thereto, at the initial appearance before the court the judge is not bound by the V.I. Rules of Evidence and may consider all of the information provided by the People and the person arrested in determining whether there are reasonable grounds to believe:

(A) An offense has occurred in the other jurisdiction providing a lawful basis for extradition; and

(B) The arrested person now before the court is the individual sought by the other jurisdiction for that crime.

(4) *Release of the Person Arrested*. If the court concludes that there is not reasonable information that a lawful basis for extradition exists and that the person arrested is the individual who stands charged with the crime in the other jurisdiction, the person arrested must be released.

(5) *Commitment to Await Requisition*. If the court makes the findings specified in subpart (c)(3) of this Rule, in accord with 5 V.I.C. § 3815 the court shall issue a

detention warrant committing the arrested person for a specific period – not to exceed 30 days – to allow time for receipt of a requisition from the other jurisdiction for extradition of the detainee as well as issuance of an extradition warrant by the Governor of the Virgin Islands, and the court shall proceed immediately to consideration of whether the detainee should be admitted to bail during that commitment period.

(6) *Consideration of Bail*. In determining whether a detainee will be admitted to bail after being committed in anticipation of requisition by another jurisdiction and issuance of a warrant for extradition by the Virgin Islands Governor, the court may consider all of the factors recognized under the law of the Virgin Islands regarding bail, including the forms of bail and the procedures of Rule 5-1 of these Rules of Criminal Procedure; provided, however that information showing the detainee's fugitivity from another jurisdiction shall create a presumption that he or she is unlikely to appear if released, which may be overcome only by clear and convincing proof.

(d) Notice to the Other Jurisdiction; Duty of the People. Promptly after commitment of the arrested person under a detention warrant as provided in subpart (c)(5) of this Rule, the People shall give written notice of such commitment to the Governor of the other jurisdiction, or its executive or prosecutorial authorities, accompanied by a specific request for a prompt requisition by that other jurisdiction for extradition of the detainee. The People shall use all reasonable efforts to complete the process of obtaining the other jurisdiction's requisition and the issuance of the Virgin Islands Governor's warrant of extradition without unnecessary delay.

(e) Appearance Date; Period of Detention. The detainee shall be brought before the court on or before the last detention date set in the commitment warrant.

(1) At that appearance the People shall report to the court the dates and exact nature of its diligent activities in the process of obtaining the other jurisdiction's requisition and the Virgin Islands Governor's warrant of extradition.

(2) If either the other jurisdiction's requisition or the Virgin Islands Governor's warrant has not been issued by this appearance date, the court may extend the commitment of the detainee for an additional period of no more than 60 days, as provided in 5 V.I.C. § 3817, and the court may also consider whether the detainee should be admitted to bail during that extended period, as provided in subpart (c)(6) of this Rule.

(f) Proceedings After Requisition

(1) *Bail.* No detainee whose delivery into the custody of another state has been demanded by the Governor or executive authority thereof may be released on bond or other form of bail except upon an order of a court of that other jurisdiction.

(2) *Turnover Order*. The order delivering a detainee into the custody of another jurisdiction shall include an express statement of the date and time of day that such order is issued.

Effective December 1, 2017 (Promulgation Order 2017-010); amended effective January 1, 2020 (Promulgation Order 2019—13)

REPORTER'S NOTE

Rule 40-1 has been created to spell out procedures under the Uniform Criminal Extradition Act, to which the Virgin Islands is a party. See 5 V.I.C. §§ 3802 et seq. It was rewritten effective January 1, 2020.

Rule 41. Search and Seizure

(a) Scope and Definitions.

(1) This rule does not modify 5 V.I.C. § 3902 or any other statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.

(2) A search warrant authorized by this rule may be issued by a judge, who must issue the warrant to an officer authorized to execute it.

(3) *Definitions.*

The term "*property*" as used in this rule includes documents, books, papers, any other tangible objects, and information.

"*Daytime*" means the hours between 6:00 a.m. and 10:00 p.m. according to local time.

"*Judge*" as used in this Rule 41 means any judicial officer authorized to act under Virgin Islands law.

"*Tracking device*" means an electronic or mechanical device which permits the tracking of the movement of a person or object.

(b) Venue [Reserved]

(c) Persons or Property Subject to Search or Seizure. A warrant may be issued for any of the following:

(1) evidence of a crime;

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

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

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

(d) Obtaining a Warrant.

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

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

(A) Warrant on an Affidavit. When a law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces. The applicant may submit depositions or affidavits of other persons containing allegations of fact supporting or tending to support those contained in the application.

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

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

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

(e) Contents of the Warrant; Duplicates; Modification; Signing.

(1) *Warrant to Search for and Seize a Person or Property.* Except for a tracking-device warrant, the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the judge to whom it must be returned. The warrant must command the officer to:

(A) execute the warrant within a specified time no longer than 14 days; and

(B) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time.

(2) *Warrant Seeking Electronically Stored Information.* A warrant under Rule 41(e)(2)(A) may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing the warrant in Rule 41(e)(2)(A) and (f)(1)(A) refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review.

(3) *Authorization to Intercept Wire or Oral Communications.* A judge may grant—in conformity with the standards and procedures set forth in Chapter 343 of Title 5 of the Virgin Islands Code, 5 V.I.C. § 4102 et seq., an order authorizing or approving the interception of wire or oral communications.

(4) *Warrant for a Tracking Device.* A tracking-device warrant must identify the person or property to be tracked, designate the judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

(A) complete any installation authorized by the warrant within a specified time no longer than 10 days;

(B) perform any installation authorized by the warrant during the daytime, unless the judge for good cause expressly authorizes installation at another time; and

(C) return the warrant to the judge designated in the warrant.

(5*) Warrant by Telephonic or Other Means*. If a judge decides to proceed under Rule 41(d)(3), the following additional procedures apply:

(A) Preparing a Proposed Duplicate Original Warrant. The applicant must prepare a "proposed duplicate original warrant" and must read or otherwise transmit the contents of that document verbatim to the judge.

(B) Preparing an Original Warrant. If the applicant reads the contents of the proposed duplicate original warrant, the judge must enter those contents into an original warrant. If the applicant transmits the contents by reliable electronic means, that transmission may serve as the original warrant.

(C) Modification. The judge may modify the original warrant. The judge must transmit any modified warrant to the applicant by reliable electronic means under Rule 41(e)(3)(D) or direct the applicant to modify the proposed duplicate original warrant accordingly.

(D) Signing the Warrant. Upon determining to issue the warrant, the judge must immediately sign the original warrant, enter on its face the exact date and time it is issued, and transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original warrant.

(f) Executing and Returning the Warrant.

(1) *Warrant to Search for and Seize a Person or Property.*

(A) Time and Place of Execution. The officer executing the warrant must enter on it the exact date and time it was executed. A search warrant must not be executed more than 10 days after the date of issuance. A search warrant may be executed on any day of the week and, in the absence of express authorization in the warrant, must be executed only during hours of daylight. A search warrant may be executed anywhere within the Virgin Islands.

(A-1) Breaking doors. As provided in 5 V.I.C. § 3904, the officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of the officer's authority and purpose, admittance is refused, or when necessary to liberate the officer or a person aiding him in the execution of the warrant.

(B) Inventory. An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person. In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to describing the physical storage media that were seized or copied. The officer may retain a copy of the electronically stored information that was seized or copied.

(C) Receipt. The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the

officer took the property. For a warrant to use remote access to search electronic storage media and seize or copy electronically stored information, the officer must make reasonable efforts to serve a copy of the warrant and receipt on the person whose property was searched or who possessed the information that was seized or copied. Service may be accomplished by any means, including electronic means, reasonably calculated to reach that person.

(D) Return. The officer executing the warrant must promptly return it--together with a copy of the inventory--to the judge designated on the warrant. The officer may do so by reliable electronic means. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant. Disposition of property seized shall conform to 5 V.I.C. § 3905.

(2) *Warrant for a Tracking Device.*

(A) Noting the Time. The officer executing a tracking-device warrant must enter on it the exact date and time the device was installed and the period during which it was used.

(B) Return. Within 10 days after the use of the tracking device has ended, the officer executing the warrant must return it to the judge designated in the warrant. The officer may do so by reliable electronic means.

(C) Service. Within 10 days after the use of the tracking device has ended, the officer executing a tracking-device warrant must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by delivering a copy to the person who, or whose property, was tracked; or by leaving a copy at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location and by mailing a copy to the person's last known address. Upon request of the government, the judge may delay notice as provided in Rule 41(f)(3).

(3) *Delayed Notice*. Upon the government's request, a judge may delay any notice required by this rule if the delay is authorized by statute.

(4) *Return.* The officer executing the warrant must promptly return it--together with a copy of the inventory--to the judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(g) Motion to Return Property. A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the division where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. While a criminal investigation or proceeding remains pending, the burden rests upon the movant to show entitlement to return of the property, but at the conclusion of a criminal proceeding the evidentiary burden on a Rule 41(g) motion shifts to the government to demonstrate that it has a continuing legitimate reason to retain the seized property. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

(h) Motion to Suppress. A defendant may move to suppress evidence in the court where the trial will occur, as Rule 12 provides.

(i) Forwarding Papers to the Clerk. The judge to whom the warrant is returned must attach to the warrant a copy of the return, of the inventory, and of all other related papers and must deliver them to the clerk in the district where the property was seized.

Effective December 1, 2017 (Promulgation Order 2017-010)

REPORTER'S NOTE

Rule 41 governing search and seizure, has been applied by statute in the Virgin Islands, 5 V.I.C. § 3901, and is implemented in this Rule without substantive change. It establishes the procedures for issuing search warrants, and specifies who may request a warrant, what kind of showing needs to be made, the use of telephonic warrants, the return of warrants, and how a motion for return of seized property is to be made. Subparts (a) and (c) include standard provisions regarding issuance of a warrant and the categories of materials subject to seizure.

Subpart (d) states the probable cause standard, and the fact that such a finding may be based upon hearsay evidence in whole or in part. Probable cause is the level of proof that law enforcement must present to demonstrate that there is a fair probability that contraband or evidence of a crime will be found in a particular place, or that a person to be arrested has committed a crime. Procedures for requesting a warrant and presenting the required information to the judicial officer are specified. Where testimony is taken in support of a warrant it must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit.

Subpart (e) addresses the contents of the warrant, and the maximum 14 day period for execution. While the description in a warrant may neither be overbroad nor vague, a warrant may authorize the seizure of an entire class of items, such as certain types of business records, drug-related paraphernalia, or evidence of smuggling. It may also have a catch-hall phrase to authorize seizure of items related to the crime that were not yet known, or could not be described in more detail. Specific language in Rule 41 addresses execution of the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time. Additional provisions deal with electronically stored information, interception of wire or oral communications, and other specific situations, including detailed requirements and procedures governing warrants for "tracking devices." Where a "telephonic" (or other electronic) connection is used to present the probable cause information to a judicial officer, the Rule provides additional procedures for preparation of a proposed warrant form which, depending on the editing required, may be transmitted to the judge, prepared in handwritten form, or as a "duplicate" warrant. Upon determining to issue the warrant, the judge must immediately sign the original warrant, enter on its face the exact date and time it is issued, and transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original warrant.

Subpart (f) addresses issues in the execution and return of a warrant. A "breaking doors" provision tied to 5 V.I.C. § 3904 is include in subsection (A-1). Standard provisions for the creation of an inventory of seized items, and giving of receipts, are included. Several paragraphs of limitations are included for tracking device warrants.

Subsection (g) relates to motions by a person aggrieved by an unlawful search and seizure of property or by the deprivation of property who seeks the property's return. The motion must be filed in the division where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. The Virgin Islands version of this provision specifies, in accord with national law, that while a criminal investigation or proceeding remains pending, the burden rests upon the movant to show entitlement to return of the property, but at the conclusion of a criminal proceeding the evidentiary burden on a Rule 41(g) motion shifts to the government to demonstrate that it has a continuing legitimate reason to retain the seized property. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

Rule 42. Criminal Contempt

(a) Disposition After Notice. Any person who commits criminal contempt may be punished for that contempt after prosecution on notice.

(1) *Notice.* The court must give the person notice in open court, in an order to show cause, or in an arrest order. The notice must:

(A) state the time and place of the trial;

(B) allow the defendant a reasonable time to prepare a defense; and

(C) state the essential facts constituting the charged criminal contempt and describe it as such.

(1a) *Bail.* Upon giving to the clerk of the court in which the contempt is being prosecuted, a good and sufficient bond or cash deposit in lieu thereof for appearance at the hearing, approved by a judicial officer of the court, the person charged with contempt shall be admitted to bail pending the hearing.

(1b) *Pleas.* Where an order to show cause is made, the person charged with contempt may, not later than one day before the return day of the order, or within such time as the court may allow, serve an answer or an answering affidavit, or the person may plead orally at the hearing.

(2) *Appointing a Prosecutor.* The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt.

(3) *Trial and Disposition.* A person being prosecuted for criminal contempt is entitled to a jury trial in any case in which the law so provides. If the criminal contempt involves disrespect toward or criticism of a judicial officer, except as provided in part (b) of this Rule, that judicial officer is disqualified from presiding at the contempt trial or hearing unless the defendant consents. Upon a finding or verdict of guilty, the court must impose the punishment.

(b) Summary Disposition.

(1) *Generally.* Notwithstanding any other provision of these rules, a judicial officer may summarily punish a person who commits criminal contempt in the presence of the judge who saw or heard the contemptuous conduct and so certifies. The contempt order must recite the facts, be signed by the judge, and entered of record after the defendant is given an opportunity to be heard. The order shall be filed with the clerk.

(2) *Breach of the Peace in the Presence of the Court*. As provided in 5 V.I.C. § 4007, a person who, in the presence of any court, assaults or threatens to assault another, or to commit an offense against property of another, or who contends with another with angry words to the disturbance of the peace may be ordered by the court without warrant or other proof to give security to keep the peace in an amount not exceeding two thousand dollars.

Effective December 1, 2017 (Promulgation Order 2017-010)

REPORTER'S NOTE

While civil contempt is designed to coerce future compliance with court orders, criminal contempt punishes a person for past behavior. The criminal contempt rule, Rule 42, which incorporates portions of former Superior Court Rule 139, sets forth the procedures for 2 types of criminal contempt: summary (or direct) contempt and indirect contempt. It includes in subpart (a) the requirement of notice of the schedule for a trial, a reasonable period to prepare ad defense, and a specification of the essential facts charged.

Subparts (1a) and (1b) make provision for bail in such proceedings, and response by an answer, answering affidavit or oral plea. Additional provisions call for prosecution of contempt charges by an attorney for the government, unless the interest of justice requires the appointment of another attorney.

Subpart (b) authorizes "summary disposition" where a person commits criminal contempt in the presence of the judicial officer who saw or heard the contemptuous conduct and so certifies. Essentially, the judicial officer puts on the record the nature of the contumacious conduct, certifies that it occurred in the court's presence, and orders punishment. The contempt order must recite the facts, be signed by the judicial officer, and entered of record after the defendant is given an opportunity to be heard. The Rule also implements 5 V.I.C. § 4007, providing that a person who, in the presence of any court, assaults or threatens to assault another, or to commit an offense against property of another, or who contends with another with angry words to the disturbance of the peace may be ordered by the court without warrant or other proof to give security to keep the peace in an amount not exceeding two thousand dollars.

Rule 43. Defendant's Presence

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

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

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

(3) sentencing.

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

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

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

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

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

(c) Waiving Continued Presence.

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

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

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

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

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

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REPORTER'S NOTE

Rule 43 implements the constitutional guarantee for a defendant to be present at all critical stages of court proceedings, that allows for exceptions when the defendant has either voluntarily become absent from the proceedings or, by disruptive conduct must be removed by the judicial officer. It confirms that unless this Rule 5 or Rule 10 provides otherwise, the defendant must be present at: the initial appearance, the initial arraignment, and the plea; at every trial stage, including jury impanelment and the return of the verdict; and at sentencing. Thus, the scope of Rule 43 is even more far-reaching them the right of presence guaranteed by the Constitution.

Subpart (b) provides exceptions where a defendant need not be present, such as cases involving a defendant organization represented by counsel who is present, misdemeanor offenses, conferences or hearings on legal questions, and proceedings involving correction or reduction of sentence under Rule 35.

Subpart (c) states that a defendant who was initially present at trial waives the right to be present if the defendant is voluntarily absent after the trial has begun or at sentencing, and when the court warns that the defendant will be removed from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

Rule 44. Right to Appointed Counsel; Joint Representation

(a) Right to Appointed Counsel. As provided in 5 V.I.C. § 3503, a defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right.

(b) Reserved.

(c) Inquiry Into Joint Representation.

(1) *Joint Representation.* Joint representation occurs when:

(A) two or more defendants have been charged jointly under Rule 8(b) or have been joined for trial under Rule 13, and

(B) the defendants are represented by the same counsel, or counsel who are associated in law practice.

(2) *Court's Responsibilities in Cases of Joint Representation.* The court must promptly inquire about the propriety of joint representation and must personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel.

Effective December 1, 2017 (Promulgation Order 2017-010)

REPORTER'S NOTE

As provided in 5 V.I.C. § 3503, under Rule 44(a) a defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right. Subpart (c) of this Rule provides that the court must inquire about the propriety of "joint representation" (which occurs when two or more defendants have been charged jointly under Rule 8(b) or have been joined for trial under Rule 13, and the defendants are represented by the same counsel, or counsel who are associated in law practice). Unless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel. If the defendants request joint representation, the court must personally advise each defendant of the right to separate counsel. Unless the court is confident that there will be no conflicts of interest created by joint representation, the court may appoint separate counsel for each defendant.

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or any court order:

(1) *Day of the Event Excluded*. Exclude the day of the act, event, or default that begins the period.

(2) *Exclusion from Brief Periods*. when the period is 15 days or more, count every day, including intermediate Saturdays, Sundays, and legal holidays; when the period is 14 days or less, do not count intermediate Saturdays, Sundays, and legal holidays; and

(3) *Last Day.* Include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(4) "*Legal Holiday*" Defined. "Legal holiday" means:

(A) the day set aside by statute for observing January 1 (New Year's Day) January 6 (Three King's Day); Third Monday in January (Martin Luther King, Jr.'s Birthday); Third Monday in February (Presidents Day); March 31 (Transfer Day); Holy Thursday; Good Friday; Easter Monday; Last Monday in May (Memorial Day); July 3 (V.I. Emancipation Day) – Danish West Indies Emancipation Day; July 4 (Independence Day); First Monday in September (Labor Day); Second Monday in October (Columbus Day and Puerto Rico Friendship Day); November 1 (D. Hamilton Jackson Day); Election Day as provided in 18 V.I.C. § 3; November 11 (Veterans Day); Fourth Thursday in November (Thanksgiving Day); December 25 (Christmas Day); December 26 (Christmas Second Day); and

(B) any day declared a holiday by the President or Congress, or by the Governor; and

(C) any day specified in 1 V.I.C. § 171, or otherwise officially designated as a holiday in the U.S. Virgin Islands.

(b) Extending Time.

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

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

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

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

(c) Additional Time After Certain Kinds of Service. Whenever a party must or may act within a specified period after service and service is made in the manner provided under Virgin Islands Rule of Civil Procedure 5(b)(2)(B), (C), or (D), 3 days are added after the period would otherwise expire under Rule 45(a).

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REPORTER'S NOTE

Rule 45 states normal provisions for computing any period of time specified in these rules or any court order. It follows civil practice in most respects, providing that the day of a triggering event is not counted, and that when the period is 15 days or more, every day is counted, including intermediate Saturdays, Sundays, and legal holidays; when the period is 14 days or less, intermediate Saturdays, Sundays, and legal holidays are not counted. Standard designations of legal holidays are included, which also match the V.I. Rules of Civil Procedure. Subpart (b) on extensions of time states that when an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion, although after expiration of the stated period it must be shown that the party failed to act because of excusable neglect.

Rule 46. Release from Custody

(a) Before Trial. The provisions of Rule 5-1 and the statutory provisions incorporated by reference therein govern pretrial release or detention. If either the attorney for the defendant or the prosecution seeks any modification of the conditions of a defendant's release, the party making the motion must first confer with the opposing party or give reasons for not so conferring. The motion must indicate whether the opposing party has any objection.

(b) During Trial. A person released before trial continues on release during trial under the same terms and conditions. But the court may order different terms and conditions or terminate the release if necessary to ensure that the person will be present during trial or that the person's conduct will not obstruct the orderly and expeditious progress of the trial.

(c) Pending Sentence or Appeal. Reserved.

(d) Pending Hearing on a Violation of Probation or Supervised Release. Rule 32.1(a)(6) governs release pending a hearing on a violation of probation or supervised release.

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REPORTER'S NOTE

Rule 46 as implemented in the Virgin Islands, cross-references the bail provisions of Rule 5-1 for pretrial release, and recognizes that a person released before trial continues on release during trial under the same terms and conditions unless the court directs a change in such conditions if necessary to ensure that the person will be present during trial or that the person's conduct will not obstruct the orderly and expeditious progress of the trial. The federal provision for bail pending appeal is marked "Reserved" in light of the decision in Todmann v. People, 57 V.I. 540 (V.I. 2012).

Rule 47. Motions and Supporting Affidavits

(a) In General. A party applying to the court for an order must do so by motion. If either the attorney for the defendant or the prosecution seeks any modification of the conditions of a defendant's release, the party making the motion must first confer with the opposing party or

give reasons for not so conferring. The motion must indicate whether the opposing party has any objection.

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

(c) Time for Filing. A party must serve a written motion--other than one that the court may hear ex parte--and any hearing notice at least 7 days before the hearing date, unless a rule or court order sets a different period. For good cause, the court may set a different period upon ex parte application.

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

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REPORTER'S NOTE

Rule 47 is designed to set uniform and efficient standards for the filing of motions, including pre-motion negotiation between counsel to avoid unnecessary motion practice. It states general form and content provisions for motions and opposition papers, reflecting traditional doctrine that a motion should state the factual and legal grounds supporting it, the relief sought, and evidence as well as law in support of the motion. Absent a court order setting a different timetable, subpart (c) states that a party must serve a written motion--other than one that the court may hear ex parte--and any hearing notice at least 7 days before the hearing date, unless a rule or court order sets a different period. For good cause, the court may set a different period upon ex parte application. Subpart (d) specifies that the moving party must serve any supporting affidavit with the motion. A responding party must serve any opposing affidavit at least one day before the hearing, unless the court permits later service.

Rule 48. Dismissal

(a) By the Government. The government may file a dismissal or nolle prosequi of an information. Such a dismissal is without prejudice unless otherwise stated. The government may not dismiss the prosecution during trial without the defendant's consent.

(b) By the Court. The court may dismiss an information if unnecessary delay occurs in:

(1) filing an information against a defendant; or

(2) bringing a defendant to trial.

Effective December 1, 2017 (Promulgation Order 2017-010)

REPORTER'S NOTE

Rule 48 states that the he government may file a dismissal or nolle prosequi of an information – which is deemed without prejudice unless otherwise stated. However, the government may not dismiss the prosecution during trial without the defendant's consent. Under subpart (b) of the Rule, the court may dismiss an information if unnecessary delay occurs in filing it against a defendant or in bringing a defendant to trial.

Rule 49. Serving and Filing Papers

(a) When Required. A party must serve on every other party any written motion (other than one to be heard ex parte), opposition, written notice, designation of the record on appeal, or other paper submitted to the court. Any motion requesting affirmative relief should by accompanied by a proposed order for execution by the court.

(b) How Made. Service must be made in the manner provided for in a civil action. When these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party, unless the court orders otherwise.

(c) Notice of a Court Order.

(1) In all cases where a party or the party's attorney is not present, immediately upon the entry of an order on a post-arraignment motion, the clerk must serve on each party a notice of the entry of the order and must make a note in the docket of the service. Service must be made in the manner provided for in a civil action. A party's lack of notice of the entry of the order does not affect the time to appeal, or relieve—or authorize the court to relieve—the party's failure to appeal within the time allowed, except as permitted by the Rules of the Supreme Court of the Virgin Islands.

(2) Nothing in this rule shall preclude a judge or magistrate judge or an authorized staff member from performing the function of the clerk prescribed in Rule 49(c)(1).

(d) Filing. A party must file with the court a copy of any paper the party is required to serve. A paper must be filed in a manner provided for in a civil action.

(e) Electronic Service and Filing. Reserved.

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REPORTER'S NOTE

Under Rule 49 a party must serve on every other party any written motion (other than one to be heard ex parte), opposition, written notice, designation of the record on appeal, or similar paper. Service is made in the manner provided for in a civil action. Under subpart (c) if a party or the party's attorney is not present, immediately upon the entry of an order on a post-arraignment motion, the clerk must serve on each party a notice of the entry of the order and must make a note in the docket of the service. However, a party's lack of notice of the entry of the order does not affect the time to appeal, or relieve—or authorize the court to relieve—the

party's failure to appeal within the time allowed, except as permitted by the Rules of the Supreme Court of the Virgin Islands.

Rule 49.1. Privacy protection for filings made with the Court

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer identification number or driver's license or non-driver's license identification card number, the name of an individual known to be a minor child, a person's birth date, a debit card, credit card or other a financial- account number, or the home address of an individual, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials;

(4) the last four digits of the financial-account number; and

(5) the city and state of the home address.

(b) Exemptions from the Redaction Requirement . The redaction requirement does not apply to the following:

(1) a financial-account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 49.1(d);

(6) a pro se filing in a habeas corpus proceeding;

(7) a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case;

(8) an arrest or search warrant; and

(9) a charging document and an affidavit filed in support of any charging document.

(c) [Reserved]

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) Protective Orders. For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal. A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A person waives the protection of Rule 49.1(a) as to the person's own information by filing it without redaction and not under seal.

Effective December 1, 2017 (Promulgation Order 2017-010)

REPORTER'S NOTE

Rule 49.1 tracks the federal privacy/redaction rule applicable across the country. Unless the court orders otherwise, any filing (electronic or paper) that contains an individual's social-security number, taxpayer identification number or driver's license or non-driver's license identification card number, the name of an individual known to be a minor child, a person's birth date, a debit card, credit card or other a financial- account number, or the home address of an individual, must include only partial identifying information as specified in the body of the Rule. Subpart (b) allows unredacted filings for a financial-account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding; the record of an administrative or agency proceeding; the official record of a state-court proceeding; the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed; a filing covered by Rule 49.1(d); a pro se filing in a habeas corpus proceeding; a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case; an arrest or search warrant; and a charging document and an affidavit filed in support of any charging document. Under subpart (d) the court may order that a filing be made under seal without redaction. Subpart (e) authorizes protective orders to require redaction of additional information, or limit or prohibit a nonparty's remote electronic access to a document filed with the court. Additional provisions in subparts (f) and (g) provide an option for additional unredacted filings under seal, and for filing of a "reference list" to accompany a redacted filing. As provided in subpart (h), a person waives the protection of Rule 49.1(a) as to the person's own information by filing it without redaction and not under seal.

Rule 50. [Reserved].

Rule 51. Preserving Claimed Error

(a) Exceptions Unnecessary. Exceptions to rulings or orders of the court are unnecessary.

(b) Preserving a Claim of Error. A party may preserve a claim of error by informing the court— when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If

a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party.

Effective December 1, 2017 (Promulgation Order 2017-010)

REPORTER'S NOTE

Rule 51 states longstanding principles for preserving error – that "exceptions" to rulings are not required, but a party must inform the court when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. Rule 51 applies to all stages of a case, from pre-trial motions to trial proceedings and then sentencing, as well as post-trial motions.

Rule 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Effective December 1, 2017 (Promulgation Order 2017-010)

REPORTER'S NOTE

Rule 52 states standard American "harmless error" and "plain error" principles that are in accord with Virgin Islands jurisprudence. Ordinarily for an error to be remedied, the defendant must make a timely objection. However if an error is "plain" the court may raise the issue sua sponte and address the error at any time during trial. Only errors that affect a defendant's substantial rights will merit a new trial or reversal of a conviction on appeal.

Rule 53. Photography, Broadcasting, Recording, and Other Disclosures

Except as otherwise provided by a statute, these rules, or established judicial policies, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.

Effective December 1, 2017 (Promulgation Order 2017-010)

REPORTER'S NOTE

Rule 53 states housekeeping rules for the operation of the courthouse and by cross-reference implements judicial policies that have been or will become adopted for the courts.

Rule 54. [Reserved].

Rule 55. Records of the Clerk

The clerk must keep records of criminal proceedings in the form prescribed by administrative orders of the Presiding Judge or Chief Justice. The entry of an order or judgment must show the date the entry is made.

Effective December 1, 2017 (Promulgation Order 2017-010)

REPORTER'S NOTE

The Rules of Criminal Procedure do not prescribe in detail the books and records to be kept by the clerk. This Rule does provide that records of a judgment or order must show the date of entry. Otherwise, the Rule does not specify particular items to be maintained in the clerks' office records, which are left to the discretion of the Presiding Judge or the Chief Justice.

Rule 56. When Court Is Open

(a) In General. The Superior Court is considered always open for any filing, and for issuing and returning process, making a motion, or entering an order.

(b) Office Hours. The clerk's office—with the clerk or a deputy in attendance—must be open during business hours on all days except Saturdays, Sundays, and legal holidays.

(c) Special Hours. The Presiding Judge or Chief Justice may order that the clerk's office will be open for specified hours on Saturdays or legal holidays.

Effective December 1, 2017 (Promulgation Order 2017-010)

REPORTER'S NOTE

This rule states general principles for when the court is deemed open.

Rule 57. Transfers Involving Related Complex Civil Cases

The Presiding Judge may assign a criminal proceeding to the judge assigned to the Complex Litigation Division if the criminal proceeding arises out of the same transaction or occurrence that gave rise to one or more civil cases pending in the Complex Litigation Division of the

Superior Court and the efficient use of judicial resources will be fostered by coordination with the related civil matters. Provisions shall be included in any such order of assignment to protect any individual defendant's Fifth Amendment and other constitutional rights.

Effective October 1, 2018 (Promulgation Order 2018-002)

REPORTER's Note: The Advisory Committee recognizes the benefits that are intended to be achieved by the proposal to allow coordination of civil and criminal proceedings relating to the same events or conduct. However the Committee was concerned that clarification was needed to assure that any individual defendant's Fifth Amendment and other constitutional rights will be protected in the proceedings that follow. Hence the Advisory Committee added the final sentence to the Rule text as recommended.

Rules 58 – 60. [Reserved].