RULES OF CRIMINAL PROCEDURE FOR THE COURTS OF THE REPUBLIC OF PALAU

Promulgated by the Palau Supreme Court
August 23, 2004

IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU

IN RE RULES OF CRIMINAL PROCEDURE	:	ORDER

These Rules of Criminal Procedure are promulgated by the Supreme Court of the Republic of Palau pursuant to Article X, Section 14 of the Constitution and 4 PNC § 101. They take effect September l, 2004, and supersede all previously promulgated Rules of Criminal Procedure. These Rules are immediately applicable to all pending cases except to the extent that they adversely affect the substantive rights of any party.

August 23, 2004.

/s/
ARTHUR NGIRAKLSONG
Chief Justice

/s/
LARRY W. MILLER
Associate Justice

/s/
R. BARRIE MICHELSEN
Associate Justice

/s/
KATHLEEN M. SALII
Associate Justice

RULES OF CRIMINAL PROCEDURE
TABLE OF CONTENTS

RULES OF CRIMINAL PROCEDURE

I. SCOPE, PURPOSE, AND CONSTRUCTION

RULE 1. SCOPE.

These rules govern the procedure in all criminal proceedings in the Republic of Palau Supreme Court Trial Division and Court of Common Pleas.

Comment: These rules are promulgated pursuant to Art. X, Section 14, of the Palau Constitution. They follow the format of the Rules of Criminal Procedure for the United States District Courts [hereinafter, "the Federal Rules"]. Where appropriate, these rules adopt language similar to Federal Rules. No changes to this rule have been made from the last version of the RUICS of Criminal Procedure for the Republic of Palau, implemented in 1983 [hereinafter, "1983 Rules"].

RULE 2. PURPOSE AND CONSTRUCTION.

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.

Comment: No changes have been made from the 1983 Rules.

II. PRELIMINARY PROCEEDINGS

RULE 3. THE COMPLAINT.

The complaint is a written statement of the essential facts constituting the offense charged. All minor offenses, as defined by Rule 5.1(a), may be prosecuted by a complaint.

Comment: The amendments are technical. No substantive change is intended.

RULE 4. ARREST WARRANTOR SUMMONS UPON COMPLAINT.

(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to a police officer or some other officer authorized by law to execute it. Upon the request of the attorney or trial assistant for the government, a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

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

(c) Form.

(1) Warrant. The warrant shall be signed by a justice or judge and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before a justice or judge.

(2) Summons. The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a justice or judge at a stated time and place.

(d) Execution or Service; and Return.

(1) By Whom. The warrant shall be executed by a police officer or by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action.

(2) Territorial Limits. The warrant may be executed or the summons may be served at any place within the jurisdiction of the Republic of Palau.

(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not be in possession of the warrant at the time of the arrest, but upon request the officer shall show the warrant to the defendant as soon as possible. If the officer is 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. The summons shall be served upon the defendant by delivering a copy thereof to the defendant personally, or by leaving it at the defendant's dwelling house or usual place of abode or business with some person over the age of eighteen (18) years of age and of suitable discretion, then residing or employed therein. Reasonable attempts shall also be made to assure that the person served understands the meaning of the summons and what the person served is required to do.

(4) Return. The officer executing a warrant shall make return thereof to the justice or judge before whom the defendant is brought pursuant to Rule 5. At the request of the attorney or trial assistant for the government, any unexecuted warrant shall be returned to the justice or judge by whom it was issued and shall be canceled by that justice or judge. On or before the return day, the person to whom a summons was delivered for service shall make return thereof to the justice or judge before whom the summons is returnable. At the request of the attorney or trial assistant for the government made at any time while the complaint is pending, a warrant returned unexecuted and not canceled or a summons returned unserved or a duplicate thereof may be delivered by the justice or judge to the police officer or other authorized person for execution or service.

Comment: The amendments are technical. No substantive change is intended.

RULE 5. INITIAL APPEARANCE.

(a) In General. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person before the nearest available justice or judge by not later than the day following the day of the arrest, unless that day is a Saturday, Sunday, or legal holiday as defined in Rule 45(a) of these Rules, in which case the appearance shall take place on the next day that is not a Saturday, Sunday or legal holiday. If a person arrested without a warrant is brought before a justice or judge, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause.

(b) Notification of Rights. The defendant shall not be called upon to plead. The justice or judge shall inform the defendant of the complaint against him or her and of any affidavit filed therewith, of the right to retain counsel, of the right to request the assignment of counsel if he or she is unable to obtain counsel, and of the general circumstances under which the defendant may secure pretrial release. The justice or judge shall inform the defendant that the defendant is not required to make a statement and that any statement made by the defendant may be used against him or her. The justice or judge shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided by statute or in these rules.

(c) Consolidation With Arraignment. With the consent of the defendant, the arraignment provided for in Rule 10 of these Rules may be consolidated with the initial appearance provided for in this Rule, and both proceedings may be conducted at the time of the initial appearance.

Comment: Rule 5(a) has been amended and Rule 5(c) added to prescribe the time within which a defendant shall be brought before the court for an initial appearance. Rule 5(b) is the former Rule 5(c) from the 1983 Rules. The former Rule 5(h) was vacant and has been deleted. All other amendments are technical. No substantive change is intended.

RULE 5.1. MINOR CRIMINAL CASES; HEARING; CERTIFICATION; APPEAL.

(a) Minor Offenses. A minor offense is a charge against the defendant where the maximum punishment which may be imposed does not exceed a fine of $10,000 or imprisonment for five (5) years, or both.

(b) Hearing. The Chief Justice of the Supreme Court may assign cases involving minor offenses for hearing to a judge of the Court of Common Pleas. Thereafter, all further proceedings in the case shall be before the judge of the Court of Common Pleas. However, the Chief Justice may, at any time, for good cause, withdraw a case in whole or in part from a judge of the Court of Common Pleas and either handle the case personally or assign it, or any part thereof, to another judge or justice.

(c) Certification. The judgment or order of the judge of the Court of Common Pleas shall become final upon certification of the decision by the Chief Justice of the Supreme Court and entry thereof by the clerk of courts. Within five (5) days after the entry of the judgment or order, the Chief Justice of the Supreme Court shall certify the judgment or order, or return it to the Court of Common Pleas with instructions.

(d) Appeal. Unless a notice of appeal is filed, the certified order or judgment of the Court of Common Pleas shall become final. All appeals from certified judgments or orders of the Court of Common Pleas shall be to the Appellate Division of the Supreme Court, pursuant to the Rules of Appellate Procedure.

Comment: The amendment to Rule 5.1(a) is intended to track the change to the jurisdiction of the Court of Common Pleas effected by RPPL No. 6-43, which will be incorporated into 4 PNC § 207. All other amendments are technical. No substantive change is intended.

III. THE INFORMATION

RULE 6. VACANT.

RULE 7. THE INFORMATION

(a) Vacant.

(b) Vacant.

(c) Nature and Contents.

(1) In General. The information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney or trial assistant for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The information shall state for each count the citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

(2) Harmless Error. Error in the citation or its omission shall not be ground for dismissal of the information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.

(d) Surplusage. The court on motion of the defendant may strike surplusage from the information.

(e) Amendment. The court may permit an information to be amended at any time before finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

(f) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten (10) days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

Comment: Rule 7(a) has been rendered vacant as this provision of the 1983 Rules is inconsistent with 18 PNC § 101(d). The other amendments are technical. No substantive change is intended.

RULE 8. JOINDER OF OFFENSES AND OF DEFENDANTS.

(a) Joinder of Offenses. Two or more offenses may be charged in the same information in a separate count for each offense 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. Two or more defendants may be charged in the same information 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. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Comment: The amendment to Rule 8(b) is technical. No substantive change is intended.

RULE 9. WARRANT OR SUMMONS UPON INFORMATION.

(a) Issuance. Upon the request of the attorney or trial assistant for the government the court shall issue a warrant for each defendant named in an information supported by a showing of probable cause under oath as is required by Rule 4(a). Upon the request of the attorney or trial assistant for the government a summons instead of a warrant shall issue. If no request is made, the court may issue either a warrant or a summons in its discretion. More than one warrant or summons may issue for the same defendant. The clerk of courts shall deliver the warrant or summons to the police officer or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) Form.

(1) Warrant. The form of the warrant shall be as provided in Rule 4(c)(1). It shall be signed by a justice or judge, it shall describe the offense charged in the information, and it shall command that the defendant be arrested and brought before the court. The amount of bail may be fixed by the court and endorsed on the warrant.

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

(c) Execution or Service; and Return.

(1) Execution or Service. The warrant shall be executed or the summons served as provided in Rule 4(d)(1), (2), and (3). A summons to a corporation shall be served by delivering a copy to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the Republic of Palau or its principal place of business. The officer executing the warrant shall bring the arrested person promptly before the court.

(2) Return. The officer executing a warrant shall make return thereof to the court. At the request of the attorney or trial assistant for the government any unexecuted warrant shall be returned and canceled. On or before the return day the person to whom a summons was delivered for service shall make return thereof.

At the request of the attorney or trial assistant for the government made at any time while the information is pending, a warrant returned unexecuted and not canceled or a summons returned unserved or a duplicate thereof may be delivered by the clerk of courts to the police officer or other authorized person for execution or service.

Comment: The former Rule 9(d) was vacant and has been deleted. The other amendments are technical. No substantive change is intended.

IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

RULE 10. ARRAIGNMENT.

Arraignment shall be conducted in open court and shall consist of reading the complaint or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the complaint or information before being called upon to plead.

Comment: The amendments are technical. No substantive change is intended.

RULE 11. PLEAS.

(a) Alternatives.

(1) In General. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. Absent compliance with the remainder of this rule, the defendant shall be deemed to have pleaded not guilty.

(2) Conditional Pleas. With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by counsel, that the defendant has the right to be represented by counsel at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made and that the defendant has the right to a trial and at that trial has the right to the assistance of counsel, the right to compel the attendance of witnesses on his or her behalf, the right to confront and cross-examine witnesses against him or her, the right to testify and present evidence, and the right against compelled self-incrimination; and

(4) that if the defendant pleads guilty or nolo contendere there will not be a further trial of any kind, so

that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) that if the defendant pleads guilty or nolo contendere, the court may ask the defendant questions about the offense to which the defendant has pleaded, and if the defendant answers these questions under oath, on record, and in the presence of counsel, the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

(d) Insuring that the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney or trial assistant for the government and the defendant or the defendant's attorney or trial assistant.

(e) Plea Agreement Procedure.

(1) In General. The attorney or trial assistant for the government and the attorney or trial assistant for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney or trial assistant for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the pre-sentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in the guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided

in this rule, 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:

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

(B) a plea of nolo contendere;

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

(D) any statement made in the course of plea discussions with an attorney or trial assistant for the government which does not result in a plea of guilty or which results in a plea of guilty later withdrawn. However, such a statement is admissible

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

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

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of the plea.

(h) Harmless Error. Any variance from the procedure required by this rule which does not affect substantial rights shall be disregarded.

Comment: Rule 11(a)(1) has been amended to prescribe the consequences of non-compliance with the material terms of this Rule. Rule 11(c)(3) has been amended to require the justice or judge to advise a defendant of his constitutional and statutory right to compel the attendance of witnesses on the defendant's behalf and the right to testify and present evidence. Rule 11(e)(6)(D) has been amended to harmonize it with the Federal Rules and to correct an omission in the 1983 Rules. The remainder of the amendments are technical. No substantive change is intended.

RULE 12. PLEADINGS AND MOTIONS; DEFENSES AND OBJECTIONS.

(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the information and the pleas of not guilty, guilty, and polo contendere. All defenses and objections raised before trial shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. A pretrial motion shall be in writing unless the court permits it to be made orally. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or

(3) Motions to suppress evidence; or

(4) Requests for discovery under Rule 16; or

(5) Requests for a severance of charges or defendants under Rule 14.

(c) Motion Date and Practice. The court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing. Absent an order of the court, or as otherwise provided by law, motions shall be filed no less than 30 (thirty) days before the date on which trial is scheduled to commence. The moving party shall set forth in the motion the basis for the motion and the specific relief requested.

(1) Every motion raising a substantial issue of law shall be supported by a brief which shall be filed simultaneously with the motion. The brief shall contain a concise statement of the reasons for the motion and a citation of the authorities relied upon. Briefs are not required when the motion raises no substantial issue of law and relief is within the court's discretion. Examples include, but are not limited to, motions to which all parties are shown to agree and motions for an extension of time.

(2) For good cause shown a motion may be made on ex parte application.

(3) If a motion requires consideration of matters not established by the information, the moving party, at the time of filing the motion, shall also file such evidentiary materials, including affidavits, as are being relied upon. Documents must be identified and authenticated by affidavit. Each affidavit must be made on personal knowledge, must set forth such facts as would be admissible in evidence, must show affirmatively that the affiant is competent to testify to the matters stated therein, and must identify the motion in connection with which the affidavit is filed. If the motion requires consideration of discovery materials the motion shall refer to the specific pages and lines being relied upon.

(4) Absent order of the court, any opposing brief or opposition must be filed no later than fourteen (14) days after service of the motion. Failure to timely file an opposing brief or opposition authorizes the court, in its discretion, to deem the matter confessed and to enter the requested relief. Any reply brief or rebuttal shall be filed no later than seven (7) days after the last opposing brief or opposition is filed. Reply briefs and oppositions shall be filed only in response to arguments raised in opposition to the motion and not to repeat previously presented arguments or to raise new arguments. Rebuttal material shall be filed only to dispute material filed in opposition to the motion.

(d) Notice by the Government of the Intention to Use Evidence. Absent order of the court, the government shall, within twenty-one (21) days of the first court appearance of the defendant, give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule.

(e) Ruling on Pretrial Motion. A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after finding, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(f) Effect of Failure to Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by this Rule or by the court, or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

(g) Records. A verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally.

(h) Effect of Determination. If the court grants a motion based on a defect in the institution of the prosecution or in the information, it may also order that the defendant be continued in custody or that the defendant's bail be continued for a specified time pending the filing of a new information. Nothing in this rule shall be deemed to affect the provisions of any Act of the Olbiil Era Kelulau relating to speedy trial or periods of limitations.

Comment: Rule 12(a) has been amended to reflect that demurrers and motions to quash have never existed in the Republic and therefore need not be abolished by rule. Rule 12(b) has been amended to require all pretrial motions to be made in writing absent specific approval from the court for an oral motion. Rule 12(c) has been amended to harmonize criminal motions practice as far as practicable with the motions practice reflected in the Court's newly adopted Civil Rules. Rule 12(d) has been amended to make mandatory and to establish a timetable for the government's provision of notice of intent to use evidence in order to facilitate and expedite the filing and determination of suppression motions. Rule 12(h) has been amended to include a reference to the Speedy Trial Act, 18 PNC §§ 403-405. Rule 12(i) has been deleted because the mandatory disclosure provisions contained in the amended Rule l6(a)(1)(E) obviate the need for special procedures concerning prior statements made by witnesses at suppression hearings. All other amendments are technical. No substantive effect is intended.

RULE 12.1. NOTICE OF ALIBI.

(a) Notice by Defendant. Upon written demand of the attorney or trial assistant for the government stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten (10) days, or at such different time as the court may direct, upon the attorney or trial assistant for the government a written notice of the defendant's intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi.

(b) Disclosure of Information and Witnesses. Within ten (10) days thereafter, but in no event less than ten (10) days before trial, unless the court otherwise directs, the attorney or trial assistant for the government shall serve upon the defendant or the defendant's attorney or trial assistant a written notice stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(c) Continuing Duty to Disclose. If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (a) or (b), the party shall promptly notify the other party or the other party's attorney or trial assistant of the existence and identity of such additional witness.

(d) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.

(e) Exceptions. For good cause shown, the court may grant an exception to any of the requirements of subdivisions (a) through (d) of this rule.

(f) Inadmissibility of Withdrawn Alibi. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with such intention, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention.

Comment: The amendments are technical. No substantive change is intended.

RULE 12.2. NOTICE OF INSANITY DEFENSE OR EXPERT TESTIMONY OF DEFENDANT'S MENTAL CONDITION.

(a) Defense of Insanity. If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney or trial assistant for the government in writing of such intention and file a copy

of such notice with the clerk of courts. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(b) Expert Testimony of Defendant's Mental Condition. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of the defendant's guilt, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney or trial assistant for the government in writing of such intention and file a copy of such notice with the clerk of courts. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(e) Mental Examination of Defendant. In an appropriate case the court may, upon motion of the attorney or trial assistant for the government, order the defendant to submit to a mental examination by a psychiatrist or other expert designated for this purpose in the order of the court. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination shall be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.

(d) Failure to Comply. If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's mental condition.

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

Comment: The amendments are technical. No substantive change is intended.

RULE 13. TRIAL TOGETHER OF INFORMATIONS.

The court may order two or more informations to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single information. The procedure shall be the same as if the prosecution were under such single information.

Comment: No changes have been made from the 1983 Rules.

RULE 14. RELIEF FROM PREJUDICIAL JOINDER.

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney or trial assistant for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

Comment: No changes have been made from the 1983 Rules.

RULE 15. DEPOSITIONS.

(a) When Taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties, order that testimony of such witness be taken by deposition and that any

designated book, paper, document, record, recording or other material not privileged, be produced at the same time and place. If a witness is detained pursuant to 18 PNC § 702, the court on written motion of the witness and upon notice to the parties may direct that the witness' deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at the examination and keep the defendant in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause the defendant to be removed from the place of the taking of the deposition, the defendant persists in conduct which is such as to justify exclusion from that place. A defendant not in custody shall have the right to be present at the examination upon request, subject to such terms as may be fixed by the court, but a failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(c) Payment of Expenses. Whenever a deposition is taken at the instance of the government, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and the defendant's attorney or trial assistant for attendance at the examination and the cost of the transcript of the deposition shall be paid by the government.

(d) How Taken. Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that

(1) in no event shall a deposition be taken of a party defendant without that defendant's consent, and

(2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself.

The government shall make available to the defendant or the defendant's counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would otherwise be entitled pursuant to Rule 16(a)(1)(E).

(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the Rules of Evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with that witness' deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require that party to offer all of it which is relevant to the part offered and any party may offer other parts.

(f) Objections to Deposition Testimony. Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.

(g) Deposition by Agreement Not Precluded. Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court.

Comment: The amendments are technical. No substantive change is intended.

RULE 16. DISCOVERY AND INSPECTION.

(a) Disclosure of Evidence by the Government.

(1) Information Subject to Disclosure. Absent order of the court, within twenty-one (21) days of the defendant's first court appearance, the government shall provide to the defendant or the defendant's attorney or trial assistant, and shall permit the defendant or the defendant's attorney or trial assistant to inspect and copy or photograph, the following materials:

(A) Any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney or trial assistant for the government, and that portion of any written record containing the substance of any oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent. The government must also disclose to the defendant or the defendant's attorney or trial assistant the substance of any other relevant oral statements made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. Upon request of a defendant which is an organization such as a corporation, partnership, or other association, the government must disclose to the defendant any of the foregoing statements made by a person who the government contends

(i) was, at the time of making the statement, so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or

(ii) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved.

(B) A copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney or trial assistant for the government.

(C) Any books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense, or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney or trial assistant for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(E) The name and address of any person whom the prosecuting attorney or trial assistant intends to call as a witness at trial or at any hearing, and the statements and the record of any felony convictions of such proposed witnesses. As used in this subdivision, a "statement" of a witness means:

(i) a written statement made by the witness that is signed or otherwise adopted or approved by the witness; or

(ii) a substantially verbatim recital of an oral statement made by the witness that was recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or transcription thereof.

(F) Any report or statement or summary of a police officer made in connection with the case.

(G) Any material or information which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the defendant's punishment thereafter. Such material or information includes, but is not limited to, the existence of witnesses favorable to the defendant, favorable witness statements, evidence which reduces the credibility or probative value of evidence used by the prosecution, prior inconsistent statements of witnesses, and promises of immunity or other favorable treatment made by government agents to a witness.

(H) A written summary of testimony the government intends to use under Rules 702, 703 or 705 of the Rules of Evidence during its case in chief at trial. This summary shall describe the witnesses' opinions, the bases and reasons therefor, and the witnesses' qualifications.

(2) Information Not Subject to Disclosure.

(A) Except as provided in paragraphs (A), (B), (D), (E) and (H) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney or trial assistant for the government in connection with the investigation or prosecution of the case.

(B) Should the defendant or the defendant's attorney or trial counselor provide notice pursuant to subdivision (b)(1) of this rule, the government need not make disclosures pursuant to paragraphs (C), (D), and/or (H) of subdivision (a)(1) of this rule.

(b) Disclosure of Evidence by the Defendant.

(1) Information Subject to Disclosure. Unless the defendant or the defendant's attorney or trial assistant has notified the government within ten (10) days after the defendant's first court appearance that the defendant does not want to receive the information required to be disclosed under paragraphs (C), (D), and/or (H) of subdivision (a)(1) of this rule, the defendant, or the defendant's attorney or trial assistant, within ten (10) days of the government's making of the disclosures required by paragraphs (C), (D), and/or (H) of subdivisions (a)(1) of this rule, shall have a reciprocal duty to provide to the government to inspect and copy or photograph the following materials:

(A) Books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Any results or reports of physical or mental examination and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.

(C) A written summary of testimony the defendant intends to use under Rules 702, 703 and 705 of the Rules of Evidence as evidence at trial. This summary must describe the opinions of the witnesses, the bases and reasons therefor, and the witnesses' qualifications. If the defendant has given notice pursuant to Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition, this duty of disclosure shall be mandatory on the defendant irrespective of the

defendant's provision of notice under subsection (b)(1) of this rule.

(2) Information Not Subject to Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda or other internal defense documents made by the defendant, or the defendant's attorneys or trial assistants or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, or to the defendant's agents or attorneys or trial assistants.

(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, or discovers additional witnesses or defenses that are subject to disclosure under this rule, the party shall promptly notify the other party or the other party's counsel or the court of the existence of the additional evidence, material, witness or defense.

(d) Protective and Modifying Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the justice or judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(e) Sanction for Failure to Comply.

(1) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance to permit the other party to examine the evidence not previously disclosed, or prohibit the party from introducing evidence not disclosed or from offering the testimony of any witness whose statement or prospective testimony was subject to disclosure but not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place, and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(2) In addition to the sanctions listed above, if a party introduces evidence at trial or any pretrial hearing that was subject to disclosure but not disclosed or testimony of a witness whose statement or prospective testimony was subject to disclosure but not disclosed, the court may order that the evidence or testimony be stricken from the record and that the trial or hearing proceed or, if it is the attorney or trial assistant for the government who has failed to make a required disclosure, the court may declare a mistrial or dismiss the information if required by the interests of justice.

Comment: Rule 16 has been substantially revised to provide for a comprehensive and streamlined discovery regimen in criminal cases. As part of this effort, Rule 26.2 has been abrogated. Specifically, Rule 16(a) now imposes an expanded series of mandatory discovery disclosures on the government and establishes the time frame in which those disclosures must be made. Rule 16(b) imposes certain mandatory reciprocal discovery obligations on a defendant, with an escape clause allowing a defendant to elect to avoid these disclosure requirements in exchange for foregoing the right to receive certain reciprocal discovery from the government. Rule 16(c) has been amended to impose an additional continuing duty of disclosure for witnesses or for latterly-identified defenses that are otherwise required to be disclosed under these rules. Rule 16(d) has been recaptioned because the former Rule 16(d)(2) has been deleted. That subdivision has now largely been incorporated into the expanded sanctions provisions of the new Rule 16(e), which is itself an expansive adaptation of the former Rule 26.2(e).

RULE 17. SUBPOENA.

(a) For Attendance of Witnesses; Form; Issuance. A subpoena shall be issued by the court or the clerk of courts under the seal of the court. It shall state the name of the court and the title of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The court or the clerk of courts shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who

shall fill in the blanks before it is served.

(b) Vacant.

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys or trial assistants.

(d) Service. A subpoena may be served by a police officer or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named. Reasonable attempts shall also be made to assure that the person served understands the meaning of the subpoena and what the person served is required to do. At or before the time stated for appearance in a subpoena, the person to whom such a subpoena is delivered for service shall write a report of his or her action on it, sign it, and have it delivered to the court named therein. If the person has served the subpoena, the report shall show the date, place, and method of service.

(e) Place of Service. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the Republic of Palau.

(f) For Taking Deposition; Place of Examination.

(1) Issuance. An order to take a deposition authorizes the issuance by the court or the clerk of courts of subpoenas for the persons named or described therein.

(2) Place. The witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the court, taking into account the convenience of the witness and the parties.

(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.

Comment: Rule 16(h) has been deleted because it has been rendered superfluous by the mandatory nature of the disclosures required by Rule 16. The other amendments are technical. No substantive change is intended.

RULE 17.1. PRETRIAL CONFERENCE.

At any time after the filing of the complaint or information the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. No admissions made by the defendant or the defendant's attorney or trial assistant at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and the defendant's attorney or trial assistant. This rule shall not be invoked in the case of a defendant who is not represented by counsel.

Comment: The amendments are technical. No substantive change is intended.

V. VENUE

RULE 18. PLACE OF PROSECUTION AND TRIAL.

Except as otherwise permitted by statute or by these rules, the court shall fix the place of trial with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.

Comment: No changes have been made from the 1983 Rules.

RULES 19-22. VACANT.

VI. TRIAL

RULE 23. FINDING BY THE COURT UPON TRIAL.

Except as provided below, the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein. In a case tried before special judges pursuant to 4 PNC § 309, the court shall enter a general finding unless, in the court's discretion, it chooses to find the facts specially.

Comment: The amendments to the first sentence are technical. No substantive change is intended. The addition of the last sentence is intended to recognize cases tried pursuant to 4 PNC § 309.

RULE 24. VACANT.

RULE 25. DISABILITY OF JUSTICE OR JUDGE.

(a) During Trial. If by reason of death, sickness, or other disability the justice or judge before whom a trial has commenced is unable to proceed with the trial, and the entire trial has been videotaped, any other justice or judge regularly sitting in or assigned to the court, upon certifying that he or she has familiarized himself or herself with the record of the trial, including the videotape, may proceed with and finish the trial.

(b) After Finding of Guilt. If by reason of absence, death, sickness or other disability the justice or judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a finding of guilt, any other justice or judge regularly sitting in or assigned to the court may perform those duties; but if that other justice or judge is satisfied that a judge who did not preside at the trial cannot perform those duties or that it is appropriate for any other reason, that judge may grant a new trial.

Comment: Rule 25(a) has been amended to provide for the substitution of a different justice orjudge in the event of the inability of a trial judge to proceed with an ongoing trial, but only where the trial has been videotaped. The amendments to Rule 25(b) are technical. No substantive change is intended.

RULE 26. TAKING OF TESTIMONY.

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of the Olbiil Era Kelulau or by these rules, the Rules of Evidence, or other rules adopted by the Supreme Court.

Comment: The amendments are technical. No substantive change is intended.

RULE 26.1 DETERMINATION OF FOREIGN LAW.

A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

Comment: No changes have been made from the 1983 Rules.

RULE 26.2. VACANT.

Comment: This rule has been deleted because the discovery of witness statements is now addressed by the expanded discovery regimen incorporated into the amended Rule 16.

RULE 26.3. MISTRIAL.

Before ordering a mistrial, the court shall provide an opportunity for the government and for each defendant to comment on the propriety of the order, including whether each party consents or objects to a mistrial, and to suggest any alternatives.

Comment: This rule is new and tracks verbatim Rule 26.3 of the Federal Rules, which was adopted in 1993. It is designed as a procedural device to reduce the risk of an erroneously ordered mistrial by affording all parties the opportunity to place on record their views about a potential mistrial. It is not intended to alter the substantive law governing mistrials.

RULE 27. PROOF OF OFFICIAL RECORD.

An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions.

Comment: No changes have been made from the 1983 Rules.

RULE 28. OFFICIALS.

The court may appoint, on a temporary basis, interpreters, reporters, and other officials whenever these are needed for a particular case or cases and have not previously been appointed by the Chief Justice. Such officials shall, when practicable, be drawn from those already in government employ and shall not be entitled to any extra compensation for the performance of court duties without the prior approval of the Chief Justice. Any official, reporter, or interpreter appointed hereunder shall, before assuming his or her duties, take an oath that he or she will perform such duties to the best of his or her ability, except that bailiffs or orderlies need not be sworn.

Comment: The amendments are technical. No substantive change is intended.

RULE 29. MOTION FOR JUDGMENT OF ACQUITTAL.

The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the information after the evidence of either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

Comment: The amendments are technical. No substantive change is intended.

RULE 29.1. CLOSING ARGUMENT.

After the closing of evidence the prosecution shall open the argument. The defense shall be permitted to reply. The prosecution shall then be permitted to reply in rebuttal.

Comment: No changes have been made from the 1983 Rules.

RULE 30. VACANT.

RULE 31. FINDING.

(a) Return. The finding of the justice or judge shall be returned in open court.

(b) Conviction of Lesser Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

Comment: The amendments are technical. No substantive change is intended.

VII. JUDGMENT

RULE 32. SENTENCE AND JUDGMENT.

(a) Sentence.

(1) Imposition of Sentence. Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and determine whether the defendant wishes to make a statement on his or her own behalf and/or to present any information in mitigation of punishment. The attorney or trial assistant for the government shall have an equivalent opportunity to speak to the court.

(2) Notification of Right to Appeal. After imposing sentence in a case which has gone to trial on a plea of not guilty, the court must advise the defendant of the right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. After imposing sentence in any case, the court must advise the defendant of any right to appeal the sentence unless the defendant has entered a plea of guilty or nolo contendere where the sentence has been agreed to by the defendant as a term of the plea agreement.

(b) Judgment. A judgment of conviction shall set forth the plea, the findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the justice or judge and entered by the clerk of courts.

(c) Presentence Investigation.

(1) When Made. Upon order of the court, the probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation.

(2) Report. The presentence report shall contain:

(A) information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment;

(B) a statement of the circumstances of the offense and circumstances affecting the defendant's behavior;

(C) information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense;

(D) any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense.

(3) Disclosure.

(A) Before imposing sentence the court shall upon request permit the defendant, or the defendant's counsel if the defendant is so represented, to read the report of the presentence investigation excluding any recommendation as to sentence and any 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, and the court shall afford the defendant or the defendant's counsel an opportunity before the imposition of the sentence to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report. Neither the defendant nor the defendant's counsel shall duplicate or alter the presentence report and the original report must be returned to the court.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or the defendant's counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material disclosed to the defendant or the defendant's counsel shall also be disclosed to the attorney or trial assistant for the government.

(D) Any copies of the presentence investigation report made available to the defendant or the defendant's counsel and the attorney or trial assistant for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion, directs otherwise.

(d) Withdrawal of Plea of Guilty. If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 18 PNC § 1102.

(e) Probation. After conviction of an offense, the defendant may be placed on probation if permitted by law.

Comment: Rule 32(a)(2) has been amended to require a judge to notify a defendant of the right to appeal any sentence imposed in all cases except where the defendant has agreed to a particular sentence as part of a plea agreement. Rule 32(c)(2)(A) has been expanded to track the Federal Rules and reflect actual practice. Rule 32(d) has been amended to track Federal Rule 32(e) and to clarify the circumstances under which a defendant may withdraw a plea after sentence has been imposed. This change also eliminates any inconsistency with the amended Rule 35. The other amendments are technical. No substantive change is intended.

RULE 32.1. REVOCATION OR MODIFICATION OF PROBATION.

(a) Revocation of Probation.

(1) Initiation of Revocation Proceedings. Revocation proceedings may be initiated by a report filed by the probation office, a motion filed by an attorney or trial assistant for the government, or on the court's own motion. Whenever a probation officer has prepared and filed a report or an attorney or trial assistant for the government has prepared and filed a motion alleging that a probationer has violated a condition of probation and stating the facts that are believed to warrant revocation of probation, upon a finding that probable cause exists to believe the probationer has violated a term of probation, the court shall issue a warrant of arrest for the probationer or a penal summons to appear.

(2) Preliminary Hearing. Whenever a person is held in custody on the grounds that the person has violated a condition of probation, the person shall be afforded a prompt hearing before any judge or justice. The person shall be given:

(A) notice of the preliminary hearing and its purpose and of the alleged violation;

(B) an opportunity to appear at the hearing and present evidence on the person's own behalf;

(C) upon request, the opportunity to question witnesses against the person unless, for good cause, the judge or justice decides that justice does not require the appearance of the witness;

(D) notice of the person's right to be represented by counsel.

If, at the preliminary hearing, probable cause is found to exist, the person shall be held for a revocation hearing. The person may be released pursuant to Rule 46(c) pending the revocation hearing. If probable cause is found not to exist, the proceeding shall be dismissed.

(3) Revocation Hearing. The revocation hearing, unless waived by the person, shall be held within a reasonable time. The person shall be given:

(A) written notice of the alleged violation of probation;

(B) disclosure of the evidence against the person;

(C) an opportunity to appear and to present evidence on his or her own behalf;

(D) the opportunity to question witnesses against him or her; and

(E) notice of his or her right to be represented by counsel.

(b) Modification of Probation. A hearing and assistance of counsel are required before the terms or conditions of probation can be modified, unless the relief granted to the person on probation upon the person's request or the court's own motion is favorable to the person and the attorney or trial assistant for the government, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of the term of probation is not favorable to the person for the purposes of this rule.

(c) Production of Statements and Sanction for Failure to Produce. Rule 16 applies at any hearing under this rule. Evidence that was subject to disclosure under Rule 16 but not disclosed or testimony of a witness whose statement or testimony was subject to disclosure under that rule but not disclosed may not be considered.

Comment: Rule 32.1(a) has been amended to track the Federal Rules more closely and to delineate more fully the procedures to be followed for the initiation and conduct of revocation proceedings and the rights of probationers. The

amendments to Rule 32.1 (b) are technical. No substantive change is intended. Rule 32.1 (c) is new and applies the expanded discovery obligations imposed by the amended Rule 16 to the revocation context in order to enhance the accuracy of revocation hearings. This change parallels the 1993 amendments to the Federal Rules which incorporated the obligation to produce witness statements into the rules governing revocation proceedings.

RULE 33. NEW TRIAL.

On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require, or may vacate the judgment if entered, take additional testimony, and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two (2) years after final judgment, but if an appeal is pending, the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within seven (7) days after a finding of guilty or within such further time as the court may fix during the seven (7) day period.

Comment: The amendments are technical. No substantive change is intended.

RULE 34. ARREST OF JUDGMENT.

The court on motion of a defendant shall arrest judgment if the complaint or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within seven (7) days after the finding of guilty, or after a plea of guilty or nolo contendere, or within such further time as the court may fix during the seven (7) day period.

Comment: No changes have been made from the 1983 Rules.

RULE 35. CORRECTION OR REDUCTION OF SENTENCE.

(a) Correction of Sentence. The court shall correct a sentence that is determined on appeal to have been imposed in violation of law, to have been imposed as a result of an incorrect application of law, or to be unreasonable, upon remand of the case to the court

(1) for imposition of a sentence in accord with the findings of the Appellate Division; or

(2) for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.

(b) Reduction of Sentence. If the government so moves within one year after the sentence is imposed or probation is revoked, or within one year after the entry of any order of the Appellate Division denying review or having the effect of affirming a sentence or revocation of probation, the court may reduce a sentence to reflect a defendant's subsequent substantial assistance in investigating or prosecuting another person. The court may consider a government motion to reduce a sentence made one year or more after the sentence is imposed if the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after sentence is imposed. The court may reduce a sentence within one hundred twenty (120) days after the sentence is imposed or probation is revoked, or within one hundred twenty (120) days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within one hundred twenty (120) days after entry of any order or judgment of the Appellate Division of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

(c) Correction of Sentence by Sentencing Court. The court, acting within seven (7) days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error.

Comment: Rule 35(a) has been amended to track the Federal Rules more closely and to clarify that a sentencing court may only correct a sentence upon remand from the Appellate Division, except pursuant to the specific terms of Rules 35(b) and

(c). Rule 35(b) has been amended to expand the time in which the government may move for a reduction in a defendant's sentence on the ground of substantial assistance. Rule 35(c) is new and tracks the Federal Rules.

RULE 36. CLERICAL MISTAKE.

Clerical mistakes in judgments, orders, or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

Comment: No changes have been made from the 1983 Rules.

VIII. APPEAL RULE

37. VACANT.

RULE 38. STAY OF EXECUTION AND RELIEF PENDING REVIEW.

(a) Imprisonment. A sentence of imprisonment shall be stayed if an appeal is taken and the defendant is released pending disposition of the appeal pursuant to Rule 9(b) of the Rules of Appellate Procedure or Rule 46(c) of these Rules. If the sentence is not stayed, the court may recommend to the attorney or trial assistant for the government that the defendant be retained under conditions, and at a place, which permit the defendant to assist in the preparation of the defendant's appeal to the Appellate Division.

(b) Fine. A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the trial court or by the Appellate Division of the Supreme Court upon such terms as the court deems proper. The court may require the defendant, pending appeal, to deposit the whole or any part of the fine and costs in the registry of the trial court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating such defendant's assets.

(c) Probation. A sentence of probation may be stayed if an appeal is taken. If not stayed, the court shall specify when the term of probation shall commence. If the order is stayed, the court shall fix the terms of the stay.

Comment: Rule 38(a) has been amended to reference the procedures for release pending appeal delineated in the new Rule 46(c). The other amendments are technical. No substantive change is intended.

RULE 39. VACANT.

IX. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

RULE 40. VACANT.

RULE 41. SEARCH AND SEIZURE.

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a justice or judge upon the request of a police officer or an attorney or trial assistant for the government.

(b) Property or Persons Which May Be Seized With a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

(c) Issuance and Contents. A warrant shall issue only on an affidavit or affidavits establishing the grounds for issuing the warrant. If the justice or judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, the justice or judge shall issue a warrant identifying the property to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the justice or judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made a part of the affidavit. The warrant shall be directed to a police officer. It shall command the police officer to search, within a specified period of time not to exceed ten (l0) days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorized its execution at times other than daytime. It shall designate the justice or judge to whom it shall be returned.

(d) Execution and Return With Inventory. The police officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave a copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the police officer. The justice or judge shall upon request deliver 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.

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the court for the return of the property which was illegally seized. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored to the movant and it shall not be admissible in evidence at any hearing or trial. If the motion for return of property is made or comes on for hearing after an information is filed, it shall be treated also as a motion to suppress under Rule 12.

(f) Motion to Suppress. A motion to suppress evidence may be made as provided in Rule 12.

(g) Return of Papers to Clerk of Courts. The justice or judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory, and all other papers in connection therewith and shall file them with the clerk of courts.

(h) Definitions. The term “property” is used in this rule to include documents, books, papers, and any other tangible objects. The term “daytime” is used in this rule to mean the hours from 6:00 a.m. to 10:00 p.m. according to local time.

Comment: Rule 41 (c) has been amended in light of *ROP v. Tomei, 7* ROP Intrm. 25, 26 (1995), which held that, contrary to the terms of the former Rule 41(c), affidavits establishing grounds for the issuance of warrants need not be sworn out exclusively before justices or judges but may also legally be sworn out in front of the clerk of courts. The other amendments are technical. No substantive change is intended.

RULE 42. CRIMINAL CONTEMPT.

(a) Summary Disposition. A criminal contempt maybe punished summarily if the justice or judge certifies that the justice or judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the justice or judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and

describe it as such. The notice maybe given orally by the justice or judge in open court in the presence of the defendant or, on application of the government attorney or trial assistant or of an attorney or trial assistant appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a justice or judge, that justice or judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a finding of guilt the court shall enter an order fixing the punishment.

Comment: The amendment is technical. No substantive change is intended.

X. GENERAL PROVISIONS

RULE 43. PRESENCE OF THE DEFENDANT.

(a) Presence Required. The defendant shall be present at arraignment, at the time of the plea, at every stage of the trial including the return of the finding of the court, and at the imposition of sentence, except as otherwise provided by this rule.

(b) Continued Presence Not Required. The further progress of the trial to and including the return of the finding of the court and the imposition of sentence shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant initially present at trial, or having pled guilty or nolo contendere,

(1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of his obligation to remain during the trial), or

(2) is voluntarily absent at the imposition of sentence, or

(3) after being warned by the court that disruptive conduct will cause the defendant to be removed from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

(c) Presence Not Required. A defendant need not be present when:

(1) the defendant is a corporation and is represented by counsel;

(2) the offense is punishable by fine or by imprisonment for not more than one year or both, and the court, with the written consent of the defendant, permits arraignment, plea, trial, and imposition of sentence in the defendant’s absence;

(3) the proceeding involves only a conference or hearing upon a question of law; or

(4) the proceeding involves a reduction or correction of sentence under Rule 35.

Comment: Rule 43(b) has been amended to clarify that a defendant’s presence is not required when the defendant voluntarily chooses not to appear for sentencing. The other amendments are technical. No substantive change is intended.

RULE 44. RIGHT TO AND ASSIGNMENT OF COUNSEL.

(a) Right to Assigned Counsel. Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent that defendant at every stage of the proceedings from initial appearance before a justice or judge through appeal, unless the defendant waives such appointment. Counsel may include a trial assistant in cases where the defendant is charged with a minor offense for which a trial assistant would be permitted to represent the accused.

(b) Assignment Procedure. If the defendant appears in court without counsel, the court shall advise the defendant of the right to counsel and assign counsel to represent the defendant at every stage of the proceedings. Absent an indication to the contrary, the Office of the Public Defender shall be presumed to be available to enter an appearance as counsel for any defendant who is unable to afford to retain counsel. If, because of a conflict of interest or any other reason, the Office of the Public Defender is precluded from representing a defendant who is unable to afford to retain counsel, the court shall appoint a member of the private bar to serve as defense counsel.

(c) Determination of Indigence. In determining whether a defendant is unable to afford to retain counsel, the court may require the defendant to file an affidavit and may hear testimony or consider any other relevant evidence.

(d) Joint Representation. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

Comment: Rule 44(b) is new and delineates the procedure governing the appointment of counsel. Rule 44(c) is also new and delineates the procedure for the court to determine a defendant's indigence. Rule 44(d) is the former Rule 44(c). The other amendments are technical. No substantive change is intended.

RULE 45. TIME.

(a) Computation. In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of some paper in court, a day on which weather or other conditions have made the office of the clerk of courts inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When a period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in these rules, "legal holiday" means any day appointed as a holiday by the President or the Olbiil Era Kelulau.

(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion

(1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or

(2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but the court may not extend the time for taking any action under Rules 29, 33, 34, and 35, except to the extent and under the conditions stated in them.

(c) Vacant.

(d) Vacant.

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon that party and the notice or other paper is served by mail, three (3) days shall be added to the prescribed period.

Comment: Rule 45(d) has been deleted as the time for filing motions is now addressed by Rule 12. The other amendments are technical. No substantive change is intended.

RULE 46. RELEASE FROM CUSTODY.

(a) Release Prior to Trial.

(1) Any person charged with an offense shall, upon appearance before a justice or judge, be ordered released pending trial on personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the justice or judge, unless the justice or judge determines, in the exercise of discretion, that such a release will not reasonably assure the appearance of the person as required or would pose a danger to the defendant, any other person, or to the community. When such a determination is made, the justice or judge shall, either in lieu of, or in addition to, the above methods of release, order any of the following conditions of release:

(A) restrictions placing the person in the custody of a designated person or organization agreeing to supervise the person;

(B) restrictions on the travel, association, or place of abode of the person during the period of release;

(C) the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed ten (10) per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;

(D) the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or

(E) any other condition deemed reasonably necessary to assure the appearance of the accused as required and to assure the safety of the accused, any other person, or the community, including a condition requiring that the person return to custody after specified hours.

(2) In determining which conditions of release are appropriate in a given case, the justice or judge shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of the accused's residence in the community, the accused's record of convictions, and the accused's record of appearing at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

(3) A justice or judge authorizing the release of a person under this section shall issue an appropriate order containing a statement of the conditions imposed, if any, shall inform such person of the penalties applicable to violations of the conditions of release, and shall advise such person that a warrant for arrest will be issued immediately upon any such violation.

(4) A person for whom conditions of release are imposed and who after twenty-four (24) hours from the time of the release hearing continues to be detained as a result of inability to meet the conditions of release, shall, upon application, be entitled to have the conditions reviewed by the justice or judge who imposed them. Unless the conditions of release are amended and the person is thereupon released, the justice or judge shall set forth in writing the reasons for requiring the conditions imposed. A person who is ordered released on a condition which requires that the person return to custody after specified hours shall, upon application, be entitled to a review by the justice or judge who imposed the condition. Unless the requirement is removed and the person is thereupon released on another condition, the justice or judge shall set forth in writing the reasons for continuing the requirement. In the event that the justice or judge who imposed conditions of release is not available, any other justice or judge may review such conditions.

(5) A justice or judge ordering the release of a person on any condition specified in this section may at any time amend the order to impose additional or different conditions of release, provided that if the imposition of such additional or different conditions results in the detention of the person as a result of the person's inability to meet such conditions or in the release of the person on a condition requiring the person to return to custody after specified hours, the provisions of subsection (4) shall apply.

(6) Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law.

(b) Release During Trial. A person released before trial shall continue on release during trial and until any judgment of conviction is entered, under the same terms and conditions as were previously imposed, unless the court determines that other terms and conditions or termination of release are necessary to assure the person's presence during the trial, to assure that the person's conduct will not obstruct the orderly and expeditious progress of the trial, or to assure that the person will not pose an undue risk to himself or herself, any other persons, or the community during trial.

(c) Release Pending Appeal. Application for release after a judgment of conviction shall be made in the first instance in the trial court. The trial court shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal, be detained, unless the trial court finds:

(1) that the person is not likely to flee or pose a danger to the safety of any person or the community if released; and

(2) that the appeal raises a substantial question of law or fact which is sufficiently important to the merits that an appellate ruling is likely to require the person's release or a new trial.

If the trial court refuses release pending appeal or imposes conditions of release, a motion for release or for modification of the conditions of release may be made to the Appellate Division or to a justice thereof. The motion shall be determined promptly upon such papers, affidavits, and portions of the record as the parties shall present and after reasonable notice to the appellee. The Appellate Division or a justice thereof may order the release of the appellant pending disposition of the motion.

(d) Release of a Detained Material Witness. If a justice or judge orders detention of a material witness in accordance with 18 PNC § 702(a), the justice or judge shall impose conditions of release pursuant to Rule 46(a)(1) through (6) above. No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to Rule 15.

(e) Justification of Sureties. Every surety, except a corporate surety which is approved as provided by law, shall justify by affidavit and may be required to describe in the affidavit the property by which the surety proposes to justify and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by the surety and remaining undischarged, and all of the surety's other liabilities. No bond shall be approved unless the surety thereon appears to be qualified.

(f) Forfeiture.

(1) Declaration. If there is a breach of a condition of a bond, the court shall declare a forfeiture of the bail.

(2) Setting Aside. The court may direct that a forfeiture be set aside, upon such conditions 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 bond the obligors submit to the jurisdiction of the court and irrevocably appoint the clerk of courts 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 courts, who shall forthwith mail copies to the obligors to their 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 (2) of this subdivision.

(g) Exoneration. When the condition of the bond 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 bond or by a timely surrender of the defendant into custody.

(h) Supervision of Detention Pending Trial. The court shall exercise supervision over the detention of defendants and witnesses pending trial for the purpose of eliminating all unnecessary detention. The attorney or trial assistant for the government shall make a biweekly report to the court listing each defendant and witness who has been held in custody pending information, arraignment, or trial for a period in excess of ten (10) days. As to each witness so listed the attorney or trial assistant for the government shall make a statement of the reasons why such witness should not be released with or without the taking of the witness' deposition pursuant to Rule 15(a). As to each defendant so listed the attorney or trial assistant for the government shall make a statement of the reasons why the defendant is still held in custody.

Comment: Rule 46(a)(1)(E) has been amended to clarify the purpose of conditions of release. The former Rule 46(a)(7) has, with amendments to incorporate a reference to 18 PNC § 702, been moved to Rule 46(d) to reflect the differences between the release of a defendant and the release of a detained material witness. Rule 46(c) has been amended to bring the rule into conformity with Rule 9(b) of the Rules of Appellate Procedure. The new Rule 46(c) therefore provides for detention (rather than release, as under the old rule) as the post-conviction default position. The other amendments are technical. No substantive change is intended.

RULE 47. VACANT.

Comment: This rule has been rendered vacant as motions are now extensively covered by Rule 12.

RULE 48. DISMISSAL.

(a) By Attorney or Trial Assistant for the Government. The attorney or trial assistant for the government may by leave of court file a dismissal of an information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

(b) By Court. If there is unnecessary delay in filing an information or complaint against a defendant who has been held to answer to the court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the information or complaint.

Comment: The insertion of the word "not" into the second sentence of Rule 48(a) significantly alters the meaning of the rule. This amendment is intended to afford defendants the right to insist on a disposition on the merits once trial has commenced. The amended rule accords with the Federal Rules and with United States case law. The amendment to Rule 48(b) is technical. No substantive change is intended.

RULE 49. SERVICE AND FILING OF PAPERS.

(a) Service: When Required. Written motions other than those which are heard ex parte, written notices, designations of record on appeal, and similar papers shall be served upon each of the parties.

(b) Service: How Made. Whenever under these rules or by an order of the court service is required or permitted

to be made upon a party represented by an attorney or trial assistant, the service shall be made upon the attorney or trial assistant unless service upon the party personally is ordered by the court. Service upon the attorney or trial assistant or upon a party shall be made in the manner provided in civil actions.

(c) Notice of Orders. Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk of courts shall mail a notice thereof to each party, or shall have each party served with a notice thereof by any means that would constitute a valid method of service pursuant to subdivision (b) of this rule. The clerk of courts shall note in the docket the provision and method of notice.

(d) Filing. Except for disclosures required under Rule 16, papers required to be served shall be filed with the court. Papers shall be filed in the manner provided in civil actions. Unless otherwise ordered by the court, parties must file with the court an original of all documents filed with the court pursuant to these rules.

Comment: The first sentence of Rule 49(d) has been amended to reflect that discovery materials are not to be filed as a matter of course. The other amendments are technical. No substantive change is intended.

RULE 50. FILING DOCUMENTS UNDER SEAL.

A party seeking to file under seal a pleading, motion, document, or exhibit must file a written motion for leave to do so. The pleading, motion, document, or exhibit thereafter may be filed under seal only if the court so orders. Once the court enters an order permitting or directing the parties to file certain designated materials under seal, the parties thereafter shall file all such materials under seal without filing a further request to do so.

A request for leave to file materials under seal may be filed under seal ex parte and without prior court order. The request must be delivered to the clerk of courts in a sealed envelope marked with the caption of the case and the notation, "REQUEST FOR LEAVE TO FILE UNDER SEAL PURSUANT TO ROP R. CRIM. P. 50."

Materials to be filed under seal, as well as all materials filed in response to or in connection with other materials filed under seal, must be filed in a sealed envelope marked with the caption of the case and the notation, 'SEALED PURSUANT TO COURT ORDER ENTERED [DATE]."

Envelopes containing materials filed under seal may be opened only by justices or judges, except as otherwise ordered by the court.

Thirty (30) days after a judgment has become final or, if an appeal from the judgment is filed, thirty (30) days after the issuance of a decision by the Appellate Division, sealed materials not claimed by the filing party may be unsealed by the clerk of courts unless otherwise ordered by the court. Prior to the expiration of the thirty (30) day period following the termination of a case, a party may move for an order of the court either extending the seal for a specified additional time period or returning sealed documents to the filing party upon a showing of good cause.

Comment: This new rule has been added to establish a procedure for filing documents under seal. This language is adopted from Local Rule 5.1 of the Northern District of Iowa and Local Rule 13.05 of the Eastern District of Missouri.

RULE 51. PRESERVING OBJECTIONS.

To preserve an objection to a ruling or order of the court, it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice the party.

Comment: The amended title and text of this rule reflects the fact that exceptions, which were abolished in the United States in 1944, have never been incorporated into Palauan or Trust Territory practice and therefore need not be expressly abolished by rule. The new rule sets forth the proper method for preserving an objection under modern practice.

RULE 52. HARMLESS ERROR AND PLAIN ERROR.

(a) Harmless Error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Comment: No changes have been made from the 1983 Rules.

RULES 53-54. VACANT.

RULE 55. RECORDS.

The clerk of courts shall keep such records in criminal proceedings as the Chief Justice shall prescribe.

Comment: The reference to a "criminal docket" book and its required contents has been deleted to reflect an ongoing shift to electronic record keeping and to provide flexibility for future technological developments.

RULE 56. COURTS AND CLERKS.

The court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process, and of making motions and orders. The office of the clerk of courts with a clerk in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but the Chief Justice may provide by order of court that the office of the clerk of courts shall be open for specified hours on Saturdays or particular legal holidays.

Comment: The amendments are technical. No substantive change is intended.

RULE 57. RULES WHERE PROCEDURE NOT OTHERWISE SPECIFIED.

If no procedure is specifically prescribed by rule or applicable statute, the court may proceed in any lawful manner not inconsistent with any rule or applicable statute.

Comment: The heading has been changed to reflect the content of the present rule, and language has been added to the rule to provide the courts with broad discretion to proceed in any lawful manner in the absence of controlling law.

RULE 58. VACANT.

RULE 59. EFFECTIVE DATE.

These rules take effect on September 1, 2004. They govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.

RULE 60. TITLE.

These rules may be known and cited as the Republic of Palau Rules of Criminal Procedure. (ROP R. Crim. P.___).

Comment: The abbreviated citation has been changed to conform with the abbreviation suggested by the Bluebook.