1963

Colorado Rules of Criminal Procedure

Colorado General Assembly

COLORADO RULES OF CRIMINAL PROCEDURE

Effective November 1, 1961

I. SCOPE, PURPOSE AND CONSTRUCTION

RULE 1. SCOPE

These rules govern the procedure in all criminal proceedings in courts of record and in all proceedings preliminary to disposition of such cases before justice of the peace courts of the State of Colorado, with the exceptions stated in Rule 54.

RULE 2. PURPOSE AND CONSTRUCTION

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

II. INITIATION OF PRELIMINARY PROCEEDINGS

RULE 3. THE COMPLAINT

The complaint is a written statement of the essential facts constituting the offense charged and shall be made upon oath before a Colorado justice of the peace or any other person authorized to administer oaths within Colorado.

RULE 4. WARRANT OR SUMMONS UPON COMPLAINT

(a) **Issuance**

If it appears to any justice of the peace from the complaint that there is probable cause to believe that an offense has been committed by the defendant, a warrant for his arrest shall issue to any person authorized by law to execute it. Upon the request of the prosecuting attorney the justice of the peace may issue a summons instead of a warrant. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to a summons, a warrant shall issue.

(b) **Form**

(1) **Warrant.** The warrant shall:

(i) state the defendant's name, or if that is unknown, any name or description by which he can be identified with reasonable certainty;

(ii) command that the defendant be arrested and brought without unnecessary delay before the nearest available justice of the peace;

(iii) describe the offense charged;

(iv) have indorsed upon it the amount of bail if the offense is bailable; and

(v) be signed by the issuing justice of the peace.

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

(c) **Execution or Service and Return**

(1) **By Whom.** The warrant shall be executed by any person authorized by law. The summons may be served by any person authorized to execute a warrant.

(2) **Territorial Limits.** The warrant may be executed or the summons served anywhere within Colorado.

(3) **Manner.** The warrant shall be executed by arresting the defendant. The officer need not have the warrant in his possession at the time of the arrest, but if he has the warrant at that time he shall show it to the defendant immediately upon request. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense and of the fact that a warrant has been issued, and upon request he shall show the warrant to the defendant as soon as possible. The summons shall be served by delivering a copy to the defendant personally, or by leaving it at his usual place of abode with some person over the age of eighteen years residing therein, or by mailing it to the defendant's last known address by certified mail with return receipt requested not less than three days prior to the time the defendant is required to appear.

(4) **Return.** The officer executing a warrant shall make return thereof to the issuing justice of the peace or other justice of the peace before

whom the defendant is brought pursuant to Rule 5. At the request of the prosecuting attorney any unexecuted warrant shall be returned to the issuing justice of the peace and cancelled by him. On or before the return day the person to whom a summons has been delivered for service shall make return thereof to the justice of the peace before whom the summons is returnable. At the request of the prosecuting attorney made while a complaint is pending, a warrant returned unexecuted and not cancelled or summons returned unserved or a duplicate of either may be delivered by the justice of the peace to the sheriff or other authorized person for execution or service.

As amended December 20, 1962, effective January 1, 1962.

RULE 5. PRELIMINARY PROCEEDINGS PEFORE THE JUSTICE OF THE PEACE

(a) Appearance before the Justice of the Peace

(1) **With Warrant.** Any officer making an arrest under a warrant issued upon a complaint shall take the arrested person without unnecessary delay before the nearest available justice of the peace, where a copy of the warrant shall be given to him.

(2) **Without Warrant.** Any person making an arrest without a warrant shall take the arrested person within a reasonable time before the nearest available justice of the peace. When a person thus arrested is taken before a justice of the peace, a complaint shall be filed forthwith in the county where the crime allegedly was committed, and a copy of the complaint shall be given to the accused person within a reasonable time.

(b) Procedure before the Justice of the Peace

(1) **Before the Justice of the Peace Who Issued the Warrant.** The justice of the peace shall inform the defendant of the complaint against him, of the amount of bail, if the offense is bailable, of his right to retain counsel and of his right, in all cases in which the justice of the peace has no jurisdiction to enter final judgment, to have a preliminary examination.

He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The justice of the peace shall allow the defendant reasonable time and opportunity to consult counsel and, if the offense is bailable, shall admit him to bail.

(2) **Before a Justice of the Peace Who Did Not Issue the Warrant.** If the defendant is taken before a justice of the peace who did not issue the warrant, the justice of the peace shall inform him of the matters set out in subsection (b) (1) above, and, allowing time for bail returnable not less than ten days thereafter before the justice of the peace who issued the warrant, shall transmit forthwith a transcript of the proceedings and all papers in the case to the justice of the peace who issued the warrant.

(3) **Before a Justice of the Peace Where No Warrant Has Issued.** When a defendant arrested without a warrant is taken before a justice of the peace, the justice of the peace shall inform him of the matters set out in subsection (b) (1) above. He shall allow the defendant reasonable time and opportunity to consult counsel and if the offense is bailable shall admit him to bail.

(c) **Misdemeanors**

If the defendant is charged with a misdemeanor over which the justice of the peace has jurisdiction, the justice of the peace shall hear and determine the matter as provided by law.

(d) **Preliminary Examination**

Where the complaint charges a felony, or a misdemeanor over which the justice of the peace does not have complete jurisdiction, the justice of the peace within a reasonable time shall conduct a preliminary examination. The preliminary examination shall be held before the issuing justice of the peace, who shall provide the defendant a copy of the complaint. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the justice of the peace shall forthwith hold him to answer in the appropriate court of record. The defendant may cross-examine witnesses against him and introduce evidence in his own behalf. If from the evidence it

appears to the justice of the peace that there is probable cause to believe that an offense has been committed by the defendant, the justice of the peace shall forthwith hold him to answer in the appropriate court; otherwise the justice of the peace shall discharge him. If the offense is bailable, the justice of the peace shall admit the defendant to bail. After concluding the proceedings the justice of the peace shall transmit forthwith to the clerk of the appropriate court all papers in the case and any bail taken by him which shall apply as bond until changed by order of the appropriate court.

III. INDICTMENT AND INFORMATION

RULE 6. SUMMONING GRAND JURORS

The district court in each county may order a grand jury summoned whenever authorized by law or required by the public interest.

RULE 7. THE INDICTMENT AND THE INFORMATION

(a) **Indictment**

Any offense against the People of the State of Colorado may be prosecuted by indictment returned according to law. The indictment shall be returned in open court and shall have indorsed thereon the names of witnesses in the same manner and with the same effect as in the case of the indorsement of witnesses upon an information.

(b) **Information**

Any offense against the People of the State of Colorado may be prosecuted by information prepared and filed according to these rules.

(1) **Information — Where Filed — Names of Witnesses.** The prosecuting attorney as informant shall file the information in the court having trial jurisdiction of the offenses charged. At the time of filing he shall indorse on the information the names of witnesses then known to him. Thereafter, at such time as the court by rule or otherwise may prescribe, he shall indorse thereon the names of other witnesses who become known to him before the trial. This rule shall not preclude calling any witness whose name or the materiality of whose testimony is first learned by the prosecutor upon the trial.

(2) **Information after Preliminary Examination or Waiver.** An information may be filed for any offense against anyone who has either:

(i) waived a preliminary examination, or

(ii) had a preliminary examination and been bound over to appear at the court having trial jurisdiction.

(3) **Direct Information.** The prosecuting attorney, with consent of the court having trial jurisdiction, may file a direct information if:

(i) a preliminary examination has been neither had nor waived,

(ii) upon preliminary examination the accused person has been discharged, or

(iii) the affidavit or complaint upon which the examination has been held has not been delivered to the clerk of the proper court. The court shall authorize a direct information only if the prosecutor has the names of witnesses for the prosecution and the affidavit of some credible person competent to testify in the case stating the affiant's personal knowledge that the offense was committed and the name of each person to be charged. Process shall issue immediately after the information is filed.

(c) **Nature and Contents**

The indictment or 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 prosecuting attorney or by his deputy.

(d) **Surplusage**

The court on motion of the defendant may strike surplusage from the indictment or information.

(e) **Amendment of Information**

The court may permit an information to be amended as to form or substance at any time prior to trial; the court may permit it to be amended as to form at any time before verdict or 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 for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires.

As amended December 20, 1962, effective January 1, 1963.

RULE 8. JOINDER OF OFFENSES AND OF DEFENDANTS

(a) **Joinder of Offenses**

Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are based on the same act or transaction or on two or more acts or transactions connected together.

(b) **Joinder of Defendants**

Two or more defendants may be charged in the same indictment or 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.

RULE 9. WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION

(a) **Issuance**

Upon the filing of an indictment or information, the prosecuting attorney shall request that a warrant or summons issue. Thereupon the clerk of the court shall issue the requested warrant or summons for each defendant named in the indictment or information and shall deliver it to any person authorized by law to execute or serve it. If a defendant fails to appear in response to a summons, a warrant shall issue.

(b) **Form**

(1) **Warrant.** The form of the warrant shall be provided in Rule 4 (b) (1), except that it

shall be signed by the clerk, it shall describe the offense charged in the indictment or information, and it shall command that the defendant be arrested and brought before the court. The amount of bail shall be fixed by the court and indorsed on the warrant if the offense is bailable, unless he shall be admitted to bail as otherwise provided in these rules.

(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 (c) (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. If the agent is one authorized by statute to receive service and the statute so requires, a copy shall also be mailed to the corporation's last known address within Colorado. The officer executing the warrant shall without unnecessary delay bring the arrested person before the court or, for the purpose of admission to bail, before the clerk of the court, the sheriff of the county where the arrest occurs, or other officer authorized by law to admit to bail.

(2) **Return.** The officer executing a warrant shall make return thereof to the court. At the request of the prosecuting attorney any unexecuted warrant shall be returned and cancelled. 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 prosecuting attorney made at any time while the indictment or information is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the clerk to the sheriff or other authorized person for execution or service.

As amended December 20, 1962, effective January 1, 1963.

IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

RULE 10. ARRAIGNMENT

The arraignment shall be conducted in open court.

(a) If the indictment or information charges a misdemeanor, the defendant may appear in person or by counsel.

(b) In all other cases the defendant must be present, except that the court, with the written consent of the defendant and the approval of the prosecuting attorney, may permit arraignment without the presence of the defendant if a not guilty plea is entered.

(c) Upon arraignment the defendant or his counsel shall be furnished with a copy of the indictment or information.

(d) An official reporter shall record the proceedings at every arraignment unless the holding of the arraignment without such a reporter is:

(1) consented to in writing by the defendant and his counsel, and

(2) approved by the court.

(e) If the defendant appears without counsel at arraignment, the information or indictment shall be read to him by the court or the clerk thereof.

(f) As soon as the jury panel is drawn which will try the case, a list of the names of the jurors on the panel shall be made available by the clerk of the court to defendant's counsel, and if the defendant has no counsel the list shall be served on him personally or by certified mail.

As amended December 20, 1962, effective January 1, 1963.

RULE 11. PLEAS

(a) **Generally**

A defendant personally or by counsel orally may plead guilty, not guilty, or, with the consent of the court, nolo contendere. The court shall not accept the plea of guilty without first:

(1) determining that the plea is made voluntarily with understanding of the nature of the charge, and

(2) explaining fully to the defendant his right to trial by jury, his right to counsel, and the possible penalty provided by statute for the offense charged.

If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. If for any reason the arraignment here provided for has not been had, the case shall for all purposes be considered as one in which a plea of not guilty has been entered.

(b) **Defense of Insanity**

The defense of insanity must be pleaded at the time of arraignment, except that the court for good cause shown may permit such plea to be entered at any time before trial. It must be pleaded orally, either by the defendant or by his counsel, in the form, "not guilty by reason of insanity at the time of the alleged commission of the crime". A defendant who does not thus plead not guilty by reason of insanity shall not be permitted to rely on insanity as a defense to any accusation of crime; provided, however, that evidence of mental condition may be offered in a proper case as bearing upon the capacity of the accused to form the specific intent essential to the commission of a crime.

RULE 12. PLEADINGS, MOTIONS BEFORE TRIAL, DEFENSES AND OBJECTIONS

(a) **Pleadings and Motions**

Pleadings shall consist of the indictment or information, and the pleas of guilty, not guilty, not guilty by reason of insanity, and nolo contendere. All other pleas, demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) **The Motion Raising Defenses and Objections**

(1) **Defenses and Objections Which May Be Raised.** Any defense or objection which is capable of determination without the trial of the general issue may be raised by motion.

(2) **Defenses and Objections Which Must Be Raised.** Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion. The motion shall include all such defenses and objections then available to the defendant. Failure thus to present any such defense or objection constitutes a waiver of it, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the proceeding.

(3) **Time of Making Motion.** The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(4) **Hearing on Motion.** A motion before trial raising defenses or objections shall be determined before the trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required by the constitution or by statute. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.

(5) **Effect of Determination.** If a motion is determined adversely to the defendant, he shall be permitted to plead if he has not previously pleaded. A plea previously entered shall stand.

RULE 13. TRIAL TOGETHER OF INDICTMENTS OR INFORMATIONS

Subject to the provisions of Rule 14 the court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there are more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

RULE 14. RELIEF FROM PREJUDICIAL JOINDER

If it appears that a defendant or the prosecution is prejudiced by a joinder of offenses or of defendants in an indictment or 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. However, upon motion any defendant shall be granted a separate trial as of right if the court finds that the prosecution probably will present against a joint defendant evidence, other than reputation or character testimony, which would not be admissable in a separate trial of the moving defendant.

RULE 15. DEPOSITIONS

(a) Motion and Order

Upon motion filed by the prosecutor or a defendant at any time after an indictment or information is filed, and supported by an affidavit showing that a prospective witness may be unable to attend a trial or hearing and that it is necessary to take his deposition to prevent injustice, the court may order that the prospective witness' deposition be taken. The order shall fix the time for taking the deposition before the court where the case is pending and may require that any designated books, papers, documents, photographs or tangible objects, not privileged, be produced at that time and place.

(b) Presence of Witness

Upon entering an order for the taking of a deposition, the court shall direct that a subpoena issue for each person named in the order. If it appears, however, that the witness will disregard a subpoena, the court may direct the sheriff to produce the prospective witness in court where the witness may be let to bail upon personal recognizance or upon bond in such amount not over $500 as the court deems reasonable conditioned upon the witness' appearance at the time and place fixed for taking the deposition. If the witness fails to give bail, the court shall remand him to custody until the deposition can be taken but in no event for longer than 48 hours. If the deposition be not taken within 48 hours, the witness shall be discharged.

(c) Notice of Taking

The party at whose instance a deposition is to be taken shall give every other 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 notice is served, the court for cause shown may extend or shorten the time.

(d) **Deposition Taken Forthwith**

If the subpoenaed deponent appears before the judge who ordered his deposition taken and is willing to testify immediately, the judge forthwith shall:

(1) procure the presence of the prosecuting attorney or one of his deputies,

(2) procure the presence of each defendant and his counsel,

(3) take the deposition, and

(4) upon completion of the deposition, discharge the witness.

If any defendant is without counsel or his attorney fails to attend, the court shall advise him of his right and, unless he elects to proceed without counsel, shall assign counsel to represent him at that hearing only.

(e) **Certification and Filing**

The deposition shall be taken and transcribed by the court reporter or by any stenographer appointed by the court for that purpose, and upon completion shall be lodged with the clerk of the court. It need not be signed by the witness.

(f) **Use**

At the trial or any hearing a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if:

(1) the witness is dead, or

(2) the witness is unable to attend or testify because of sickness or infirmity, or

(3) the party offering the deposition has been unable to procure the witness' attendance by subpoena, or

(4) the witness is out of the state, his presence cannot be secured by subpoena or other lawful means, and his absence was not procured by the party offering the deposition.

A deposition may also be used to contradict or impeach an adverse party or the offering party's own hostile witness if surprise is shown. If a party offers in evidence only a part of a deposition, any adverse party may require him to offer any other part or parts relevant to the part offered. In addition any party may offer other parts.

(g) **Copy of Deposition to Defendant**

If the deposition is taken at the instance of the State, a transcribed copy of it shall be furnished without cost to the defendant promptly upon his request.

RULE 16. DISCOVERY AND INSPECTION

(a) **By Defendant**

Upon the motion of a defendant at any time after the filing of the indictment or information, the court may order the prosecuting attorney to permit the defendant to inspect and copy or photograph designated books, papers, documents, photographs or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

(b) **Witness' Statements**

After a witness called by the State has testified on direct examination, the court shall on motion of the defendant order the prosecuting attorney to produce any statement of the witness in the possession of the prosecuting attorney or under his control which relates to the subject matter to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the witness' testimony, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) **Irrelevant Matters**

If the State claims that any statement ordered to be produced under this rule contains matter which does not relate to the subject matter of the witness' testimony, the court shall order the State to deliver the statement for the court's inspection in chambers. Upon such delivery the court shall excise the portions of the statement which do not relate to the subject matter of the witness' testimony, then direct delivery of the statement to the defendant for his use. If pursuant to such procedure any portion of the statement is withheld from the defendant and the de-

fendant objects to such withholding, and the trial is continued to an adjudication of the defendant's guilt, the entire text of the statement shall be preserved by the State and, in the event the defendant seeks review, it shall be made available to the reviewing court for the purpose of determining the correctness of the trial judge's ruling. Whenever any statement is delivered to a defendant pursuant to this rule, the court in its discretion, upon application of the defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the defendant's examination of the statement and his preparation for its use in the trial. If necessary to preserve the original statement, a photographic copy shall be made and the excisions made thereon.

(d) **Statement Defined**

The term "statement" as used in subsections (b) and (c) of this section in relation to any witness called by the State means:

(1) a written statement made by such witness and signed or otherwise adopted or approved by him;

(2) a mechanical, electrical, or other recording, or a transcription thereof, which is a recital of an oral statement made by such witness; or

(3) stenographic or written statements or notes which are in substance recitals of an oral statement made by such witness and which were reduced to writing contemporaneously with the making of such oral statement.

RULE 17. SUBPOENA

(a) **For Attendance of Witnesses — Form — Issuance**

A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, 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 clerk 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) **Indigent Defendants**

The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant. The court may require the motion or request to be supported by affidavit in which the defendant shall state the name and address of each witness, and shall show that the evidence of the witness is material to the defense, that the defendant cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness. If the court or judge orders the subpoena to be issued, the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the State.

(c) **For Production of Documentary Evidence and of Objects.**

Upon order of the court to be issued *ex parte* a subpoena may also command the person to whom it is directed to produce the books, papers, documents, photographs 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, photographs 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, photographs or objects or portions thereof to be inspected by the parties and their attorneys.

(d) **Service**

A subpoena may be served by the sheriff, by his deputy 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 and unless otherwise ordered by the court by tendering to those residing outside the county of trial the fee for one day's attendance and the mileage allowed by law.

(e) **Place of Service**

(1) **In Colorado.** A subpoena requiring the attendance of a witness at a hearing or trial may be served anywhere within Colorado.

(2) **Witness from Another State.** Service on a witness outside this State shall be made only as provided by law.

(f) **For Taking Deposition — Issuance**

A court order to take a deposition authorizes the issuance by the clerk of the court of subpoenas for the persons named or described in the order.

(g) **Contempt**

Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

V. VENUE

RULE 18. COUNTY

(a) **One County**

Except as otherwise permitted by the constitution, by statute, or by these rules, the prosecution shall be had in the county in which the offense was committed, unless the defendant waives this right either expressly or by failure to make timely objection to trial in a county other than the one in which the offense was committed.

(b) **Two counties**

When an offense is committed on a county line, the trial may be held in either of the counties separated by that line. If at the time any offense is committed, the victim or injured property is in one county but the alleged offender is in another county, the trial may be had in either county.

RULE 19. NO COLORADO RULE

RULE 20. NO COLORADO RULE

RULE 21. CHANGE OF VENUE OR JUDGE

(a) **Prejudice, Judicial Incompetency or Expedition**

(1) **For Prejudice in the County.** When any defendant whose case is pending in a court of record fears that he will not receive a fair and impartial trial in that court because the in-

habitants of that county are prejudiced against him, the court upon his motion may award a change of venue to some other court of competent jurisdiction in some other convenient county to which there is no valid objection. Whether such change shall be granted is a question of fact to be determined by the court in its discretion.

(2) **When Judge Deemed Incompetent.** A of a court of record shall be incompetent to hear or try a case if:

(i) he is related to the defendant or to any attorney of record or attorney otherwise engaged in the case;

(ii) the offense charged is alleged to have been committed against the person or property of the judge or of some person related to him: or

(iii) he has been of counsel in the case or is in any way interested or prejudiced.

Prejudice of the judge must be shown by the affidavits of at least two credible persons not related to the defendant. If the motion is sufficient in form and the allegations are set forth as facts, the judge must enter an order disqualifying himself. If the parties agree on another judge to hear the case, and if that judge is available, the disqualified judge shall call in the judge so chosen to hear the case. If within ten days after disqualification the parties have not agreed on an available substitute judge, the disqualified judge shall certify the need for a judge to the chief justice of the supreme court who shall assign a judge to hear the matter. The term "related," when used in this rule, means related within the third degree by blood, adoption or marriage.

(3) **To Expedite Trial.** For the purpose of securing a speedy trial, the court, in its discretion, may allow the venue to be changed from one county to another upon the defendant's motion without any other cause being assigned. In such a case the court to which the prosecution is removed shall have complete jurisdiction and may proceed to trial and judgment in the same manner as if the prosecution had originated in that court.

(b) **Offense Committed in Two or More Counties**

The court upon motion of the defendant shall transfer the proceeding as to him to another county if it appears that the offense was committed in more than one county and if the court is satisfied that in the interest of justice the proceeding should be transferred to another county in which it is triable.

(c) **Proceedings in Transfer**

(1) **Motion for Change.** An application for a change of venue shall be by motion verified by the affidavit of the defendant, and supported by the affidavits of at least two reputable citizens of the county who are not related to the defendant. Reasonable notice of such motion shall be given to the prosecuting attorney. When such motion is filed, the prosecuting attorney, within such time as the court shall direct, may file counter affidavits controverting the matters alleged in the defendant's motion and supporting affidavits. The defendant, in turn, may be allowed to file rebutting affidavits. The motion shall thereupon be granted or refused by the court upon consideration of the motion and all such affidavits.

(2) **Time and Effect of Motions.** A motion for change of venue shall not be granted after the first term at which it might have been heard unless the grounds have arisen subsequent to that term. After a motion for change of venue has been denied, the applicant may renew his motion at a subsequent term of the court where the case is pending if since denial of his last venue motion he has learned of new grounds for change of venue. The renewed motion may assign the grounds set out in the prior motion in addition to the newly discovered facts. All questions concerning the regularity of the proceedings in obtaining changes of venue or the right of the court to which the change is made to try the case and execute the judgment, shall be considered waived if not raised before trial.

(3) **Order of Change.** Every order for a change of venue, if made in term, shall be entered by the clerk on the court records. If made by a judge in vacation, the order shall be in writing, signed by the judge, and filed by the clerk with the motion as a part of the record in the case.

(4) **Bail Bond.** When an order for a change of venue is made, the defendant, if not in custody, shall enter into a bond, with sufficient sureties, for his appearance to answer the charge at the next term of the court to which the case is removed and not to depart that jurisdiction without the court's leave. Such bond may be taken by the court making the order, or by any court or officer authorized by law to let to bail after indictment or information filed. When bond is given the papers shall be filed with the clerk of the court where the proceeding is pending. No order for the removal of a case shall be effectual in the case of any defendant not in custody, unless a bond, taken as directed, be entered into or filed with the clerk thereof within such time as the court may direct.

(5) **Disposition of Confined Defendant.** When the defendant is in custody, the court shall order the sheriff, or other officer having custody of the defendant, to remove him not less than three days before trial to the jail of the county to which the venue is changed, and there deliver him, together with the warrant under which he is held, to the jailer. The sheriff or other officer shall indorse on the warrant of commitment the reason for the change of custody, and deliver the warrant, with the prisoner, to the jailer of the proper county, who shall give the sheriff or other officer a receipt and keep the prisoner in the same manner as if he had originally been committed to his custody.

(6) **Transcript of Record.** When a change of venue is granted, the clerk of the court from which the change is granted shall immediately make a full transcript of the record and proceedings in the case, and of the motion and order for the change of venue, and shall transmit the same, together with all papers filed in the case, including the indictment or information and bonds of the defendant and of all witnesses, to the proper court. When the change is granted to one or more but not all of several defendants, a certified copy of the indictment or information, and of each other paper in the case, shall be transmitted to the court to which the change of venue is ordered. Such certified copies shall stand as the originals, and the defendant shall be tried upon them. The tran-

script and papers may be transmitted by mail, or in any other way the court may direct. The clerk of the court to which the venue is changed shall file the transcript and papers transmitted to him, and docket the case; and the case shall proceed before and after judgment, as if it had originated in that court.

(7) **Imprisonment.** When after a change of venue the defendant is convicted and sentenced to imprisonment in the county jail, the sheriff shall transport him at once to the county where the crime was committed if that county has a jail or other place of confinement.

As amended December 20, 1962, effective January 1, 1963.

RULE 22. TIME OF MOTION TO TRANSFER

A motion for a change of venue or for a change of judge under these rules may be made at or before arraignment or at such other time as the court or these rules may prescribe.

VI. TRIAL

RULE 23. TRIAL BY JURY OR BY THE COURT

(a) **Trial by Jury**

Cases required to be tried by jury shall be so tried, but where capital punishment is not involved the defendant may, in writing, waive a jury trial, in which event the court shall not impanel a jury.

(b) **Jury Less than Twelve**

Defendants in all criminal cases shall have a right to a trial by jury not to exceed twelve in number. If no capital offense is involved, the parties at any time before verdict may stipulate in writing with court approval that the jury shall consist of any number less than twelve.

(c) **Trial Without a Jury**

In a case tried without a jury the court shall make a general finding and in addition on request shall make findings of fact and conclusions of law.

RULE 24. TRIAL JURORS

(a) **Challenges for Cause**

(1) **Examination.** The defendant or his attorney and the prosecuting attorney shall conduct the examination of prospective jurors. The court may conduct additional examination. If in the opinion of the court the examination by the defendant, his attorney or the prosecuting attorney is unduly repetitious, irrelevant, unreasonably lengthy, abusive or otherwise improper, the court may limit such examination.

(2) **Causes for Challenge.** Challenges for cause may be taken on one or more of the following grounds:

(i) absence of any qualification prescribed by statute to render a person competent as a juror;

(ii) relationship within the third degree, by blood, adoption or marriage, to a defendant or to any attorney of record or attorney engaged in the trial of the case;

(iii) standing in the relation of guardian and ward, employer and employee, or principal and agent to, or being a member of the family of, or a partner in business with, or surety on any bond or obligation for, any defendant;

(iv) having served as a juror or been a witness in a previous trial against a defendant for the same transaction, or having served as a juror in a Colorado court of record at any prior term within the preceding year;

(v) interest of the juror in the outcome of the prosecution, or in the main question involved, except the interest of the juror as a citizen of a municipal corporation, state, or nation; or

(vi) the existence of a state of mind in the juror evincing enmity or bias toward the defendant or the State; however, no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that he will render an impartial verdict accord-

ing to the law and the evidence submitted to the jury at the trial.

(3) **Challenge to Array.** No array or panel of any petit jury shall be quashed, nor shall any verdict in any case be set aside or averted, by reason of the fact that the jury commissioners or county commissioners have returned such jury or any of them in any informal or irregular manner, if in the opinion of the court the irregularity is unimportant and insufficient to vitiate the return of such jury. All issues of fact arising on any challenge to the array shall be tried by the court.

(4) **Trial of Challenges for Cause.** If either party desires to introduce evidence of the incompetency, disqualification or prejudice of any juror selected or called for the trial who upon the voir dire examination appears to be qualified, competent, and unprejudiced, such evidence shall be heard, and the competency of such juror shall be determined, by the court out of the presence of the other jurors.

(b) **Peremptory Challenges**

(1) **Number.** In capital cases the State and the defendant, when there is but one defendant, shall each be entitled to fifteen peremptory challenges; in all other cases where the punishment may be by imprisonment in the penitentiary, to ten peremptory challenges; and in all other cases, to three peremptory challenges. If there is more than one defendant, each side shall be entitled to an additional three peremptory challenges for every defendant after the first in capital cases, but not exceeding thirty peremptory challenges to each side; in all other cases, where the punishment may be by imprisonment in the penitentiary, to two additional peremptory challenges for every defendant after the first, not exceeding twenty peremptory challenges to each side; and in all other cases to one additional peremptory challenge for every defendant after the first, not exceeding ten peremptory challenges to each side. In any case where there are multiple defendants, every peremptory challenge shall be made and considered as the joint peremptory challenge of all defendants. In case of the consolidation of any indictments or informations for trial, such

consolidated cases shall be considered, for all purposes of exercising peremptory challenges, as though the defendants had been joined in the same indictment or information.

(2) **Manner of Exercise.** Peremptory challenges shall be exercised orally by counsel, alternately, the first challenge to be exercised by the State. A prospective juror so challenged shall be excused, and the clerk shall thereupon call another juror from the panel who shall take the place of the juror excused and be sworn and examined as other jurors. Counsel announcing that he desires to waive the exercise of further peremptory challenges as to those jurors then in the box may thereafter exercise peremptory challenges only as to jurors subsequently called into the box without, however, reducing the total number of peremptory challenges available to either side.

(c) **Alternate Jurors**

The court may direct that not more than two jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged at the time the jury retires to consider its verdict. When alternate jurors are impanelled, each side is entitled to one peremptory challenge in addition to those otherwise allowed by law.

(d) **Custody of Jury**

Unless otherwise ordered by the court, jurors shall be kept in the bailiff's custody during trial recesses. In capital cases, however, jurors shall remain in the bailiff's custody during all recesses from the time they enter into and remain in the jury box as prospective jurors until excused by the court.

RULE 25. DISABILITY OF JUDGE

If by reason of absence from the district, death, sickness or other disability, the judge before whom the defendant was tried is unable to perform the duties to be performed by the court after a verdict or finding, any other judge regularly sitting in or assigned to the court may perform those duties. But if the substitute judge is satisfied that he cannot perform those duties because he did not preside at the trial, or for any other reason, he may, in his discretion, grant a new trial.

RULE 26. NO COLORADO RULE

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. (See Rule 44, Colo. R. Civ. P.)

RULE 28. NO COLORADO RULE

RULE 29. MOTION FOR ACQUITTAL

(a) **Motion for Judgment of Acquittal**

Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. 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 indictment or information after the evidence on 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 State's evidence is not granted, the defendant may offer evidence without having reserved the right.

(b) **Reservation of Decision on Motion**

If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within ten days after the jury is discharged or within such additional time as the court may fix during said ten-day period, and it may include in the alternative a motion for a new trial. If a verdict of guilty is returned, the court may,

on such motion, set aside the verdict and order a new trial, or enter judgment of acquittal. If no verdict is returned, the court may order a new trial or enter judgment of acquittal.

RULE 30. INSTRUCTIONS

A party who desires instructions shall tender his proposed instructions to the court in duplicate, the original being unsigned. All instructions shall be submitted to the parties, who shall make all objections thereto before they are given to the jury. Only the grounds so specified shall be considered on motion for a new trial or on review. Before argument the court shall read its instructions to the jury, but shall not comment upon the evidence. Such instructions may be read to the jury and commented upon by counsel during the argument, and they shall be taken by the jury when it retires. All instructions offered by the parties, or given by the court, shall be filed with the clerk and, with the indorsement thereon indicating the action of the court, shall be taken as a part of the record of the case.

RULE 31. VERDICT

(a) **Submission and Finding**

(1) **Forms of Verdict.** Before the jury retires the court shall submit to it written forms of verdict for its consideration.

(2) **Retirement of Jury.** When the jury retires to consider its verdict, the bailiff shall be sworn or affirmed to conduct the jury to some private and convenient place, and to the best of his ability to keep the jurors together until they have agreed upon a verdict. The bailiff shall not speak to any juror about the case except to ask if a verdict has been reached, nor shall he allow others to speak to the jurors. When they have agreed upon a verdict, the bailiff shall return the jury into court. However, in any case except where the punishment may be death or life imprisonment, the court, upon stipulation of counsel for all parties, may order that if the jury should agree upon a verdict during the recess or adjournment of court for the day, it shall seal its verdict, to be retained by the foreman and delivered by the jury to the judge at the opening of the court, and that thereupon the jury may separate, to meet in the jury box at the opening of court. Such a sealed verdict may be received by the court as the lawful verdict of the jury.

(3) **Return.** The verdict shall be unanimous and signed by the foreman. It shall be returned by the jury to the judge in open court.

(b) **Several Defendants**

If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(c) **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.

(d) **Poll of Jury**

When a verdict is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

VII. JUDGMENT

RULE 32. SENTENCE AND JUDGMENT

(a) **Presentence Investigation**

(1) **When Made.** In any felony case where the court has discretion as to the punishment and on court order in any misdemeanor case the court probation officer shall make a presentence investigation and written report to the court before the imposition of sentence or granting of probation.

(2) **Report.** The report of the presentence investigation shall state, in addition to any other information required by the court, the defendant's prior criminal record and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence, in granting probation, or in correctional treatment.

(b) **Sentence**

Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or, if the offense is not punishable by death or life imprisonment, may continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment. The State also shall be given an opportunity to be heard on any matter material to the imposition of sentence.

(c) **Judgment**

A judgment of conviction shall consist of a recital of the plea, the verdict or findings, the sentence, and costs if any are awarded against the defendant. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. In either event the judgment shall be signed by the judge and entered by the clerk and as thus entered it shall constitute the final judgment.

(d) **Costs**

When a judgment for costs is entered in the criminal docket provided for in Rule 55, execution may be had thereon as in civil actions.

(e) **Withdrawal of Plea of Guilty**

A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended.

(f) **Probation**

After conviction of an offense, the defendant may be placed on probation as provided by law.

As amended December 20, 1962, effective January 1, 1963

RULE 33. NEW TRIAL

The court may grant a defendant a new trial if required in the interest of justice. The motion for a new trial shall be in writing and shall point out with particularity the defects and errors complained of. A motion based upon newly discovered evidence or jury misconduct shall be supported by affidavits. A motion for a new trial

based upon newly discovered evidence shall be filed as soon after entry of judgment as the facts supporting it become known to the defendant, but if a review is pending the court may grant the motion only on remand of the case. A motion for a new trial other than on the ground of newly discovered evidence shall be filed within ten days after verdict or finding of guilt or within such additional time as the court may fix during the ten-day period.

RULE 34. ARREST OF JUDGMENT

The court shall arrest judgment if the indictment 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 ten days after verdict or finding of guilt or within such further time as the court may fix during the ten-day period. A motion in arrest of judgment may be set forth alternatively as a part of a motion for new trial.

RULE 35. CORRECTION OR VACATION OF SENTENCE

(a) Correction of Illegal Sentence

The court may correct an illegal sentence at any time. It may, on motion or of its own motion, correct a sentence not conforming to the applicable statutes, either by amending the sentence and record thereof, or, when circumstances require, by vacating the sentence previously imposed and resentencing the defendant.

(b) Post Conviction Remedy for Prisoner in Custody

A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the constitution or laws of Colorado or of the United States, or that the court imposing the sentence was without jurisdiction to do so, or that the sentence was in excess of the maximum sentence authorized by law, or that the statute for the violation of which the sentence was imposed is unconstitutional or was repealed before the prisoner contravened its provisions, may file a motion at any time in the court which imposed such sentence to vacate, set aside or correct it. Unless the motion and the files and record of the case show to the satisfaction of the court that the prisoner is not entitled to relief, the court shall cause notice thereof to be served on the prosecuting attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with re-

spect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was illegal, or that the statute upon which the sentence was based is unconstitutional or was repealed before the prisoner contravened its provisions, or that there was a violation of the prisoner's constitutional rights of a sort not effectively subject to review on writ of error either because the violation itself operated to prevent review or because the violation through no fault of the prisoner did not appear upon the record so as to be subject to review, the court shall vacate and set aside the judgment, and shall discharge the prisoner or resentence him or grant a new trial as may appear appropriate. The court may stay its order for discharge of the prisoner pending Supreme Court review of the order. If the court orders a new trial, the transcript of testimony given at the trial which resulted in the vacated sentence by witnesses who have since died or otherwise become unavailable may be used at the new trial. The court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner. The order of the trial court granting or denying the motion is a final order reviewable on writ of error.

(c) **Credit For Time Already Served**

Whenever the court resentences a defendant under this rule, it shall order that the new sentence be operative as of the time of the defendant's confinement under the original sentence, in which case any period of confinement under the terms of the vacated sentence shall be credited to the defendant as having been served under the new sentence so imposed.

As amended December 20, 1962, effective January 1, 1963.

RULE 36. CLERICAL MISTAKES

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.

VIII. SUPREME COURT PROCEEDINGS

RULE 37. WRIT OF ERROR

(a) **When Taken**

A writ of error shall lie from the Supreme Court to a final judgment of any court of record in any criminal proceeding.

(b) **Conditions of Review**

A writ of error shall not issue to a final judgment against a defendant unless a motion for a new trial or in arrest of judgment has been filed as provided by Rules 33 and 34 and a clerk's certificate to that effect has been filed with the Supreme Court. Only questions presented in such motions will be considered on review, except that plain error or defects affecting substantial rights may be noted although they were not brought to the attention of the trial court.

(c) **Judgments and Orders — When Final**

(1) For the purpose of these rules, except as may otherwise be provided herein, a judgment shall be final when it terminates the litigation on the merits.

(2) For the purpose of review on behalf of the State, any order finally disposing of the case shall be a final order.

(3) An order deferring imposition of sentence or staying execution of sentence entered upon and granting an application for probation, shall give finality to the judgment for the purpose of seeking review as provided in these rules.

(d) **When Writ of Error Will Not Lie**

No writ of error on behalf of the defendant shall lie to a judgment based upon a plea of guilty or nolo contendere, or to an order based upon a finding of insanity after plea of not guilty by reason of insanity.

RULE 38. STAY OF EXECUTION AND RELIEF PENDING REVIEW

(a) **Stay of Execution**

(1) **Death.** A sentence of death shall be stayed upon the issuance of a writ of error.

(2) **Imprisonment.** A sentence of imprisonment shall be stayed if a writ of error is issued and the defendant elects not to commence service or is admitted to bail. The sentencing court shall on written motion of a defendant for a stay and stating that he intends to seek review on writ of error, stay a sentence of imprisonment.

(3) **Fine.** A sentence to pay a fine or a fine and costs may be stayed by the trial court upon such terms as the court deems proper if a writ of error issues. The court may require the defendant 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 may make any appropriate order to restrain the defendant from dissipating his assets.

(4) **Probation.** An order placing the defendant on probation shall be stayed when a writ of error issues.

(b) **Bail**

Admission to bail upon writ of error shall be as provided in these rules.

(c) **Application for Relief Pending Review**

If an application is made to the Supreme Court, or a Justice thereof, for bail pending writ of error or for an extension of time for filing the record or for any other relief which might have been granted by the trial court, the application shall be upon notice and shall show that application to the court below or a judge thereof is not practicable or that application has been made and denied, with the reasons given for the denial, or that the lower court action on the application did not afford the relief to which the applicant considers himself entitled.

RULE 39. PROCEDURE AND SUPERVISION

(a) **Procedure**

The procedure to obtain a writ of error shall be under the practice now existing until altered by the adoption of different procedures by the Supreme Court. After a defendant has docketed his case in the Supreme Court all service of process, notice or other pleadings or instruments shall be upon the At-

torney General as attorney for the People of the State of Colorado.

(b) **Motion to Dismiss**

The Supreme Court, at any time after docketing the matter, may entertain a motion to dismiss the writ of error.

(c) **Rules and Practice**

Abstracts of the record and assignments of error are neither required nor permitted. Except as otherwise provided in these rules, the practice and procedure governing the preparation and form of records and briefs or other documents and pleadings and their filing in the Supreme Court shall be as prescribed by the Colorado Rules of Civil Procedure.

(d) **Time Limitations**

No writ of error shall be issued after six months from the date of a final judgment or order in a criminal case. The time for doing such other things as thereafter may be required in prosecuting the writ shall be as provided in the rules of civil procedure.

IX. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

RULE 40. NO COLORADO RULE

RULE 41. SEARCH AND SEIZURE ON WARRANT

(a) **Authority to Issue Warrant**

A search warrant authorized by this rule may be issued by any judge of the Supreme, District, County, Superior or Justice of the Peace Court.

(b) **Grounds for Issuance**

A search warrant may be issued under this rule to search for and seize any property which:

(1) is stolen or embezzled, or

(2) is designed or intended for use or which is or has been used as a means of committing a criminal offense or the possession of which is illegal, or

(3) would be material evidence in a subsequent criminal prosecution.

(c) **Issuance and Contents**

A search warrant shall issue only on affidavit sworn to or affirmed before the judge and establishing the grounds for issuing the warrant. If the judge is satisfied that grounds for the application exist, or that there is probable cause to believe that they exist, he shall issue a search warrant identifying the property and naming or describing the person or place to be searched. The search warrant shall be directed to any officer authorized by law to execute it in the county wherein the property is located. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the judge to whom it shall be returned.

(d) **Execution and Return with Inventory**

The warrant may be executed and returned only within ten days after its date. The 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 the 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 officer. The judge upon request shall 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 and to Suppress Evidence**

A person aggrieved by an unlawful search and seizure may move the district court for the county where the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that:

(1) the property was illegally seized without warrant, or

(2) the warrant is insufficient on its face, or

(3) the property seized is not that described in the warrant, or

(4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or

(5) the warrant was illegally executed.

The judge 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 unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the court where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

(f) **Return of Papers to Clerk**

The judge who has issued a search warrant 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 the district court for the county in which the property was seized.

(g) **Scope and Definition**

This rule does not modify any statute, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers, photographs and any other tangible objects.

RULE 42. NO COLORADO RULE

RULE 43. NO COLORADO RULE

RULE 44. ASSIGNMENT OF COUNSEL

If the defendant appears in court without counsel, the court shall advise him of his right to counsel. In any felony case, if upon the defendant's affidavit or sworn testimony and other investigation the court finds that the defendant is financially unable to obtain counsel, an attorney shall be assigned to represent him at every stage of the trial court proceedings. In any misdemeanor case, upon such a showing of indigency, an attorney may be assigned to represent the defendant at every stage of the trial court proceedings.

As amended December 20, 1962, effective January 1, 1963.

RULE 45. TIME

(a) **Computation**

In computing any period of time the day of the act or event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday. When a period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

(b) **Enlargement**

When an act is required or allowed to be performed 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 application therefor is made before expiration of the period originally prescribed or of that period as extended by a previous order, or,

(2) upon motion permit the act to be done after expiration of the specified period if the failure to act on time was the result of excusable neglect.

(c) **Unaffected by Expiration of Term**

The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court.

(d) **For Motions — Affidavits**

A written motion, other than one which may be heard *ex parte*, and notice of the hearing thereof, shall be served not later than five days before the time specified for the hearing unless a different period is fixed by rule or order of the court. For cause shown such an order may be made on *ex parte* application. When a motion is supported by affidavit, the affidavit shall be served with the motion, and opposing affidavits may be served not less than one day before the hearing unless the court permits them to be served at a later time

(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 him and the notice or other paper is served upon him by mail, three days shall be added to the prescribed period.

RULE 46. BAIL

(a) **Right to Bail**

(1) **Before Conviction.** All persons shall be bailable by sufficient sureties except for capital offenses when the evidence of guilt is strong.

(2) **After Conviction.** Except when a person has been convicted of a capital offense, bail may be allowed pending determination of a motion for a new trial or motion in arrest of judgment, or during any stay of execution, or pending review by a higher court unless it appears that the review is sought on frivolous grounds or is taken for delay. Pending review by a higher court, bail may be allowed by the trial judge, or by any judge of a higher court, to run until final termination of the proceedings in all courts. Pending review by the Supreme Court, bail may be allowed by the trial judge or by the Supreme Court or a justice thereof. Any court or any judge or justice granting bail may at any time revoke the order admitting the defendant to bail.

(b) **Amount**

A defendant shall be admitted to bail in an amount which in the judgment of the court, judge or justice will insure the defendant's presence.

(c) **Form and Place of Deposit**

A person permitted to give bail shall execute a bond for his appearance in court on a designated day, or on the first day of the next term of court and from day to day thereafter, as the court may deem appropriate. One or more sureties may be required or the defendant may furnish cash security, or, in the discretion of the court, no security or surety need by required.

(d) **Justification of Sureties**

Every surety, except a corporate surety which is licensed as provided by law, shall justify by affidavit and may be required to describe in the affidavit the property by which he proposes to justify and the encumbrances on it, the number and amount of other bonds and undertakings for bail entered into by him and remaining undischarged and all his other liabilities. He shall provide such other evidence of financial responsibility as the clerk, judge or other person authorized to admit to bail may require. No bond shall be approved unless the surety or sureties appear, in the opinion of the clerk, judge or other person authorized to admit to bail, to be financially responsible in at least the amount of the bond. No lienesed attorney at law shall be a surety on any bond without consent of the judge of the court where the case is pending.

(e) **Forfeiture**

(1) **Declaration.** If there is a breach of 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 Forfeiture Not Set Aside.** By entering into a bond each obligor, whether he is the principal or a surety, submits to the jurisdiction of the court. His liability under the bond may be enforced, without the necessity of an independent action, as follows: The court shall order the issuance of a citation directed to the obligor to show cause, if any there be, why judgment should not be entered against him forthwith and execution issue there-

on. Said citation may be served personally or by certified mail upon the obligor directed to the address given in the bond. Hearing on the citation shall be held not less than 20 days after service. The defendant's attorney and the prosecuting attorney shall be given notice of the hearing. At the conclusion of the hearing, the court may enter a judgment against the obligor, and execution shall issue thereon as on other judgments.

(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. If a bond forfeiture has been paid into the general fund of the county, the commissioners thereof shall be notified of any application for remission.

(5) **Meaning of "Court".** Wherever used in subdivision (e) the word "court" means the court in which the principal has undertaken by his bond to appear, except that, where he has undertaken to appear in the justice of the peace court, the word "court" means the court to which the principal's breach of condition of the bond may be certified as provided by law.

(f) **Exoneration.** The obligor shall be exonerated as follows:

(1) When the condition of the bond has been satisfied; or

(2) When the amount of the forfeiture has been paid; or

(3) Upon surrender of the defendant into custody before judgment upon an order to show cause, upon payment of all costs occasioned thereby. A surety may seize and surrender the defendant to the sheriff of the county wherein the bond shall be taken, and it shall be the duty of such sheriff, on such surrender and delivery to him of a certified copy of the bond by which the surety is bound, to take such person into custody, and by writing acknowledge such surrender.

(g) **Continuation of Bonds.** In the discretion of the trial court and with the consent of the surety or sureties, the same bond may be con-

tinued until the final disposition of the case in the trial court or pending disposition of the case on review.

As amended December 20, 1962, effective January 1, 1963.

RULE 47. MOTIONS

An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit.

RULE 48. DISMISSAL

(a) **By the State**

No criminal case pending in any court shall be dismissed or a nolle prosequi therein entered by any prosecuting attorney or his deputy, unless upon a motion in open court, and with the court's consent and approval. Such a motion shall be supported or accompanied by a written statement concisely stating the reasons for the action. The statement shall be filed with the record of the particular case and be open to public inspection. Such a dismissal may not be filed during the trial without the defendant's consent

(b) **By the Court**

If after the filing of a complaint there is unnecessary delay in finding an indictment or filing an information against a defendant who has been held to answer in a court of record, the court may dismiss the prosecution. If the trial of a defendant is delayed more than one year after the finding of the indictment or filing of the information, unless the delay is occasioned by the action or request of the defendant, the court shall dismiss the indictment or information; and the defendant shall not thereafter be tried for the same offense.

As amended December 20, 1962, effective January 1, 1963.

RULE 49. SERVICE AND FILING OF PAPERS

(a) **Service — When Required**

Written motions other than those which are heard *ex parte*, written notices and similar papers shall be served upon the adverse parties.

(b) **Service — How Made**

Whenever under these rules or by court order service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided for civil actions unless otherwise ordered by the court.

(c) **Notice of Orders**

Immediately upon entry of any order made out of the presence of the parties after the information or indictment is filed, the clerk shall mail to each party affected a notice of the order and shall note the mailing in the docket.

As amended December 20, 1961, effective January 1, 1963.

RULE 50. CALENDARS

The courts of record may provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings.

RULE 51. EXCEPTIONS UNNECESSARY

Exceptions to rulings or orders of the court are unnecessary. For all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the court ruling or order is made or sought, makes known to the court the action which he desires the court to take or his objection to the court's action 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 him.

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.

RULE 53. REGULATION OF CONDUCT IN THE COURTROOM

Conduct in the courtroom pertaining to the publication of judicial proceedings shall conform to Canon 35 of the Canons of Judicial Ethics, as adopted by the Supreme Court of Colorado.

RULE 54. APPLICATION AND EXCEPTION

(a) **Courts**

These rules apply to all criminal proceedings in all courts of record and in the Supreme Court of the State of Colorado and before justices of the peace as provided herein.

(b) **Proceedings**

(1) **Peace Bonds.** These rules do not alter the power of judges to hold for security of the peace and for good behavior as provided by law, but in such cases the procedure shall conform to these rules so far as they are applicable.

(2) **Other Proceedings.** These rules are not applicable to extradition and rendition of fugitives; forfeiture of property for violation of a statute or the collection of fines and penalties; nor to any other special criminal proceeding where a statutory procedure inconsistent with these rules is provided.

(c) **Application of Terms**

"Law" includes statutes and judicial decisions. "Civil action" refers to a civil action in a court of record. "Oath" includes affirmations. "Prosecuting attorney" means the Attorney General, a district attorney or his assistant or deputy or special prosecutor. The words "demurrer", "motion to quash", "plea in abatement", "plea in bar", and "special plea in bar", or words to the same effect in any statute, shall be construed to mean the motion raising a defense or objection provided in Rule 12.

(d) **Numbering — Meaning of "No Colorado Rule"**

Insofar as practicable, the order and numbering of these rules follows that of the Federal Rules of Criminal Procedure. In some instances, usually because of differences in judicial systems or of jurisdiction, there is no Colorado rule corresponding in number with an existing federal rule. In these in-

stances, to maintain the general numbering scheme, the phrase "No Colorado Rule" appears opposite the number for which there is a federal rule but not a Colorado rule. The phrase "No Colorado Rule" means only that there is no rule included *in these rules* covering the subject of the federal rule bearing that number. The phrase does not imply either that there is or that there is not constitutional, statutory or case law in Colorado covering the subject of the corresponding federal rule.

RULE 55. RECORDS

(a) Criminal Docket

The clerk of each court of record shall keep a book known as the criminal docket and shall enter there each criminal action to which these rules are applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket where the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all costs, appearances, orders, verdicts and judgments shall be noted chronologically in the criminal docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. When deemed proper by the court the criminal docket may be kept in the same book with the civil docket provided the two are recorded in separate parts of the book.

(b) Criminal Record

The clerk shall keep a book or microfilm record for criminal actions and shall record there, in the sequence of their making, exact copies of the indictment or information, minutes of the proceedings showing the appearances and pleas, judgments and orders of the court and mittimuses. When deemed proper by the court the criminal record may be kept in the same book with the civil record provided the criminal and civil actions and indices are recorded in separate parts of the book.

(c) Indices

Clerks shall keep suitable indices of all records under the direction of the court.

(d) **Files**

All papers and process filed in a case shall be filed in a separate file folder.

As amended December 20, 1962, effective January 1, 1963.

RULE 56. COURTS AND CLERKS

All courts of record 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 clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Sundays, legal holidays and such other days as the courthouse of the particular court shall be closed as provided by federal or state statute.

RULE 57. RULES OF COURT

(a) **Rules of Courts of Record**

Courts of record may make rules for the conduct of criminal proceedings not inconsistent with these rules. Copies of all such rules shall be submitted to the Supreme Court for its approval before adoption and, upon their promulgation, a copy shall be furnished to the office of the Judicial Administrator to the end that all rules made as provided herein may be published promptly and that copies may be available to the public.

(b) **Procedure Not Otherwise Specified**

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

RULE 58. FORMS

See appendix of illustrative forms.

RULE 59. EFFECTIVE DATE

These rules take effect on November 1, 1961. Amendments take effect on the date indicated. They govern all proceedings in criminal actions brought after they take effect and also all further proceedings in actions then pending.

RULE 60. CITATION

These rules may be known and cited as "The Colorado Rules of Criminal Procedure", or "Colo. R. Crim. P."

Approved for Publication
May 1, 1963
By The Colorado Supreme Court