

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

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TO: Hon. Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and Procedure

FROM: W. Eugene Davis, Chair
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: Report of the Advisory Committee on Criminal Rules

DATE: May 12, 1999

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on April 22 and 23, 1999 at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. and took action on a number of proposed amendments. The draft Minutes of that meeting are attached. This report addresses matters discussed by the Committee at that meeting.

First, the Committee reconsidered proposed style amendments to Rules 1 through 9 of the Rules of Criminal Procedure.

Second, the Committee discussed proposed amendments to the following rules:

- Rule 10. Arraignment & Rule 43, Presence of Defendant.
- Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition.
- Rule 26. Taking of Testimony.
- Rule 35. Reduction of Sentence

- Rule 43. Presence of Defendant.
- Rule 49. Service and Filing of Papers.

II. Action Items

The Criminal Rules Committee has no items requiring action by the Standing Committee

III. Information Items

A. The Restyling Project

The Committee has begun restyling the Criminal Rules. As part of that effort, two subcommittees have been formed to consider separate groups of rules over the next year. The first group of rules, Rules 1 through 9, were first considered by Subcommittee A (Chaired by Judge D. Brooks Smith), using a draft submitted by the Standing Committee's Style Subcommittee. Professor Stephen Saltzburg is serving as a special consultant to that Subcommittee. Subcommittee A met in March to review the various drafts and recommendations and at the April meeting presented its recommendations. Subcommittee B (Chaired by Judge David Dowd) will be studying Rules 11 through 22. Those rules will be discussed at a specially called meeting of the Advisory Committee in Portland, Oregon on June 21 and 22, 1999.

B. Criminal Rules Pending Further Discussion

At its April 1999 meeting the Committee discussed a number of proposed amendments to other Rules of Criminal Procedure. None of them are ready for publication and comment and each of them will be on the agenda for the Committee's consideration at its Fall 1999 meeting.

1. Rules 10 (Arrestment) and 43 (Presence of Defendant) (Ability of Defendant to Waive Appearance at Arrestment).

The Committee is actively considering amendments to Rules 10 and 43 which would permit a defendant to waive an appearance at his or her arrestment. The rule would require that the waiver be in writing and with the consent of the court. In conjunction with those amendments, the Committee will also consider the possibility of amending Rules 10 and 43 to permit a defendant to waive an

appearance for entering a plea on superseding indictment. Additionally, the Committee is considering whether any provision should be made for teleconferencing of criminal proceedings. To that end, a subcommittee has been appointed to study the issue and report to the Committee. The Committee's current draft has been submitted to the Subcommittee on Style for its consideration and recommendations.

2. Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition. (Court-Ordered Examination)

The Committee has continued discussion of amendments to Rule 12.2 that would accomplish two results. First, a defendant in a capital case — who intends to introduce expert testimony on the issue of mental condition at sentencing — would be required to give notice of an intent to do so. Second, the rule would make it clear that the trial court would have the authority to order a mental examination of a defendant who had given such notice. And third, the amendment would address the issue of releasing the results of that examination to the parties. At its April 1999 meeting, the Committee considered a report from the Federal Judicial Center that compared the procedures in ten states that have procedural rules similar to those being considered by the Committee. The Committee's current draft has been submitted to the Style Subcommittee for its consideration and recommendation.

3. Rule 26. Taking of Testimony (Electronic Transmission)

The Committee has approved an amendment to Rule 26 that would parallel Civil Rule 43 regarding the taking of testimony in court through means other than oral testimony. The amendment would permit the court to take testimony by remote transmission where it is in the interests of justice to do so, the proponent establishes compelling reasons for doing so, the court establishes appropriate safeguards, and the witness is unavailable within the meaning of Rule 804(a), Federal Rules of Evidence. The current draft of this amendment has also been submitted to the Style Subcommittee for its recommendations.

4. Rule 35(b). Reduction of Sentence.

The Committee is considering an amendment to Rule 35(b) to address an issue recognized in *United States v. Orozco*, 160 F.3d 1309 (11th Cir. 1998). In that decision the court focused on the question of whether a court may grant sentence relief to a defendant who has provided information to the government

within one year of sentencing (as required by the current rule) but the information is not actually useful to the government until much later. The court concluded that the plain language of Rule 35(b) prevented any relief being granted to the defendant in that situation and recommended that Congress consider a change to the rule. The Committee will be considering possible amendments to Rule 35 to address that problem.

5. Rule 49. Service and Filing of Papers

The Committee discussed materials submitted by the other Committees on proposals to adopt a uniform rule for electronic service. Although Criminal Rule 49 incorporates civil practice regarding service of papers, and to that extent considered the most recent draft of a proposal being considered by that Committee. The Committee took note of the fact that in those courts that are using electronic service the response has been largely positive. It also recognized, however, that to date, no court is using electronic filing in criminal cases. Although there is a general consensus that electronic filing would probably work in criminal cases for some service of papers, several members noted the potential problem of how proof of service would be accomplished. The Committee will continue to monitor developments in this area.

Attachment:

Draft Minutes of April 1999 Meeting