

## **Interim Report of the Activities of the Criminal Rules Committee 2020**

Following the January 2020 meeting, the committee worked strenuously via email to finish its work on a proposed public access to documents rule. The final product was as follows:

### **Rule 55.1. Access to Court Records in Criminal Cases**

- (a) Court records in criminal cases are presumed to be accessible to the public. Unless a court record or any part of a court record is otherwise inaccessible to the public pursuant to statute, rule, regulation, chief justice directive, or court order, the court may deny the public access to a court record or to any part of a court record only in compliance with this rule.
- (1) **Motion Requesting to Limit Public Access.** A party may file a motion requesting that the court limit public access to a court record or to any part of a court record by making it inaccessible to the public or by allowing only a redacted copy of it to be accessible to the public. A party seeking to limit public access to a court record or to any part of a court record must file a motion pursuant to this rule and serve it on any opposing party. An opposing party must file any response within 7 days after service of the motion unless otherwise directed by the court. The body of the motion, the body of any response(s), and the body of any accompanying materials shall be inaccessible to the public until otherwise ordered by the court. The court may sua sponte make a court record inaccessible to the public or order that only a redacted copy of it be accessible to the public. If the court does so, it must notify the parties and comply with paragraphs (a)(5), (a)(6), (a)(7), (a)(8), and (a)(9) of this rule. In its discretion, the court may hold a hearing before sua sponte ordering a court record or any part of a court record inaccessible to the public.
- (2) **Contents of the Motion.** A motion to limit public access shall identify the court record or any part of the court record that the moving party wishes to make inaccessible, state the reasons for the request, and specify how long the information identified should remain inaccessible to the public.
- (3) **Limited Access to Records Already Filed.** A party may file a motion requesting that the court limit public access to a court record already filed or to any part of that court record by making it inaccessible to the public or by allowing only a redacted copy of it to be accessible to the public. Such a motion must be served on any opposing party. Upon receiving the motion, the court shall immediately make the subject court record inaccessible to the public until otherwise ordered by the court. The body of the motion, the body of any response(s), and the body of any accompanying materials shall also be inaccessible to the public until otherwise ordered by the court. After being fully apprised of the circumstances, the court shall resolve the motion in accordance with the provisions of this rule.

- (4) **Hearing.** The court may conduct a hearing on a motion to limit public access. Notice of the hearing shall be provided to the parties. The hearing shall be closed to the public, unless the court in its discretion determines otherwise.
- (5) **When Request Granted.** The court shall not make a court record or any part of a court record inaccessible to the public pursuant to this rule without a written order. When a request to limit public access is granted, the court's order shall:
- (A) specifically identify one or more substantial interests served by making the court record inaccessible to the public or by allowing only a redacted copy of it to be accessible to the public;
  - (B) explain how taking such action serves the interest(s) identified;
  - (C) explain why there would be a substantial probability of harm to the interest(s) identified;
  - (D) find that no less restrictive means than making the record inaccessible to the public or allowing only a redacted copy of it to be accessible to the public exists to achieve or protect the identified interest(s); and
  - (E) conclude that the identified interest(s) outweigh(s) the right of public access to the court record or to an unredacted copy of it.
- (6) **Duration.** Any order limiting public access to a court record or to any part of a court record shall indicate how long the order will remain in effect.
- (7) **Access to the Court's Order.** The court's order limiting access to a court record or to any part of a court record pursuant to this rule shall be accessible to the public, except that any information deemed inaccessible under this rule shall be redacted from the order.
- (8) **Review.** The court shall review any order issued pursuant to this rule at the time of the expiration of the order or earlier upon motion of one of the parties. The court may postpone the expiration date of the order issued pursuant to this rule if it determines that the findings previously made under paragraph (a)(5) of this rule continue to apply or if it makes new findings under paragraph (a)(5) of this rule justifying postponement of the expiration date.
- (9) **Access to the Original Court Record.** If a court limits access to a court record or to any part of a court record pursuant to this rule, only the court, the court's staff, authorized Judicial Department staff, the parties to the case, and the attorneys of record and their agents shall have access to the original court record.
- (10) **Effective Date.** This rule shall be effective on \_\_\_\_\_.

Near the end of the process of considering this rule, an adjunct to this rule was proposed, and discussed as Crim. P. 55.2. Ultimately, Crim. P. 55.2 was fashioned to read:

## **Rule 55.2 Inaccessible Court Records**

**(a) Arrest warrants, search warrants, and supporting affidavits.** Except as provided in Rule 2 of the Public Access to Information and Records Rules, arrest warrants, search warrants, supporting affidavits, and accompanying materials are inaccessible to any party, other than the submitting party, and to the public until the warrant has been executed.

**(b) Materials submitted for in camera review.** Motions for in camera review are presumed to be accessible to the parties and the public, but the underlying materials submitted for such review are inaccessible to the parties and the public. At the conclusion of the in camera review, the presumption of public accessibility shall attach to any materials the court has determined must be disclosed to the parties except to the extent that those materials are otherwise inaccessible to the public pursuant to statute, rule, regulation, chief justice directive, or court order.

The committee was divided with respect to the necessity or advisability of Crim. P. 55.2. Ultimately, the committee decided, 11-2, to send Crim. P. 55.1 alone to the supreme court and to more fully consider Crim. P. 55.2 at an upcoming meeting.

After Judge Dailey transmitted Crim. P. 55.1 to the supreme court, the court scheduled a public hearing on it for April 14, 2020. On February 7, 2020, Judge Dailey notified committee members, via email, that

“[T]he supreme court has been informed that the lack of unanimous support for rule 55.1 was the result of it not being “teamed up” with a proposed rule 55.2. And it has been informally suggested to me that the 55.2 issues (whether to have it, and if so, what its content would be) might better be presented at the public hearing rather than the April Committee meeting.

To that end, (1) I plan to take 55.2 off the agenda for the April meeting, and (2) anyone who wants to comment on the various 55.2 proposals might want to send in written comments by the deadline mentioned below, or, perhaps better yet, come to the hearing to address the subject in person. Or you can, of course, do both.”

The public meeting scheduled for April 2020 on proposed Crim. P. 55.1 was postponed because of the pandemic and is now scheduled to be held via WebEx at 3:30 p.m. on October 13, 2020.

The April 2020 and July 2020 meetings were cancelled because of the COVID-19 pandemic. Nonetheless, the committee did considerable work on various proposals to amend the rules of criminal procedure. In each instance during the pandemic, a proposal was sent out to the committee via email and discussed and voted on by email. After considering various proposals, the committee recommended the following amendments to the criminal rules:

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By a vote of 12-0, to amend rule 43 as follows on March 19, 2020. It was adopted by the court that day:

### Rule 43. Presence of the Defendant

(a) – (e) [NO CHANGE]

#### (f) Public Health Crisis Exception

(1) If the court finds that a public health crisis exists, it may require the defendant to appear by contemporaneous audio communication (such as by phone) at arraignment and any proceeding listed in subsections (e)(2)(I), (II), (III), (V), (VI), (VII), and (VIII) of this rule. During any contemporaneous audio communication proceeding under this subsection (f)(1), defense counsel must be in the physical presence of the defendant unless the court permits defense counsel's participation from a different location, in which case a separate, confidential communication line (such as a phone line) must be available to allow counsel to confer with the defendant. A contemporaneous audio communication proceeding under this subsection (f)(1) shall be conducted in a courtroom open to the public and in a manner that allows members of the public to hear, and, where appropriate, participate in the proceeding.

(2) If the court finds that a public health crisis exists, it may, in its discretion and with the defendant's oral or written consent, allow the defendant to appear by an interactive audiovisual device for a preliminary hearing, entry of a plea, sentencing associated with that plea, a deferred judgment violation hearing, a probation violation hearing, sentencing following the revocation of a deferred judgment or probation, or a transfer hearing following termination of placement in community corrections. This subsection (f)(2) shall only apply in cases where none of the offenses charged is included within those offenses enumerated in C.R.S. 24-4.1-302(1). Use of an interactive audiovisual device under this subsection (f)(2) must comply with subsections (e)(1) and (e)(3)(I) and (III) of this rule.

Comment [NO CHANGE]

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By a vote of 10-0, to amend rule 43 further on March 23, 2020, as follows below. It was adopted by the court that day:

### Rule 43. Presence of the Defendant

(a) – (e) [NO CHANGE]

#### (f) Public Health Crisis Exception

(1) If the court finds that a public health crisis exists, it may require the defendant and counsel to appear by contemporaneous audio communication (such as by phone) at arraignment and any proceeding listed in subsections (e)(2)(I), (II), (III), (V), (VI), (VII), and (VIII) of this rule. During any contemporaneous audio communication proceeding under this subsection (f)(1), the court must allow counsel the opportunity to confer with the defendant confidentially when necessary~~defense counsel must be in the physical presence of the defendant unless the court~~

~~permits defense counsel's participation from a different location, in which case a separate, confidential communication line (such as a phone line) must be available to allow counsel to confer with the defendant.~~ A contemporaneous audio communication proceeding under this subsection (f)(1) shall be conducted in a courtroom open to the public and or in a manner that allows members of the public to hear, and, where appropriate, participate in the proceeding.

(2) If the court finds that a public health crisis exists, it may, in its discretion and with the defendant's oral or written consent, allow the defendant and counsel to appear by an interactive audiovisual device for a preliminary hearing, entry of a plea, sentencing associated with that plea, a deferred judgment violation hearing, a probation violation hearing, sentencing following the revocation of a deferred judgment or probation, or a transfer hearing following termination of placement in community corrections. This subsection (f)(2) shall only apply in cases where none of the offenses charged is included within those offenses enumerated in C.R.S. 24-4.1-302(1). During any interactive audiovisual proceeding under this subsection (f)(2), the court must allow counsel the opportunity to confer with the defendant confidentially when necessary. An interactive audiovisual proceeding under this subsection (f)(2) shall be conducted in a courtroom open to the public or in a manner that allows members of the public to hear or watch and, where appropriate, participate in the proceeding. Use of an interactive audiovisual device under this subsection (f)(2) must comply with subsections ~~(e)(1) and (e)(3)(I) and (III)~~ of this rule.

#### **Comment [NO CHANGE]**

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By a vote of 11-1, to further amend rule 43 as follows on March 27, 2020. The court adopted the proposal on March 30, 2020:

### **Rule 43. Presence of the Defendant**

**(a) – (e) [NO CHANGE]**

#### **(f) Public Health Crisis Exception**

(1) If the court finds that a public health crisis exists, it may require the defendant and counsel to appear by contemporaneous audio communication (such as by phone) at arraignment and any proceeding listed in subsections (e)(2)(I), (II), (III), (V), (VI), (VII), and (VIII) of this rule. During any contemporaneous audio communication proceeding under this subsection (f)(1), the court must allow counsel the opportunity to confer with the defendant confidentially when necessary. A contemporaneous audio communication proceeding under this subsection (f)(1) shall be conducted in a courtroom open to the public or in a manner that allows members of the public (including victims) to hear and, where appropriate, participate in the proceeding.

(2) If the court finds that a public health crisis exists, it may, in its discretion and with the defendant's oral or written consent, allow the defendant and counsel to appear by an interactive audiovisual device for a preliminary hearing, entry of a plea, sentencing associated with that plea, a deferred judgment violation hearing, a probation violation hearing, sentencing following the revocation of a deferred judgment or probation, or a transfer hearing following termination of

placement in community corrections. ~~This subsection (f)(2) shall only apply in cases where none of the offenses charged is included within those offenses enumerated in C.R.S. 24-4.1-302(1).~~ During any interactive audiovisual proceeding under this subsection (f)(2), the court must allow counsel the opportunity to confer with the defendant confidentially when necessary. An interactive audiovisual proceeding under this subsection (f)(2) shall be conducted in a courtroom open to the public or in a manner that allows members of the public [\(including victims\)](#) to hear or watch and, where appropriate, participate in the proceeding. Use of an interactive audiovisual device under this subsection (f)(2) must comply with subsection (e)(1) of this rule.

**Comment [NO CHANGE]**

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By a vote of 9-3, to amend rule 48 as follows on April 6, 2020.

**Rule 48. Dismissal**

(a) – (b)(6)(VI) [NO CHANGE]

(VII) The period of delay not exceeding six months resulting from a continuance granted at the request of the prosecuting attorney, without the consent of the defendant, if:

(A) The continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at the later date. [Within the meaning of this paragraph \(A\) and its corresponding statutory provision, section 18-1-405\(6\)\(g\)\(I\), C.R.S. \(2019\), evidence is unavailable if it is to be presented by any witness whose presence cannot be safely compelled due to a public health crisis;](#) or

(6)(VII)(B) – End [NO CHANGE]

The supreme court subsequently rejected the proposed change to rule 48.

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By a vote of 9-3, to amend rule 24 as follows on April 7, 2020, and it was adopted that day by the court:

**Rule 24. Trial Jurors**

(a) – (c)(3) [NO CHANGE]

[\(4\) At any time before trial, upon motion by a party or on its own motion, the court may declare a mistrial on the ground that a fair jury pool cannot be safely assembled due to a public health crisis.](#)

Committee Comment [NO CHANGE]

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By a vote of 12-0, to amend rule 43 as follows on April 7, 2020. The court adopted it that same day:

### **Rule 43. Presence of the Defendant**

(a) – (f)(1) [NO CHANGE]

(2) If the court finds that a public health crisis exists, it may, in its discretion and with the defendant’s oral or written consent, allow the defendant and counsel to appear by an interactive audiovisual device for any proceeding that does not involve a jury. The defendant’s oral or written consent is not necessary if the proceeding is listed in subsection (f)(1). ~~a preliminary hearing, entry of a plea, sentencing associated with that plea, a deferred judgment violation hearing, a probation violation hearing, sentencing following the revocation of a deferred judgment or probation, or a transfer hearing following termination of placement in community corrections.~~ During any interactive audiovisual proceeding under this subsection (f)(2), the court must allow counsel the opportunity to confer with the defendant confidentially when necessary. An interactive audiovisual proceeding under this subsection (f)(2) shall be conducted in a courtroom open to the public or in a manner that allows members of the public (including victims) to hear or watch and, where appropriate, participate in the proceeding. Use of an interactive audiovisual device under this subsection (f)(2) must comply with subsection (e)(1) of this rule.

Comment [NO CHANGE]

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By a vote of 9-4, to amend rule 35(b) as follows on April 10, 2020:

### **Rule 35. Postconviction Remedies**

(a) [NO CHANGE]

(b) **Reduction of Sentence.** The court may reduce the sentence provided that a motion for reduction of sentence is filed (1) within 126 days (18 weeks) after the sentence is imposed, ~~or~~ (2) within 126 days (18 weeks) after receipt by the court of a remittitur issued upon affirmance of the judgment or sentence or dismissal of the appeal, ~~or~~ (3) within 126 days (18 weeks) after entry of any order or judgment of the appellate court denying review or having the effect of upholding a judgment of conviction or sentence, or (4) at any time pursuant to a limited remand from an appellate court during the pendency of a direct appeal. The court may, after considering the motion and supporting documents, if any, deny the motion without a hearing. The court may reduce a sentence on its own initiative within any of the above periods of time.

(c) [NO CHANGE]

The court adopted the rule on April 16, 2020 with two small amendments—they did not delete the word “or” between numbered sections. The final version adopted by the court is below:

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### **Rule 35. Postconviction Remedies**

(a) [NO CHANGE]

**(b) Reduction of Sentence.** The court may reduce the sentence provided that a motion for reduction of sentence is filed (1) within 126 days (18 weeks) after the sentence is imposed, or (2) within 126 days (18 weeks) after receipt by the court of a remittitur issued upon affirmance of the judgment or sentence or dismissal of the appeal, or (3) within 126 days (18 weeks) after entry of any order or judgment of the appellate court denying review or having the effect of upholding a judgment of conviction or sentence, or (4) at any time pursuant to a limited remand from an appellate court during the pendency of a direct appeal. The court may, after considering the motion and supporting documents, if any, deny the motion without a hearing. The court may reduce a sentence on its own initiative within any of the above periods of time.

(c) [NO CHANGE]

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By a vote of 11-0, to amend rule 16 as follows on May 8, 2020. It was adopted by the court on May 14, 2020:

### **Rule 16. Discovery and Procedure Before Trial**

**Definitions.** [NO CHANGE]

**Part I. – Part IV.** [NO CHANGE]

**Part V. Time Schedules and Discovery Procedures**

(a) [NO CHANGE]

**(b) Time Schedule.**

(1) [NO CHANGE]

(2) Regarding the use and timing of electronic discovery.

(i) The prosecutor may perform his or her obligations by use of a statewide discovery sharing system as established pursuant to 16-9-702, C.R.S.

(ii) When utilizing such system the prosecutor's obligations to make discovery available to the defense as required by Part I are fulfilled when any such material or information is made available for electronic download to defense counsel, defense counsel's designee, or, in the case of a public defender, to the central administrative office of the Office of the State Public Defender.

(3) If either the prosecuting attorney or the defense claims that discoverable material under this rule was not furnished, was incomplete, was illegible or otherwise failed to satisfy this rule, or if claim is made that discretionary disclosures pursuant to Part I (d) should be made, the prosecuting attorney or the defense may file a motion concerning these matters and the motion shall be promptly heard by the court.

(43) For good cause, the court may, on motion of either party or its own motion, alter the time for all matters relating to discovery under this rule.

(c) [NO CHANGE]

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By a vote of 8-5, to amend rule 24 as follows on July 21, 2020. It was adopted by the court on July 22, 2020:

**Rule 24. Trial Jurors**

(a) – (c)(3) [NO CHANGE]

(4) At any time before trial, upon motion by a party or on its own motion, the court may declare a mistrial [in a case](#) on the ground that a fair jury pool cannot be safely assembled [in that particular case](#) due to a public health crisis [or limitations brought about by such crisis. A declaration of a mistrial under this paragraph must be supported by specific findings.](#)

(d)-(g) [NO CHANGE]

Committee Comment [NO CHANGE]

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In each instance, Judge Dailey forwarded the proposals on to the supreme court, accompanied by a “report” consisting of the “email chain” related to the various proposals mentioned above.