COMMITTEE ON RULES
of
PRACTICE AND PROCEDURE
Volume II.

Report of the Advisory
Committee on Criminal Rules
Agenda Item 8
June 7-8, 2000

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 7-8, 2000

1. Opening Remarks of the Chair

   A. Report on the Judicial Conference session

   B. Supreme Court approval of proposed rule amendments

2. **ACTION** — Approval of Minutes

3. Report of the Administrative Office

   - **ACTION** — Proposal linking courts' Internet web sites containing local rules with "Federal Rulemaking" web site and encouraging courts that do not have an existing web site to post their local rules on one

4. Report of the Federal Judicial Center

5. Report of the Advisory Committee on Appellate Rules

   A. **ACTION** — Proposed amendments to Rules 4, 25, and 45 for approval to be published for comment (publication of proposed amendments to Rules 1, 5, 15, 24, 26, 27, 28, 31, 32, 41, and 44 and revision of Form 6 approved at January 2000 meeting)

   B. Minutes and other informational items

6. Report of the Advisory Committee on Bankruptcy Rules

   A. **ACTION** — Proposed amendments to Rules 1007, 2002, 3016, 3017, 3020, 9006, 9020, and 9022 and Official Form 7 for approval and transmission to the Judicial Conference

   B. **ACTION** — Proposed amendments to Rules 1004, 1004.1, 2014, 2015, 4004, 9014, and 9027 and Official Form 1 for approval to be published for comment

   C. Minutes and other informational items

7. Report of the Advisory Committee on Civil Rules

   A. **ACTION** — Proposed amendments to Rules 5, 6, 65, 77, 81, and 82, and abrogation of Copyright Rules for approval and transmission to the Judicial Conference

B. **ACTION** — Proposed amendments to Rules 54, 58, and 81(a)(2) for approval to be published for comment

C. Minutes and informational items

8. Report of the Advisory Committee on Criminal Rules

A. **ACTION** — Comprehensive "style" revision of Rules 32 through 60 for approval to be published for comment in August (publication of revised Rules 1 through 31 approved at January 2000 meeting)

B. **ACTION** — Proposed "substantive" amendments to Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43, which deal with revisions that were considered before the "style" project started, for approval to be published for comment

C. **ACTION** — Proposed amendments to Rules 1, 2, 3, 6, 8, 9, and 10 Governing Section 2254 Proceedings and Rules 2, 3, 8, 9, and 10 Governing Section 2255 Proceedings

D. Minutes and other informational items

9. Report of the Advisory Committee on Evidence Rules

10. Status Report of Subcommittee on Attorney Conduct Rules

11. Disclosure of Financial Interests

A. **ACTION** — Proposed new Civil Rule 7.1 and Criminal Rule 12.4 and amendments to Appellate Rule 26.1 for approval to be published for comment

B. Alternative language recommended by Committee of Codes of Conduct and FJC report on local rules governing financial disclosure

12. Report of Technology Subcommittee

13. Status Report of Local Rules Project

14. Comments on Proposed New Statistical System

15. Long Range Planning

16. Next Meeting: January 4-5, 2001, in Tucson, Arizona; June 14-15, 2001 (tentative dates)

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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 8, 2000**

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on January 10-11, 2000 in Orlando, Florida and on April 25-26 in New York City and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Minutes of those meetings are included at Appendix E.

II. Action Items—Summary and Recommendations.

This report includes three action items:

- Approval for publication of Criminal Rules 1 to 60 in two separate packages;
- Approval for publication of proposed changes to the Rules Governing § 2254 and § 2255 Proceedings (Habeas Rules); and

- Approval of new Rule 12.4 (financial disclosure statements) for publication and comment.

A. Publication of Restyled Criminal Rules 1-60--Summary

The Committee has been working on restyling the Rules of Criminal Procedure since 1999. Those discussions have taken place at five full Committee meetings and at a series of subcommittee meetings. In January 2000, the Standing Committee approved the publication of Criminal Rules 1 to 31, subject to some suggested editing and revisions.

This report addresses the proposed changes to Rules 32 through 60. The rules and the accompanying Committee Notes are at Appendix A. The Committee requests that the amendments to those rules be approved for public comment. The "style" package is appended as Appendix A.

B. Separate Publication of Amendments to Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43--Summary.

A number of proposed amendments were under active consideration by the Criminal Rules Committee before the restyling project was begun. In addition, during the restyling effort, the Committee identified several amendments that might be considered controversial or significant changes in current practice. The Committee believes that it would be appropriate to publish these rules —which also contain the style changes —as a separate package in order to highlight those proposed changes for the bench and the bar. Those amendments are attached as Appendix B.

C. Publication of Proposed Amendments to Rules Governing §§ 2254 and 2255 Proceedings--Summary

The Committee conducted a review of the Rules Governing §§ 2254 and 2255 Proceedings to determine if any changes were required as a result of the passage of the Antiterrorism and Effective Death Penalty Act, which amended a number of applicable federal statutes. As a result, the Committee has proposed a number of amendments to those rules and recommends that they be published separately for public comment. Those proposed amendments are attached at Appendix C.

D. Publication of Proposed Amendment to New Rule 12.4, Disclosure Statement.

The Criminal Rules Committee has proposed a new Rule 12.4 to mirror similar amendments to Appellate Rule of Procedure 26.1 and Civil Rule of Procedure 7.1, with some modifications. A copy of the proposed rule and accompanying committee note are attached at Appendix D.

III. Restyling Project—

A. Rules 1 to 60—In General

In 1998, the Committee was informed that following successful completion of the restyling of the Appellate Rules, the Style Subcommittee of the Standing Committee would prepare an initial draft of proposed style changes to the Criminal Rules, with the first installment being presented in late 1998. The Advisory Committee was formed into two separate subcommittees to review the rules as they were completed by the Style Subcommittee. In April, June, and October 1999, the Committee considered style revisions to Rules 1 through 31 and presented those rules to the Standing Committee at its January 2000 meeting in Miami.

At meetings in January and April 2000, the Advisory Committee considered the Standing Committee's proposed revisions to Rules 1-31 and proposed style changes to Rules 32-60.

In conducting the restyling project, the Committee has focused on several key points. First, the Committee has attempted to standardize key terms and phrases that appear throughout the rules.

Second, the Committee has attempted to avoid any unforeseen substantive changes and has attempted in the Committee Notes to clearly state where the Committee is making what it considers to be a change in practice.

Third, in several rules, the Committee has deleted provisions that it believed were no longer necessary or required, usually because the caselaw has evolved since the rule was initially promulgated (or last amended). Whether those constitute changes in practice is not always clear. *See* Rule 4, where the Committee has deleted the reference to whether hearsay may be used to establish probable cause.

Fourth, during the restyling effort, several rules have been completely reorganized to make them easier to read and apply. *See, e.g.*, Rules 11, 16, 32, and 32.1. In several

others, sections from one rule have been transferred to another rule. *See, e.g.*, Rules 4, 9, and 40.

Fifth, in some rules, major substantive changes have been made. Some of those changes have been under discussion for some time but were deferred pending the restyling projects. Still others were identified and included during the project. As noted, below, the Committee proposes that those Rules be published separately; one version containing proposed style and controversial amendment and the other including only the proposed style changes.

B. Proposed Separate Publication of Rules—

The Committee recommends that Standing Committee approve publication of the changes to Rules 1 to 60 in two separate packages. The purpose of separating these two packages—although somewhat duplicative—is to make it clear to the public that there are some rules that deserve special attention.

The first package—referred to as the "restyle" package, includes Rules 1 to 60. For those rules where the Committee is proposing significant substantive changes (Rules 5, 5.1, 10, 12.2, 26, 30, 35, 41, and 43), the language containing those major changes has been deleted from the "style" package. A proposed "Reporter's Note" explains to the public that additional substantive changes for that particular rule are being published simultaneously in a separate package.

The second package—referred to as the "substantive" package, consists of Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43, which all provide for significant changes in practice. This version of the package includes not only the restyled version of the rule but also the language that would effect the change in practice. The Committee Notes reflect those changes and again, a proposed Reporter's Note explains that another version of each of these rules (which includes only style changes) is being published simultaneously in a separate package. Rules, such as Rule 11, which have been completely reorganized, were not included because they did not appear to include what could be considered significant changes in substance or practice.

IV. ACTION ITEM—Restyling Project—Publication of Rules for Comment.

The following discussion focuses on the Rules that include one or more substantive changes, or changes, which the Committee believes are likely to generate some debate.

A. Proposed Amendments in Rules 1 to 31.

1. In General.

Following the Standing Committee Meeting in January, the Advisory Committee considered suggested revisions made by members of the Standing Committee, both at the meeting and in later communications. Most of those changes were accepted and incorporated into Rules 1 to 31.

The following discussion briefly addresses significant, nonstyle, changes that were made in Rules 1 to 31 following the Standing Committee meeting.

2. Rule 5. Initial Appearance.

During the process of reviewing Rules 32-60, the Committee concluded that portions of Rule 32.1 (Revoking or Modifying Probation or Supervised Release) and Rule 40 (Commitment to Another District) would be better suited for Rule 5. A subcommittee was formed and ultimately recommended that Rule 5 be expanded to cover all initial appearances, including those cases where the person has been arrested for failing to appear in another district, or for violating a term of probation or supervised release. The Rule now also deals with transfers to another district.

The version of Rule 5 presented to the Standing Committee in January 2000 included a provision for conduct video teleconferencing for initial appearances —if the defendant consents. At its meeting in April, the Advisory Committee reconsidered that proposal and concluded that it would be helpful to publish not only that provision but also an alternate provision that would permit the court to conduct such procedures, even without the defendant's consent. Thus, the substantive package version of Rule 5(f) includes alternative proposals. The Committee Note addresses the two alternatives.

Because Rule 5 contains an amendment that was being considered apart from the restyling project (video teleconferencing), the Committee has included this rule in the "substantive" package for publication.

3. Rule 10. Arraignments.

Rule 10 is being included in the "substantive" package of amendments due to the fact that it includes the proposed amendment to video teleconferencing—a proposal that had been under consideration before the restyling project began. As with Rule 5, *supra*, the version of Rule 10 presented to the Standing Committee in January 2000 included a provision for conduct video teleconferencing for arraignments—if the defendant consents. The Advisory Committee reconsidered that proposal and concluded that it would be helpful to publish not only that provision but also an alternate provision that

would permit the court to conduct such procedures, even without the defendant's consent. Thus, the substantive package version of Rule 10 includes alternative proposals.

4. Rule 24. Trial Jurors.

In the materials presented to the Standing Committee at its January 2000, meeting, the Advisory Committee proposed an amendment to Rule 24 that would have equalized the number of peremptory challenges available to the defense and the government. After further consideration, the Committee has deleted that amendment from the restyling project and has deferred consideration of that particular amendment.

5. Rule 26.

The Committee considered its proposed amendment to Rule 26 concerning remote transmission of testimony and its possible impact on Federal Rule of Evidence 804. Although the Committee has narrowed the grounds of unavailability for using such procedures—Rule 804(a)(1)-(3) seemed inapplicable—but has not taken any other action that might explicitly address the interplay in the Rule and the ability of a proponent to admit hearsay statements under Rule 804 if the declarant is in effect "available" to give remote testimony. The Committee views remote transmission of live testimony to be preferable to other hearsay evidence, even if it is in the form of a deposition or other recorded testimony.

B. Proposed Amendments to Rules 32 to 60.

The Advisory Committee discussed proposed style changes to Rules 32 to 60 at a special meeting in January 2000, at two subcommittee meetings, and finally, at its regularly schedule meeting in April 2000, in New York City.

The following discussion focuses on the Rules that include one or more substantive changes, or changes, which the Committee believes are likely to generate some debate.

1. Rule 32. Sentencing and Judgment.

Rule 32 has been completely reorganized to make it easier to follow and apply; the sequencing of the provisions has been changed. For example, the definitions in the rule had been moved to the first sections.

The proposed rule includes one change that may generate controversy. The Committee considered whether to retain revised Rule 32(h)(3)(A) (portions of current Rule 32(c)(1)). Some members believed that the provision, which requires the court to rule on all unresolved objections to the presentence report, placed an unnecessary burden on the court. Others noted that the Bureau of Prisons regularly relies upon the

presentence report to make important decisions about post-sentencing disposition of defendants, for example, designating them for a particular confinement facility. Ultimately, the Committee adopted language that would require the sentencing judge to rule on all unresolved objections to a "material" matter in the report. For all other unresolved objections the judge may either rule on them or conclude that the objections affect matters that will not be considered in imposing an appropriate sentence. The Committee envisions that a "material" matter would include those matters that would typically impact on treatment of the defendant in the prison system.

Because of this significant amendment, the Committee decided to include it in the "substantive" package.

2. Rule 32.1. Revoking or Modifying Probation or Supervised Release.

Although Rule 32.1 has been completely reorganized and expanded, the Committee intends to make no significant changes in practice. In particular, Rule 32.1(a)(5) now includes guidance on dealing with cases where the person is arrested in a district that does not have jurisdiction to conduct a revocation proceeding.

3. Rule 35. Correcting or Reducing a Sentence.

The Committee decided to delete current rule 35(a) in its entirety. Rule 35(a)(1) was considered unnecessary. Rule 35(a)(2) was also considered unnecessary; it should be very clear to a district court that further sentencing proceedings are necessary, following a decision by a Court of Appeals on the issue of whether the sentence was correct.

Rule 35 includes a substantive change that had been under consideration apart from the restyling project. That amendment, in Rule 35(b) includes new language to the effect that the government may file a late motion to reduce a sentence if it demonstrates that the defendant had presented information, the usefulness of which could not reasonably be known until more than one year following sentencing. The current rule, however, did not address the issue. The courts were split on the issue. *Compare United States v. Morales*, 52 F.3d 7 (1st Cir. 1995) (permitting filing and granting of motion) *with United States v. Orozco*, 160 F.3d 1309 (11th Cir. 1998) (denying relief and citing cases). Although the court in *Orozco* felt constrained to deny relief under Rule 35(b), the court urged an amendment of the rule to:

> address the apparent unforeseen situation presented in this case where a convicted defendant provides information to the government prior to the expiration of the jurisdictional, one-year period from sentence imposition, but that information does not become useful to the government until more than one year after sentence imposition. *Id.* at 1316, n. 13.

The amendment to Rule 35(b) makes clear that a sentence reduction motion is permitted in those instances identified by the court in *Orozco*. The proposed amendment would not eliminate the one-year requirement as a generally operative element.

Rule 35 is one of those rules that are also included in the substantive package for publication.

4. Rule 40. Transfer to Another District.

As noted supra, as the Committee reviewed Rules 32 to 60, it came to the conclusion that some of the material in Rule 40 should be included in Rule 5. A subcommittee considered the issue and recommended major amendments in Rules 5, 32.1, and 40. Much of Rule 40 is now located in Rule 5. Although those three rules have been completely reorganized, the Committee anticipates no great controversy over the amendments.

5. Rule 41. Search and Seizure.

Rule 41 has been completely reorganized and includes a substantive amendment that may generate some controversy. The substantive amendment would permit officers to seek a warrant to conduct "covert entry" searches, e.g., where officers seek a warrant to examine or monitor activities in a covert manner. The Committee discussed this proposed change at length. Although two circuits have approved such searches, several members of the Committee believed that the amendment was premature and that any change in the rule should await further caselaw developments. Ultimately, a motion to remove this provision from Rule 41 failed by a close vote.

Rule 41(b) also includes a possible change in practice by stating a clear preference for seeking a warrant from a magistrate judge; the current rule states no preference. The Committee Note indicates that the Committee does not intend to create any new ground for contesting the validity of a search warrant.

Rule 41 has been included in the "substantive" package for publication.

6. Rule 42. Criminal Contempt.

Rule 42 includes an amendment regarding the appointment of a prosecutor for contempt proceedings. The proposed language mirrors language in *Klayminic v. United States ex rel Vuitton*, 481 U.S. 787 (1987). In that case, the Supreme Court observed that ordinarily the court should request that an attorney for the government prosecute the contempt; only if that request is denied, should the court appoint a private prosecutor. The revised rule also includes a reference to the fact that notwithstanding Rule 32, the

court may summarily punish a person found in contempt in the presence of the judge. The Committee expects no controversy regarding these amendments.

7. Rule 43. Presence of the Defendant.

Portions of Rule 43 have been reorganized and depending upon the disposition of proposed amendments to Rules 5 and 10, regarding presence of the defendant where video teleconferencing is used for initial appearances and arraignments, Rule 43 will also have to be amended. Thus, Rule 43 has been included in the substantive package for publication, along with Rules 5 and 10.

8. Rule 46. Release from Custody.

Revised Rule 46(i), currently Rule 46(h), includes language originally included by Congress. Following several discussions about that provision, the Committee decided to restyle the language and retain the essence of the original language. Revised Rule 46(i) addresses the ability of a court to order forfeiture of property where a defendant has failed to appear as required by the court. Under this provision, the court may only forfeit property as permitted under 18 U.S.C. §§ 3146(b) and 3142(c)(1)(B)(xi). The term "appropriate sentence" means a sentence that is consistent with the Sentencing Guidelines.

9. Rule 48. Dismissal.

In reviewing Rule 48(b), which deals with the authority of the court to dismiss an indictment for delays, the Committee questioned whether there was still need for any provision in the rule that seemed to be already covered by the Speedy Trial Act. The original provision predated that Act, and some members of the Committee were concerned that re-promulgating Rule 48(b) might be viewed as superseding the Speedy Trial Act. The Committee ultimately decided to retain Rule 48(b) and make it clear in the Committee Note that it views the rule and the Act to operate independently and that there is no intent supersede any provision in the Act.

10. Rule 49. Serving and Filing of Papers.

The Committee has proposed an amendment to Rule 49 to reflect changes in the Civil Rules of Procedure 5(b) and 77(d) that permit, but do not require, a court to provide notice of its orders and judgments through electronic means. Rule 49(c) now parallels a similar extant provision in Rule 49(b), regarding service of papers.

11. Rule 51. Preserving Claimed Error.

The Committee has added a sentence at the end of the Rule to clarify that any rulings regarding evidence would be governed by Federal Rule of Evidence 103. The

sentence was added because of concerns about the Supersession Clause and the belief that an argument might have been made that Congressional approval of this rule would supercede that Rule of Evidence.

12. Rule 53. Courtroom Photographing and Broadcasting Prohibited.

Rule 53 has been amended by deleting the word "radio." Further, the rule has been amended to reference the fact that other rules, such as the proposed amendments to Rules 5 and 10 regarding video teleconferencing of certain proceedings, might provide for exceptions to the general prohibition against broadcasting.

Recommendation—The Committee recommends that restyled Criminal Rules 1 to 60 be approved and separately published for public comment.

Recommendation—The Committee recommends that Criminal Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43.1 be approved and separately published for public comment.

V. ACTION ITEM—Publication of Amendments to Rules Governing § 2254 and § 2255 Proceedings for Comment.

Over the past year, the Criminal Rules Committee has conducted a review of the Rules Governing §§ 2254 and 2255 Proceedings to determine if any changes were required as a result of the passage of the Antiterrorism and Effective Death Penalty Act, which amended a number of applicable federal statutes. As a result, the Committee has proposed a number of amendments to those rules and recommends that they be published separately for public comment. Those proposed amendments are attached at Appendix C.

The amendments to Rule 1 of both sets of rules recognizes that there are no separate rules governing actions brought under 28 U.S.C. § 2241 (power to grant a writ of habeas corpus) and which might not otherwise be covered under § 2254 (state custody) or § 2255 (federal custody). The Committee believes that applying the rules to § 2241 proceedings will promote uniformity and consistency.

The amendments to Rule 2 in both sets of rules is intended to conform the rules to language in Federal Rule of Civil Procedure 5(e). In addition, Rule 2 of the Rules Governing § 2255 Proceedings has been amended to make use of the term "movant" consistent throughout those rules.

Amendments to Rule 3 in both sets of rules is intended to reflect the practice set out in Federal Rule of Civil Procedure 5(e) —that the clerk files the papers and refers the matter to the court for consideration of any defects in the petition or the motion.

Rules 8 and 10 of both sets have been amended to reflect the change in title of magistrate judges to United States magistrate judges. In addition, Rule 8 of the Rules Governing § 2254 Proceedings has been amended to reflect the change in designation of 18 U.S.C. § 3006A.

Finally, Rule 9 in both sets of rules has been amended to reflect amendments to 28 U.S.C. § 2244, where Congress limited the ability of petitioners and movants to obtain relief on successive actions; under the amendments, the person seeking relief must first obtain approval from a court of appeals before filing a second or successive petition.

The proposed amendments and Committee Notes are at Appendix C to this report.

Recommendation—The Committee recommends that Rules 1, 2, 3, 6, 8, 9 and 10 of the Rules Governing § 2254 Proceedings and Rules 1, 2, 3, 8, 9, and 10 of the Rules Governing § 2255 Proceedings be approved and separately published for public comment.

VI. ACTION ITEM—Publication of Rule 12.4 for Comment.

The Criminal Rules Committee has recommended that new Rule 12.4 be promulgated to address the issue of filing disclosure statements with the court. Similar amendments are being proposed in Appellate Rule 26.1 and Civil Rule 7.1. Although Rule 12.4 closely tracks those two rules in most respects, Rule 12.4(b) includes a requirement that the government disclose to the court the identities of any organizational victims in the case. While the scope of the Civil and Appellate Rules are limited to corporate parties, Rule 12.4 would extend the disclosure requirement to organizational victims which would include business associations and partnerships. The Committee believed that the ethical rules require judges to recuse themselves if they have a financial interest in an organizational victim. Absent such disclosure, a judge may not know the identity of the organizational victim.

The proposed Rule and Committee Note are at Appendix D to this report.

Recommendation—The Committee recommends that new Criminal Rule 12.4 be approved and published for public comment.

Attachments:

Appendix A. Rules 1 to 60 — Style Package.
Appendix B. Substantive Package (Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43).

Appendix C. Rules Governing §§ 2254 and 2255 Proceedings.
Appendix D. Rule 12.4. Disclosure Statement.
Appendix E. Minutes of Meetings (January 2000, April 2000).

8A

APPENDIX A

STYLE PACKAGE
RULES 1 TO 60

I. SCOPE, PURPOSE, AND CONSTRUCTION	**TITLE I. APPLICABILITY OF RULES**
	Rule 1. Scope; Definitions
Rule 1. Scope These rules govern the procedure in all criminal proceedings in the courts of the United States, as provided in Rule 54(a); and, whenever specifically provided in one of the rules, to preliminary, supplementary, and special proceedings before United States magistrate judges and at proceedings before state and local judicial officers. **Rule 54. Application and Exception** (a) **Courts**. These rules apply to all criminal proceedings in the United States District Courts; in the District of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263); and in the District Court of the Virgin Islands; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that the prosecution of offenses in the District Court of the Virgin Islands shall be by indictment or information as otherwise provided by law.	**(a) Scope.** **(1)** ***In General.*** These rules govern the procedure in all criminal proceedings in the United States district courts, United States courts of appeals, and the Supreme Court of the United States. **(2)** ***State or Local Judicial Officer.*** When a rule so states, it applies to a proceeding before a state or local judicial officer. **(3)** ***Territorial Courts.*** These rules also govern the procedure in criminal proceedings in the following courts: (A) the district court of Guam; (B) the district court for the Northern Mariana Islands, except as otherwise provided by law; and (C) the district court of the Virgin Islands, except that the prosecution of offenses in that court must be by indictment or information as otherwise provided by law.

(b) PROCEEDINGS (Rule 54 continued) **(1) Removed Proceedings.** These rules apply to criminal prosecutions removed to the United States district courts from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law. **(2) Offenses Outside a District or State.** These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, except that such proceedings may be had in any district authorized by 18 U.S.C. § 3238. **(3) Peace Bonds.** These rules do not alter the power of judges of the United States or of United States magistrate judges to hold security of the peace and for good behavior under Revised Statutes, § 4069, 50 U.S.C. § 23, but in such cases the procedure shall conform to these rules so far as they are applicable. **(4) Proceedings Before United States Magistrate Judges.** Proceedings involving misdemeanors and other petty offenses are governed by Rule 58.	(4) ***Removed Proceedings.*** Although these rules govern all proceedings after removal from a state court, state law governs a dismissal by the prosecution.
(5) Other Proceedings. These rules are not applicable to extradition and rendition of fugitives; civil forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. Except as provided in Rule 20(d) they do not apply to proceedings under 18 U.S.C. Chapter 403 — Juvenile Delinquency — so far as they are inconsistent with that chapter. They do not apply to summary trials for offenses against the navigation laws under Revised Statutes §§ 4300-4305, 33 U.S.C. §§ 391-396, or to proceedings involving disputes between seamen under Revised Statutes §§ 4079-4081, as amended, 22 U.S.C. §§ 256-258, or to proceedings for fishery offenses under the Act of June 28, 1937, c. 392, 50 Stat. 325-327, 16 U.S.C. §§ 772-772i, or to proceedings against a witness in a foreign country under 28 U.S.C. § 1784.	(5) ***Excluded Proceedings.*** Proceedings not governed by these rules include: (A) the extradition and rendition of a fugitive; (B) a civil property forfeiture for the violation of a federal statute; (C) the collection of a fine or penalty; (D) a proceeding under a statute governing juvenile delinquency to the extent the procedure is inconsistent with the statute, unless Rule 20(d) provides otherwise; and (E) a dispute between seamen under 22 U.S.C. §§ 256–258.

(c) Application of Terms. (Rule 54 continued) As used in these rules the following terms have the designated meanings. "Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in Puerto Rico, in a territory or in any insular possession. "Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney, when applicable to cases arising under the laws of Guam the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein, and when applicable to cases arising under the laws of the Northern Mariana Islands the Attorney General of the Northern Mariana Islands or any other person or persons as may be authorized by the laws of the Northern Marianas to act therein. "Civil action" refers to a civil action in a district court. 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 act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12. "District court" includes all district courts named in subdivision (a) of this rule.	**(b) Definitions.** The following definitions apply to these rules: **(1)** "Attorney for the government" means: (A) the Attorney General, or an authorized assistant; (B) a United States attorney, or an authorized assistant; (C) when applicable to cases arising under Guam law, the Guam Attorney General or other person whom Guam law authorizes to act in the matter; and (D) any other attorney authorized by law to conduct proceedings under these rules as a prosecutor.
"Federal magistrate judge" means a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates. "Judge of the United States" includes a judge of the district court, court of appeals, or the Supreme Court. "Law" includes statutes and judicial decisions. "Magistrate judge" includes a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States, another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates, and a state or local judicial officer, authorized by 18 U.S.C. § 3041 to perform the functions prescribed in Rules 3, 4, and 5.	**(2)** "Court" means a federal judge performing functions authorized by law. **(3)** "Federal judge" means: (A) a justice or judge of the United States as these terms are defined in 28 U.S.C. § 451; (B) a magistrate judge; or (C) a judge confirmed by the United States Senate and empowered by statute in any commonwealth, territory, or possession to perform a function to which a particular rule relates. **(4)** "Judge" means a federal judge or a state or local judicial officer. **(5)** "Magistrate judge" means a United States magistrate judge as defined in 28 U.S.C. §§ 631-639.

"Oath" includes affirmations. "Petty offense" is defined in 18 U.S.C. § 19. "State" includes District of Columbia, Puerto Rico, territory and insular possession. "United States magistrate judge" means the officer authorized by 28 U.S.C. §§ 631-639.	**(6)** "Oath" includes an affirmation. **(7)** "Organization" is defined in 18 U.S.C. § 18. **(8)** "Petty offense" is defined in 18 U.S.C. § 19. **(9)** "State" includes the District of Columbia, and any commonwealth, territory, or possession of the United States. **(10)** "State or local judicial officer" means: (A) a state or local officer authorized to act under 18 U.S.C. § 3041; and (B) a judicial officer specifically empowered by statute in force in the District of Columbia or in any commonwealth, territory, or possession, to perform a function to which a particular rule relates. **(c) Authority of Justices and Judges of the United States.** When these rules authorize a magistrate judge to act, any other federal judge may also act.

Committee Notes
Rule 1
May 10, 2000

COMMITTEE NOTE

Rule 1 is entirely revised and expanded to incorporate Rule 54, which deals with the application of the rules. Consistent with the title of the existing rule, the Committee believed that a statement of the scope of the rules should be placed at the beginning to show readers which proceedings are governed by these rules. The Committee also revised the rule to incorporate the definitions found in Rule 54(c) as a new Rule 1(b).

Rule 1(a) contains language from Rule 54(b). But language in current Rule 54(b)(2)-(4) has been deleted for several reasons: First, Rule 54(b)(2) refers to a venue statute that governs an offense committed on the high seas or somewhere outside the jurisdiction of a particular district; it is unnecessary and has been deleted because once venue has been established, the Rules of Criminal Procedure automatically apply. Second, Rule 54(b)(3) currently deals with peace bonds; that provision is inconsistent with the governing statute and has therefore been deleted. Finally, Rule 54(b)(4) references proceedings conducted before United States Magistrate Judges, a topic now covered in Rule 58.

Rule 1(a)(5) consists of material currently located in Rule 54(b)(5), with the exception of the references to the navigation laws, fishery offenses, and to proceedings against a witness in a foreign country. Those provisions were considered obsolete. But if those proceedings were to arise, they would be governed by the Rules of Criminal Procedure.

Rule 1(b) is composed of material currently located in Rule 54(c), with several exceptions. First, the reference to an "Act of Congress" has been replaced with the term "federal statute." Second, the language concerning demurrers, pleas in abatement, etc. has been deleted as being anachronistic. Third, the definitions of "civil action" and "district court" have been deleted. Fourth, the term "attorney for the government" has been expanded to include reference to those attorneys who may serve as special or independent counsel under applicable federal statutes.

Fifth, the Committee added a definition for the term "court" in Rule 1(b)(1). Although that term originally was almost always synonymous with the term "district judge," the term might be misleading or unduly narrow because it may not cover the many functions performed by magistrate judges. *See generally* 28 U.S.C. §§ 132, 636. Additionally, the term does not cover circuit judges who may be authorized to hold a district court. *See* 28 U.S.C. § 291. The proposed definition continues the traditional view that "court" means district judge, but also reflects the current

understanding that magistrate judges act as the "court" in many proceedings. Finally, the Committee intends that the term "court" be used principally to describe a judicial officer, except where a rule uses the term in a spatial sense, such as describing proceedings in "open court."

Sixth, the term "Judge of the United States"` has been replaced with the term "Federal judge." That term includes Article III judges and magistrate judges and, as noted in Rule 1(b)(3)(C), federal judges other than Article III judges who may be authorized by statute to perform a particular act specified in the Rules of Criminal Procedure. Seventh, the definition of "Law" has been deleted as being superfluous and possibly misleading because it suggests that administrative regulations are excluded.

Eighth, the current rules include three definitions of "magistrate judge." The term used in amended Rule 1(b)(5) is limited to United States magistrate judges. In the current rules the term magistrate judge includes not only United States magistrate judges, but also district court judges, court of appeals judges, Supreme Court justices, and where authorized, state and local officers. The Committee believed that the rules should reflect current practice, i.e. the wider and almost exclusive use of United States magistrate judges, especially in preliminary matters. The definition, however, is not intended to restrict the use of other federal judicial officers to perform those functions. Thus, Rule 1(c) has been added to make it clear that where the rules authorize a magistrate judge to act, any other federal judge or justice may act.

Finally, the term "organization" has been added to the list of definitions.

The remainder of the rule has been amended as part of the general restyling of the rules to make them more easily understood. In addition to changes made to improve the clarity, the Committee has changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only.

Rule 2. Purpose and Construction	Rule 2. Interpretation
These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.	These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.

Committee Notes
Rule 2
May 10, 2000

COMMITTEE NOTE

The language of Rule 2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic. No substantive change is intended.

In particular, Rule 2 has been amended to clarify the purpose of the Rules of Criminal Procedure. The words "are intended" have been changed to read "are to be interpreted." The Committee believed that that was the original intent of the drafters and more accurately reflects the purpose of the rules.

II. PRELIMINARY PROCEEDINGS	**TITLE II. PRELIMINARY PROCEEDINGS**
Rule 3. The Complaint	**Rule 3. The Complaint**
The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate judge.	The complaint is a written statement of the essential facts constituting the offense charged. It must be made under oath before a magistrate judge, or, if none is reasonably available, before a state or local judicial officer.

Committee Notes
Rule 3
May 10, 2000

COMMITTEE NOTE

The language of Rule 3 is amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as described below.

The amendment makes one change in practice. Currently, Rule 3 requires the complaint to be sworn before a "magistrate judge," which under current Rule 54 could include a state or local judicial officer. Revised Rule 1 no longer includes state and local officers in the definition of magistrate judges for the purposes of these rules. Instead, the definition includes only United States magistrate judges. Rule 3 requires that the complaint be made before a United States magistrate judge or before a state or local officer. The revised rule does, however, make a change to reflect prevailing practice and the outcome desired by the Committee—that the procedure take place before a *federal* judicial officer if one is reasonably available. As noted in Rule 1(c), where the rules, such as Rule 3, authorize a magistrate judge to act, any other federal judge may act.

Rule 4. Arrest Warrant or Summons Upon Complaint	Rule 4. Arrest Warrant or Summons on a Complaint
(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.	**(a) Issuance.** If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of the attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If a defendant fails to appear in response to a summons, a judge may, and upon request of the attorney for the government must, issue a warrant.
(b) Probable Cause. The finding of probable cause may be based upon hearsay evidence in whole or in part.	
(c) Form. **(1) Warrant.** The warrant shall be signed by the magistrate judge and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate judge. **(2) Summons.** The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place.	**(b) Form.** **(1)** ***Warrant.*** A warrant must: (A) contain the defendant's name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty; (B) describe the offense charged in the complaint; (C) command that the defendant be arrested and brought before a magistrate judge without unnecessary delay or, if none is reasonably available, before a state or local judicial officer; and (D) be signed by a judge. **(2)** ***Summons.*** A summons is to be in the same form as a warrant except that it must require the defendant to appear before a magistrate judge at a stated time and place.

(d) Execution or Service; and Return. **(1) By Whom.** The warrant shall be executed by a marshal or by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action. **(2) Territorial Limits.** The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.	**(c) Execution or Service, and Return.** **(1)** ***By Whom.*** Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil action may serve the summons. **(2)** ***Territorial Limits.*** A warrant may be executed, or a summons served, only within the jurisdiction of the United States.
(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant at the time of the arrest but upon request shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant at the time of the arrest, the officer shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to the defendant personally, or by leaving it at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein and by mailing a copy of the summons to the defendant's last known address.	**(3)** ***Manner.*** (A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the warrant to the defendant as soon as possible. (B) A summons is served on a defendant: (i) by personal delivery; or (ii) by leaving it at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by mailing a copy to the defendant's last known address. (C) A summons to an organization is served by delivering a copy to an officer or to a managing or general agent or to another agent appointed or legally authorized to receive service of process. A copy must also be mailed to the organization's last known address within the district or to its principal place of business elsewhere in the United States.

(4) Return. The officer executing a warrant shall make return thereof to the magistrate judge or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to and canceled by the magistrate judge by whom it was issued. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the magistrate judge before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not canceled or summons returned unserved or a duplicate thereof may be delivered by the magistrate judge to the marshal or other authorized person for execution or service.	**(4)** ***Return.*** (A) After executing a warrant, the officer must return it to the judge before whom the defendant is brought in accordance with Rule 5. At the request of the attorney for the government, an unexecuted warrant must be brought back to and canceled by a magistrate judge or, if none is reasonably available, by a state or local officer. (B) The person to whom a summons was delivered for service must return it on or before the return day. (C) At the request of the attorney for the government, a judge may deliver an unexecuted warrant or an unserved summons or a copy of the warrant or summons to the marshal or other authorized person for execution or service.

Committee Notes
Rule 4
May 10, 2000

COMMITTEE NOTE

The language of Rule 4 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

The first non-stylistic change is in Rule 4(a), which has been amended to provide an element of discretion in those situations when the defendant fails to respond to a summons. Under the current rule, the judge must in all cases issue an arrest warrant. The revised rule provides discretion to the judge to issue an arrest warrant if the attorney for the government does not request that an arrest warrant be issued for a failure to appear.

Current Rule 4(b), which refers to the fact that hearsay evidence may be used to support probable cause, has been deleted. That language was added to the rule in 1974, apparently to reflect emerging federal case law. *See* Advisory Committee Note to 1974 Amendments to Rule 4 (citing cases). In the intervening years, the case law has become perfectly clear on that proposition. Thus, the Committee believed that the reference to hearsay was no longer necessary. Furthermore, the limited reference to hearsay evidence was misleading to the extent that it might have suggested that other forms of inadmissible evidence could not be considered. For example, the rule made no reference to considering a defendant's prior criminal record, which clearly may be considered in deciding whether probable cause exists. *See, e.g., Brinegar v. United States*, 338 U.S. 160 (1949) (officer's knowledge of defendant's prior criminal activity). Rather than address that issue, or any other similar issues, the Committee believed that the matter was best addressed in Rule 1101(d)(3), Federal Rules of Evidence. That rule explicitly provides that the Federal Rules of Evidence do not apply to "preliminary examinations in criminal cases, . . . issuance of warrants for arrest, criminal summonses, and search warrants." The Advisory Committee Note accompanying that rule recognizes that: "The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable." The Committee did not intend to make any substantive changes in practice by deleting the reference to hearsay evidence.

New Rule 4(b), which is currently Rule 4(c), addresses the form of an arrest warrant and a summons and includes two non-stylistic changes. First, Rule 4(b)(1)(C) requires that the warrant require that the defendant be brought "without unnecessary delay" before a judge. The Committee believed that this was a more appropriate standard than the current requirement that the defendant be brought

before the "nearest available" magistrate judge. This new language accurately reflects the thrust of the original rule, that time is of the essence and that the defendant should be brought with dispatch before a judicial officer in the district. Second, the revised rule states a preference that the defendant be brought before a federal judicial officer.

Rule 4(b)(2) has been amended to require that if a summons is issued, the defendant must appear before a magistrate judge. The current rule requires the appearance before a "magistrate," which could include a state or local judicial officer. This change is consistent with the preference for requiring defendants to appear before federal judicial officers stated in revised Rule 4(b)(1).

Rule 4(c) (currently Rule 4(d)) includes three changes. First, current Rule 4(d)(3) provides that the arresting officer is only required to inform the defendant of the offense charged and that a warrant exists, if the officer does not have a copy of the warrant. As revised, Rule 4(c)(3)(A) explicitly requires the arresting officer in all instances to inform the defendant of the offense charged and of the fact that an arrest warrant exists. The new rule continues the current provision that the arresting officer need not have a copy of the warrant but if the defendant requests to see it, the officer must show the warrant to the defendant as soon as possible. The rule does not attempt to define any particular time limits for showing the warrant to the defendant.

Second, Rule 4(c)(3)(C) is taken from former Rule 9(c)(1). That provision specifies the manner of serving a summons on an organization. The Committee believed that Rule 4 was the more appropriate location for general provisions addressing the mechanics of arrest warrants and summons. Revised Rule 9 liberally cross-references the basic provisions appearing in Rule 4. Under the amended rule, in all cases in which a summons is being served on an organization, a copy of the summons must be mailed to the organization.

Third, a change is made in Rule 4(c)(4). Currently, Rule 4(d)(4) requires that an unexecuted warrant must be returned to the judicial officer or judge who issued it. As amended, Rule 4(c)(4)(A) provides that after a warrant is executed, the officer must return it to the judge before whom the defendant will appear under Rule 5. At the government's request, however, an unexecuted warrant may be returned and canceled by any magistrate judge. The change recognizes the possibility that at the time the warrant is returned, the issuing judicial officer may not be available.

Rule 5. Initial Appearance Before the Magistrate Judge	Rule 5. Initial Appearance
(a) In General. Except as otherwise provided in this rule, an officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate judge or, if a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate judge, a complaint, satisfying the probable cause requirements of Rule 4(a), shall be promptly filed. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of this rule.	**(a) In General.** **(1)** ***Appearance Upon Arrest.*** (A) A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides. (B) A person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge.
An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest and an attorney for the government moves promptly, in the district in which the warrant was issued, to dismiss the complaint.	**(2)** ***Exceptions.*** (A) An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if: (i) the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest; and (ii) an attorney for the government moves promptly, in the district where the warrant was issued, to dismiss the complaint. (B) If a defendant is arrested for a violation of probation or supervised release, Rule 32.1 applies. (C) If a defendant is arrested for failing to appear in another district, Rule 40 applies. **(3)** ***Appearance Upon a Summons.*** When a defendant appears in response to a summons under Rule 4, a magistrate judge must proceed under Rule 5(d) or (e), as applicable.
	(b) Complaint Required. If a defendant is arrested without a warrant, a complaint meeting Rule 4(a)'s requirement of probable cause must be promptly filed in the district where the offense was allegedly committed.

	(c) Initial Appearance; Transfer to Another District. **(1)** ***Arrest in the District Where the Offense Was Allegedly Committed.*** If the defendant is arrested in the district where the offense was allegedly committed: (A) the initial appearance must be in that district; and (B) if a magistrate judge is not reasonably available, the initial appearance may be before a state or local judicial officer.

	(2) ***Arrest in District Other Than the District Where the Offense Was Allegedly Committed.*** If the defendant is arrested in a district other than where the offense was allegedly committed, the following procedures apply: (A) the initial appearance must be in that district, or in an adjacent district if the appearance can occur more promptly there; (B) the judge must inform the defendant of the provisions of Rule 20; (C) if the defendant was arrested without a warrant, the district court where the prosecution is pending must first issue a warrant before the magistrate judge transfers the defendant to that district; (D) the judge must conduct a preliminary hearing as required under Rule 5.1 or Rule 58(b)(2)(G); (E) the judge must transfer the defendant to the district where the prosecution is pending if: (i) the government produces the warrant, a certified copy of the warrant, a facsimile of either, or other appropriate form of either; and (ii) the judge finds that the defendant is the same person named in the indictment, information, or warrant; and (F) when a defendant is transferred or discharged, the court must promptly transmit the papers and any bail to the clerk in the district where the prosecution is pending.

(c) Offenses Not Triable by the United States Magistrate Judge. If the charge against the defendant is not triable by the United States magistrate judge, the defendant shall not be called upon to plead. The magistrate judge shall inform the defendant of the complaint against the defendant and of any affidavit filed therewith, of the defendant's right to retain counsel or to request the assignment of counsel if the defendant is unable to obtain counsel, and of the general circumstances under which the defendant may secure pretrial release. The magistrate judge shall inform the defendant that the defendant is not required to make a statement and that any statement made by the defendant may be used against the defendant. The magistrate judge shall also inform the defendant of the right to a preliminary examination. The magistrate judge shall allow the defendant reasonable time and opportunity to consult counsel and shall detain or conditionally release the defendant as provided by statute or in these rules. * * * * *	**(d) Procedure in a Felony Case.** **(1)** ***Advice.*** If the offense charged is a felony, the judge must inform the defendant of the following: (A) the complaint against the defendant, and any affidavit filed with it; (B) the defendant's right to retain counsel or to request that counsel be appointed if the defendant cannot obtain counsel; (C) the circumstances, if any, under which the defendant may secure pretrial release; (D) any right to a preliminary hearing; and (E) the defendant's right not to make a statement, and that any statement made may be used against the defendant. **(2)** ***Consultation with Counsel.*** The judge must allow the defendant reasonable opportunity to consult with counsel. **(3)** ***Detention or Release.*** The judge must detain or release the defendant as provided by statute or these rules. **(4)** ***Plea.*** A defendant may be asked to plead only under Rule 10.
(b) Misdemeanors and Other Petty Offenses. If the charge against the defendant is a misdemeanor or other petty offense triable by a United States magistrate judge under 18 U.S.C. § 3401, the magistrate judge shall proceed in accordance with Rule 58.	**(e) Procedure in a Misdemeanor Case.** If the defendant is charged with a misdemeanor only, the judge must inform the defendant in accordance with Rule 58(b)(2).

Committee Notes
Rule 5
May 10, 2000

COMMITTEE NOTE

The language of Rule 5 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

Rule 5 has been completely revised to more clearly set out the procedures for initial appearances and to recognize that such appearances may be required at various stages of a criminal proceeding, for example, where a defendant has been arrested for violating the terms of probation.

Rule 5(a), which governs initial appearances by an arrested defendant before a magistrate judge, includes several changes. The first is a clarifying change; revised Rule 5(a)(1) provides that a person making the arrest must bring the defendant "without unnecessary delay" before a magistrate judge, instead of the current reference to "nearest available" magistrate. This language parallels changes in Rule 4 and reflects the view that time is of the essence. The Committee intends no change in practice. In using the term, the Committee recognizes that on occasion there may be necessary delay in presenting the defendant, for example, due to weather conditions or other natural causes. A second change is non-stylistic, and reflects the stated preference (as in other provisions throughout the rules) that the defendant be brought before a federal judicial officer. Only if a magistrate judge is not available should the defendant be taken before a state or local officer.

The third sentence in current Rule 5(a), which states that a magistrate judge must proceed in accordance with the rule when a defendant is arrested without a warrant or given a summons, has been deleted because it is unnecessary.

Rule 5(a)(1)(B) codifies the caselaw reflecting that the right to an initial appearance applies not only when a person is arrested within the United States but also when the an arrest occurs outside the United States. *See, e.g., United States v. Purvis*, 768 F.2d 1237 (11th Cir. 1985); *United States v. Yunis*, 859 F.2d 953 (D.C. Cir. 1988). In these circumstances, the Committee believes—and the rule so provides—that the initial appearance should be before a federal magistrate judge rather than a state or local judicial officer.

Rule 5(a)(2)(A) consists of language currently located in Rule 5, that addresses the procedure to be followed when a defendant has been arrested under a warrant issued on a complaint charging solely a violation of 18 U.S.C. § 1073

(unlawful flight to avoid prosecution). Rule 5(a)(2)(B) and 5(a)(2)(C) are new provisions. They are intended to make it clear that when a defendant is arrested for violating probation or supervised release or for failing to appear in another district, Rules 32.1 and 40 apply. No change in practice is intended.

Rule 5(a)(3) is new and fills a perceived gap in the rules. It recognizes that a defendant may be subjected to an initial appearance under this rule if a summons was issued under Rule 4, instead of an arrest warrant. If the defendant is appearing pursuant to a summons in a felony case, Rule 5(d) applies and if the defendant is appearing in a misdemeanor case, Rule 5(e) applies.

Rule 5(b) carries forward the requirement in former Rule 5(a) that if the defendant is arrested without a warrant, a complaint must be promptly filed.

Rule 5(c) is a new provision setting out where an initial appearance is to take place. If the defendant is arrested in the district where the offense was allegedly committed, under Rule 5(c)(1), the defendant must be taken to a magistrate judge in that district. If no magistrate judge is reasonably available, the initial appearance may be conducted by a state or local judicial officer. On the other hand, if the defendant is arrested in a district other than the district where the offense was allegedly committed, Rule 5(c)(2) governs. In those instances, the defendant must be taken to a magistrate judge within the district of arrest, unless the appearance can take place more promptly in an adjacent district. The Committee recognized that in some cases, the nearest magistrate judge may actually be across a district's lines. The remainder of Rule 5(c)(2) includes material formerly located in Rule 40.

Rule 5(d) is derived from current Rule 5(c) and has been retitled to more clearly reflect the subject of that subdivision—the procedure to be used if the defendant is charged with a felony. Rule 5(d)(4) has been added to make clear that a defendant may only be called upon to enter a plea under the provisions of Rule 10. That language is intended to reflect and reaffirm current practice.

The remaining portions of current Rule 5(c) have been moved to Rule 5.1, which deals with preliminary hearings in felony cases.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 5 is one of those rules. In restyling and reformatting Rule 5, the Committee decided to also propose a substantive change that would permit video teleconferencing of initial appearances.

Another version of Rule 5, which includes a new subdivision (f) governing such procedures, is being published simultaneously in a separate pamphlet.

	Rule 5.1. Preliminary Hearing in a Felony Case
Rule 5(c) Offenses Not Triable by the United States Magistrate Judge. * * * * * A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate judge shall forthwith hold the defendant to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate judge shall schedule a preliminary examination.	**(a) In General.** If a defendant is charged with a felony, a magistrate judge must conduct a preliminary hearing unless: **(1)** the defendant waives the hearing; **(2)** the defendant is indicted; or **(3)** the government files an information under Rule 7(b).
	(b) Election of District. A defendant arrested in a district other than where the offense was allegedly committed may elect to have the preliminary hearing conducted in the district where the prosecution is pending.
Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if the defendant is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination.	**(c) Scheduling.** The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than 10 days after the initial appearance if the defendant is in custody and no later than 20 days if not in custody.
With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate judge. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.	**(d) Extending the Time.** With the defendant's consent and upon a showing of good cause — taking into account the public interest in the prompt disposition of criminal cases — a magistrate judge may extend the time limits in Rule 5.1(c) one or more times. If the defendant does not consent, a justice or judge of the United States as these terms are defined in 28 U.S.C. § 451 may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay.
Rule 5.1. Preliminary Examination. **(a) Probable Cause Finding.** If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate judge shall forthwith hold the defendant to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine adverse witnesses and may introduce evidence. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.	**(e) Hearing and Finding.** At the preliminary hearing, the defendant may cross-examine adverse witnesses and may introduce evidence but cannot object to evidence on the ground that it was unlawfully acquired. If the magistrate judge finds probable cause to believe an offense has been committed and the defendant committed it, the magistrate judge must promptly require the defendant to appear for further proceedings.

(b) Discharge of Defendant. If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate judge shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.	**(f) Discharging the Defendant.** If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.
(c) Records. After concluding the proceeding the federal magistrate judge shall transmit forthwith to the clerk of the district court all papers in the proceeding. The magistrate judge shall promptly make or cause to be made a record or summary of such proceeding. (1) On timely application to a federal magistrate judge, the attorney for a defendant in a criminal case may be given the opportunity to have the recording of the hearing on preliminary examination made available to that attorney in connection with any further hearing or preparation for trial. The court may, by local rule, appoint the place for and define the conditions under which such opportunity may be afforded counsel.	**(g) Records.** The preliminary hearing must be recorded by a court reporter or by a suitable recording device. A recording of the proceeding may be made available to any party upon request. A copy of the recording and a transcript may be provided to any party upon request and upon payment as required by applicable Judicial Conference regulations.
(2) On application of a defendant addressed to the court or any judge thereof, an order may issue that the federal magistrate judge make available a copy of the transcript, or of a portion thereof, to defense counsel. Such order shall provide for prepayment of costs of such transcript by the defendant unless the defendant makes a sufficient affidavit that the defendant is unable to pay or to give security therefor, in which case the expense shall be paid by the Director of the Administrative Office of the United States Courts from available appropriated funds. Counsel for the government may move also that a copy of the transcript, in whole or in part, be made available to it, for good cause shown, and an order may be entered granting such motion in whole or in part, on appropriate terms, except that the government need not prepay costs nor furnish security therefor.	
(d) Production of Statements. (1) In General. Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the court, for good cause shown, rules otherwise in a particular case. (2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.	**(h) Production of Statements.** **(1)** ***In General.*** Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the magistrate judge for good cause rules otherwise in a particular case. **(2)** ***Sanctions for Failure to Produce Statement.*** If a party disobeys a Rule 26.2(a) order to deliver a statement to the moving party, the magistrate judge must not consider the testimony of a witness whose statement is withheld.

Committee Notes
Rule 5.1
May 10, 2000

COMMITTEE NOTE

The language of Rule 5.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

First, the title of the rule has been changed. Although the underlying statute, 18 U.S.C. § 3060, uses the phrase *preliminary examination*, the Committee believes that the phrase *preliminary hearing* is more accurate. What happens at this proceeding is more than just an examination; it includes an evidentiary hearing, argument, and a judicial ruling. Further, the phrase *preliminary hearing* predominates in actual usage.

Rule 5.1(a) is composed of the first sentence of the second paragraph of current Rule 5(c). Rule 5.1(b) addresses the ability of a defendant to elect where a preliminary hearing will be held. That provision is taken from current Rule 40(a).

Rule 5.1(c) and (d) include material currently located in Rule 5(c): scheduling and extending the time limits for the hearing. Although the rule continues to refer to proceedings before a "court," the Committee is aware that in most districts, magistrate judges perform these functions. That point is also reflected in the definition of "court" in Rule 1(b), which in turn recognizes that magistrate judges may be authorized to act.

Rule 5.1(e), addressing the issue of probable cause, contains the language currently located in Rule 5.1(a), with the exception of the sentence, "The finding of probable cause may be based upon hearsay evidence in whole or in part." That language was included in the original promulgation of the rule in 1972. Similar language was added to Rule 4 in 1974. In the Committee Note on the 1974 amendment, the Advisory Committee explained that the language was included to make it clear that a finding of probable cause may be based upon hearsay, noting that there had been some uncertainty in the federal system about the propriety of relying upon hearsay at the preliminary examination. *See* Advisory Committee Note to Rule 5.1 (citing cases and commentary). Federal law is now clear on that proposition. Thus, the Committee believed that the reference to hearsay was no longer necessary. Further, the Committee believed that the matter was best addressed in Rule 1101(d)(3), Federal Rules of Evidence. That rule explicitly states that the Federal Rules of Evidence do not apply to "preliminary examinations in criminal

cases,...issuance of warrants for arrest, criminal summonses, and search warrants." The Advisory Committee Note accompanying that rule recognizes that: "The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable." The Committee did not intend to make any substantive changes in practice by deleting the reference to hearsay evidence.

Rule 5.1(f), which deals with the discharge of a defendant, consists of former Rule 5.1(b).

Rule 5.1(g) is a revised version of the material in current Rule 5.1(c). Instead of including detailed information in the rule itself concerning records of preliminary hearings, the Committee opted simply to direct the reader to the applicable Judicial Conference regulations governing records. The Committee did not intend to make any substantive changes in the way in which those records are currently made available.

Finally, although the rule speaks in terms of initial appearances being conducted before a magistrate judge, Rule 1(c) makes clear that a district judge may perform any function in these rules that a magistrate judge may perform.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 5.1 is one of those rules. In revising Rule 5.1, the Committee decided to also propose a significant substantive change that would permit a United States Magistrate Judge to grant a continuance for a preliminary hearing conducted under the rule where the defendant has not consented to such a continuance. That version is being published simultaneously in a separate pamphlet.

III. INDICTMENT AND INFORMATION	**TITLE III. THE GRAND JURY, THE INDICTMENT, AND THE INFORMATION**
Rule 6. The Grand Jury	**Rule 6. The Grand Jury**
(a) Summoning Grand Juries. **(1) Generally.** The court shall order one or more grand juries to be summoned at such time as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement. **(2) Alternate Jurors.** The court may direct that alternate jurors may be designated at the time a grand jury is selected. Alternate jurors in the order in which they were designated may thereafter be impanelled as provided in subdivision (g) of this rule. Alternate jurors shall be drawn in the same manner and shall have the same qualifications as the regular jurors, and if impanelled shall be subject to the same challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors.	**(a) Summoning a Grand Jury.** **(1)** ***In General.*** When the public interest so requires, the court must order that one or more grand juries be summoned. A grand jury must have 16 to 23 members, and the court must order that enough legally qualified persons be summoned to meet this requirement. **(2)** ***Alternate Jurors.*** When a grand jury is selected, the court may designate alternate jurors. They must be drawn and summoned in the same manner and must have the same qualifications as regular jurors. Alternate jurors will be impaneled in the sequence in which they are designated. If impaneled, an alternate juror is subject to the same challenges, takes the same oath, and has the same functions, duties, powers, and privileges as a regular juror.
(b) Objections to Grand Jury and to Grand Jurors. **(1) Challenges.** The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court. **(2) Motion to Dismiss.** A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. It shall be made in the manner prescribed in 28 U.S.C. § 1867(e) and shall be granted under the conditions prescribed in that statute. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.	**(b) Objections to the Grand Jury or to a Grand Juror.** **(1)** ***Challenges.*** Either the government or a defendant may challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified. **(2)** ***Motion to Dismiss an Indictment.*** A party may move to dismiss the indictment based on an objection to the grand jury or on an individual juror's lack of legal qualification, unless the court has previously ruled on the same objection under Rule 6(b)(1). The motion to dismiss is governed by 28 U.S.C. § 1867(e). The court cannot dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment.

(c) Foreperson and Deputy Foreperson. The court shall appoint one of the jurors to be foreperson and another to be deputy foreperson. The foreperson shall have power to administer oaths and affirmations and shall sign all indictments. The foreperson or another juror designated by the foreperson shall keep record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreperson, the deputy foreperson shall act as foreperson.	**(c) Foreperson and Deputy Foreperson.** The court will appoint one juror as the foreperson and another as the deputy foreperson. In the foreperson's absence, the deputy foreperson will act as the foreperson. The foreperson may administer oaths and affirmations and will sign all indictments. The foreperson — or another juror designated by the foreperson — will record the number of jurors concurring in every indictment and will file the record with the district clerk, but the record may not be made public unless the court so orders.
(d) Who May Be Present. **(1) While Grand Jury is in Session.** Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session. **(2) During Deliberations and Voting.** No person other than the jurors, and any interpreter necessary to assist a juror who is hearing or speech impaired, may be present while the grand jury is deliberating or voting.	**(d) Who May Be Present.** **(1)** ***While the Grand Jury Is in Session.*** The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a stenographer or operator of a recording device. **(2)** ***During Deliberations and Voting.*** No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting.

(e) Recording and Disclosure of Proceedings. **(1) Recording of Proceedings.** All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case. **(2) General Rule of Secrecy.** A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.	**(e) Recording and Disclosing Proceedings.** **(1)** ***Recording the Proceedings.*** Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. The validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes. **(2)** ***General Rule of Secrecy.*** Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury: (A) a grand juror; (B) an interpreter; (C) a court reporter; (D) an operator of a recording device; (E) a person who transcribes recorded testimony; (F) an attorney for the government; or (G) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii).

(3) Exceptions. (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to— (i) an attorney for the government for use in the performance of such attorney's duty; and (ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law. (B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.	**(3)** ***Exceptions.*** (A) Disclosure of a grand-jury matter — other than the grand jury's deliberations or any grand juror's vote — may be made to: (i) an attorney for the government for use in performing that attorney's duty; or (ii) any government personnel — including those of a state or state subdivision or of an Indian tribe — that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law. (B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made— (i) when so directed by a court preliminarily to or in connection with a judicial proceeding; (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; (iii) when the disclosure is made by an attorney for the government to another federal grand jury; or (iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law. If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.	(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury. (D) The court may authorize disclosure — at a time, in a manner, and subject to any other conditions that it directs — of a grand-jury matter: (i) preliminarily to or in connection with a judicial proceeding; (ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury; (iii) at the request of the government if it shows that the matter may disclose a violation of state or Indian tribal criminal law, as long as the disclosure is to an appropriate state, state-subdivision, or Indian tribal official for the purpose of enforcing that law; or (iv) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.
(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.	(E) A petition to disclose a grand jury matter under Rule 6(e)(3)(D)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte — as it may be when the government is the petitioner — the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to: (i) the attorney for the government; (ii) the parties to the judicial proceeding; and (iii) any other person whom the court may designate.

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.	(F) If the petition to disclose arises out of a proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(E) a reasonable opportunity to appear and be heard.
(4) Sealed Indictments. The federal magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons. **(5) Closed Hearing.** Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury. **(6) Sealed Records.** Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.	**(4)** ***Sealed Indictment.*** The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons. **(5)** ***Closed Hearing.*** Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury. **(6)** ***Sealed Records.*** Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury. **(7)** ***Contempt.*** A knowing violation of Rule 6 may be punished as a contempt of court.

(f) Finding and Return of Indictment. A grand jury may indict only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury, or through the foreperson or deputy foreperson on its behalf, to a federal magistrate judge in open court. If a complaint or information is pending against the defendant and 12 persons do not vote to indict, the foreperson shall so report to a federal magistrate judge in writing as soon as possible. **(g) Discharge and Excuse.** A grand jury shall serve until discharged by the court, but no grand jury may serve more than 18 months unless the court extends the service of the grand jury for a period of six months or less upon a determination that such extension is in the public interest. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.	**(f) Indictment and Return.** A grand jury may indict only if at least 12 jurors concur. The grand jury — or its foreperson or deputy foreperson — must return the indictment to a magistrate judge in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge. **(g) Discharge.** A grand jury must serve until the court discharges it, but it may serve more than 18 months only if the court, having determined that an extension is in the public interest, extends the grand jury's service. An extension may be granted for no more than 6 months, except as otherwise provided by statute. **(h) Excuse.** At any time, for good cause, the court may excuse a juror either temporarily or permanently, and if permanently, the court may impanel an alternate juror in place of the excused juror. **(i) Indian Tribe.** " Indian tribe" means an Indian tribe recognized by the Secretary of the Interior on a list published in the Federal Register under 25 U.S.C. § 479a-1.

Committee Notes
Rule 6
May 10, 2000

COMMITTEE NOTE

The language of Rule 6 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

The first change is in Rule 6(b)(1). The last sentence of current Rule 6(b)(1) provides that "Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court." That language has been deleted from the amended rule. The remainder of this subdivision rests on the assumption that formal proceedings have begun against a person, i.e., an indictment has been returned. The Committee believed that although the first sentence reflects current practice of a defendant being able to challenge the composition or qualifications of the grand jurors after the indictment is returned, the second sentence does not comport with modern practice. That is, a defendant will normally not know the composition or identity of the grand jurors before they are administered their oath. Thus, there is no opportunity to challenge them and have the court decide the issue before the oath is given.

In Rule 6(d)(1), the term "court stenographer" has been changed to "court reporter." Similar changes have been made in Rule 6(e)(1) and (2).

Rule 6(e) continues to spell out the general rule of secrecy of grand jury proceedings and the exceptions to that general rule. The last sentence in current Rule 6(e)(2), concerning contempt for violating Rule 6, now appears in Rule 6(e)(7). No change in substance is intended.

Rule 6(e)(3)(A)(ii) includes a new provision recognizing the sovereignty of Indian Tribes and the possibility that it would be necessary to disclose grand jury information to appropriate tribal officials in order to enforce federal law. Similar language has been added to Rule 6(e)(3)(D)(iii).

Rule 6(e)(3)(C) consists of language located in current Rule 6(e)(3)(C)(iii). The Committee believed that this provision, which recognizes that prior court approval is not required for disclosure of a grand jury matter to another grand jury, should be treated as a separate subdivision in revised Rule 6(e)(3). No change in practice is intended.

Rule 6(e)(3)(D)(iv) is a new provision that addresses disclosure of grand jury information to armed forces personnel where the disclosure is for the purpose of enforcing military criminal law under the Uniform Code of Military Justice, 10 U.S.C. §§ 801-946. *See, e.g.,* Department of Defense Directive 5525.7 (January 22, 1985); 1984 Memorandum of Understanding Between Department of Justice and Department of Justice; Memorandum of Understanding Between the Departments of Justice and Transportation (Coast Guard) Relating to the Investigations and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction (October 9, 1967).

In Rule 6(e)(3)(E)(ii), the Committee considered whether to amend the language relating to "parties to the judicial proceeding" and determined that in the context of the rule, it is understood that the parties referred to are the parties in the same judicial proceeding identified in Rule 6(e)(3)(D)(i).

The Committee decided to leave in subdivision (e) the provision stating that a "knowing violation of Rule 6" may be punished by contempt notwithstanding that, due to its apparent application to the entirety of the Rule, the provision seemingly is misplaced in subdivision (e). Research shows that the provision was added by Congress in 1977 and that it was crafted solely to deal with violations of the secrecy prohibitions in subdivision (e). *See* S. Rep. No. 95-354, p. 8 (1977). Supporting this narrow construction, the Committee found no reported decision involving an application or attempted use of the contempt sanction to a violation other than of the disclosure restrictions in subdivision (e). On the other hand, the Supreme Court in dicta did indicate on one occasion its arguable understanding that the contempt sanction would be available also for a violation of Rule 6(d) relating to who may be present during the grand jury's deliberations. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1987).

In sum, it appears that the scope of the contempt sanction in Rule 6 is unsettled. Because the provision creates an offense, altering its scope may be beyond the authority bestowed by the Rules Enabling Act, 28 U.S.C. 2071 et seq. *See* 28 U.S.C. 2072(b) (Rules must not "abridge, enlarge, or modify any substantive right"). The Committee decided to leave the contempt provision in its present location in subdivision (e), because breaking it out into a separate subdivision could be construed to support the interpretation that the sanction may be applied to a knowing violation of any of the Rule's provisions rather than just those in subdivision (e). Whether or not that is a correct interpretation of the provision—a matter on which the Committee takes no position—must be determined by caselaw, or resolved by Congress.

Current Rule 6(g) has been divided into two new subdivisions, Rule 6(g), Discharge, and Rule 6(h), Excuse. The Committee added the phrase in Rule 6(g) "except as otherwise provided by statute," to recognize the provisions of 18 U.S.C. § 3331 relating to special grand juries.

Rule 6(i) is a new provision defining the term "Indian Tribe," a term used only in this rule.

Rule 7. The Indictment and the Information	Rule 7. The Indictment and the Information
(a) Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.	**(a) When Used.** **(1)** ***Felony.*** An offense must be prosecuted by an indictment if it is punishable: (A) by death; or (B) by imprisonment for more than one year. **(2)** ***Misdemeanor.*** An offense punishable by imprisonment for one year or less may be prosecuted in accordance with Rule 58(b)(1).
(b) Waiver of Indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after having been advised of the nature of the charge and of the rights of the defendant, waives in open court prosecution by indictment.	**(b) Waiving Indictment.** An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant — in open court and after being advised of the nature of the charge and of the defendant's rights — waives prosecution by indictment.

(c) Nature and Contents. **(1) In General.** 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 attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. **(2) Criminal Forfeiture.** No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.[1] **(3) Harmless Error.** Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.	**(c) Nature and Contents.** **(1)** ***In General.*** The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government. It need not contain a formal introduction or conclusion. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated. **(2)** ***Criminal Forfeiture.*** No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute. **(3)** ***Citation Error.*** Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction.
(d) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.	**(d) Surplusage.** Upon the defendant's motion, the court may strike surplusage from the indictment or information.
(e) Amendment of Information. The court may permit an information to be amended 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.	**(e) Amending an Information.** Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the court may permit an information to be amended at any time before verdict or finding.
(f) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.	**(f) Bill of Particulars.** The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 10 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.

[1]The Supreme Court approved amendment in April 2000. The amendments take effect on December 1, 2000, unless Congress takes action otherwise.

Committee Notes
Rule 7
May 10, 2000

COMMITTEE NOTE

The language of Rule 7 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic.

The Committee has deleted the references to "hard labor" in the rule. This punishment is not found in current federal statutes.

[Rule 7(c)(2), Criminal Forfeiture, is language approved by the Supreme Court]

The title of Rule 7(c)(3) has been amended. The Committee believed that potential confusion could arise with the use of the term "harmless error." Rule 52, which deals with the issues of harmless error and plain error, is sufficient to address the topic. Potentially, the topic of harmless error could arise with regard to any of the other rules and there is insufficient need to highlight the term in Rule 7. Rule 7(c)(3), on the other hand, focuses specifically on the effect of an error in the citation of authority in the indictment. That material remains but without any reference to harmless error.

Rule 8. Joinder of Offenses and of Defendants	Rule 8. Joinder of Offenses or 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 of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.	**(a) Joinder of Offenses.** The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged — whether felonies or misdemeanors or both — are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.
(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.	**(b) Joinder of Defendants.** The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

Committee Notes
Rule 8
May 10, 2000

COMMITTEE NOTE

The language of Rule 8 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 9. Warrant or Summons Upon Indictment or Information	Rule 9. Arrest Warrant or Summons on an Indictment or Information
(a) Issuance. Upon the request of the attorney for government the court shall issue a warrant for each defendant named in an information supported by a showing of probable cause under oath as is required by Rule 4(a), or in an indictment. Upon the request of the attorney for the government a summons instead of a warrant shall issue. If no request is made, the court may issue either a warrant or a summons in its discretion. More than one warrant or summons may issue for the same defendant. The clerk shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue. When a defendant arrested with a warrant or given a summons appears initially before a magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of Rule 5.	**(a) Issuance.** The court must issue a warrant — or at the government's request, a summons — for each defendant named in an indictment or named in an information if one or more affidavits accompanying the information establish probable cause to believe that an offense has been committed and that the defendant committed it. More than one warrant or summons may issue for the same defendant. If a defendant fails to appear in response to a summons, the court may, and upon request of the attorney for the government must, issue a warrant. The court must issue the arrest warrant to an officer authorized to execute it or the summons to a person authorized to serve it.
(b) Form. **(1) Warrant.** The form of the warrant shall be as provided in Rule 4(c)(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 nearest available magistrate judge. The amount of bail may be fixed by the court and endorsed on the warrant. **(2) Summons.** The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate judge at a stated time and place.	**(b) Form.** **(1)** ***Warrant.*** The warrant must conform to Rule 4(b)(1) except that it must be signed by the clerk and must describe the offense charged in the indictment or information. **(2)** ***Summons.*** The summons is to be in the same form as a warrant except that it must require the defendant to appear before the court at a stated time and place.
(c) Execution or Service; and Return. **(1) Execution or Service.** The warrant shall be executed or the summons served as provided in Rule 4(d)(1), (2) and (3). A summons to a corporation shall be served by delivering a copy to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the district or at its principal place of business elsewhere in the United States. The officer executing the warrant shall bring the arrested person without unnecessary delay before the nearest available federal magistrate judge or, in the event that a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041.	**(c) Execution or Service; Return; Initial Appearance.** **(1)** ***Execution or Service.*** (A) The warrant must be executed or the summons served as provided in Rule 4(c)(1), (2), and (3). (B) The officer executing the warrant must proceed in accordance with Rule 5(a)(1).

(2) Return. The officer executing a warrant shall make return thereof to the magistrate judge or other officer before whom the defendant is brought. At the request of the attorney for the government 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 attorney for the government 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 marshal or other authorized person for execution or service.	(2) ***Return.*** A warrant or summons must be returned in accordance with Rule 4(c)(4). (3) ***Initial Appearance.*** When an arrested or summoned defendant first appears before the court, the judge must proceed under Rule 5.
[(d) Remand to United States Magistrate for Trial of Minor Offenses] (Abrogated Apr. 28, 1982, eff. Aug. 1, 1982).	

Committee Notes
Rule 9
May 10, 2000

COMMITTEE NOTE

The language of Rule 9 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 9 has been changed to reflect its relationship to Rule 4 procedures for obtaining an arrest warrant or summons. Thus, rather than simply repeating material that is already located in Rule 4, the Committee determined that where appropriate, Rule 9 should simply direct the reader to the procedures specified in Rule 4.

Rule 9(a) has been amended to permit a judge discretion whether to issue an arrest warrant when a defendant fails to respond to a summons on a complaint. Under the current language of the rule, if the defendant fails to appear, the judge must issue a warrant. Under the amended version, if the defendant fails to appear and the government requests that a warrant be issued, the judge must issue one. In the absence of such a request, the judge has the discretion whether to do so. This change mirrors language in amended Rule 4(a).

A second amendment has been made in Rule 9(b)(1). The rule has been amended to delete language permitting the court to set the amount of bail on the warrant. The Committee believes that this language is inconsistent with the 1984 Bail Reform Act. *See United States v. Thomas*, 992 F. Supp. 782 (D.V.I. 1998) (bail amount endorsed on warrant that has not been determined in proceedings conducted under Bail Reform Act has no bearing on decision by judge conducting Rule 40 hearing).

The language in current Rule 9(c)(1), concerning service of a summons on an organization, has been moved to Rule 4.

IV. ARRAIGNMENT, AND PREPARATION FOR TRIAL	**TITLE IV. ARRAIGNMENT AND PREPARATION FOR TRIAL**
Rule 10. Arraignment	**Rule 10. Arraignment**
Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called upon to plead.	Arraignment must be conducted in open court and must consist of: **(a)** ensuring that the defendant has a copy of the indictment or information; **(b)** reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and then **(c)** asking the defendant to plead to the indictment or information.

Committee Notes
Rule 10
May 10, 2000

COMMITTEE NOTE

The language of Rule 10 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 10 is one of those rules. Another version of Rule 10, which includes several significant changes, is being published simultaneously in a separate pamphlet. That version includes a proposed amendment that would permit a defendant to waive altogether an appearance at the arraignment and another amendment that would permit use of video teleconferencing for arraignments.

Rule 11. Pleas	Rule 11. Pleas
(a) Alternatives. **(1) In General.** A defendant may plead guilty, not guilty, or nolo contendere. If a defendant refuses to plead, or if a defendant organization, as defined in 18 U.S.C. § 18, fails to appear, the court shall enter a plea of not guilty. **(2) Conditional Pleas.** With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.	**(a) Entering a Plea.** **(1)** ***In General.*** A defendant may plead guilty, not guilty, or (with the court's consent) nolo contendere. **(2)** ***Conditional Plea.*** With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.
(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.	**(3)** ***Nolo Contendere Plea.*** Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice. **(4)** ***Failure to Enter a Plea.*** If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following: **(1)** the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and **(2)** if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding, and, if necessary, one will be appointed to represent the defendant; and **(3)** that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and **(4)** that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and **(5)** if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement; and	**(b) Consideration and Acceptance of a Guilty or Nolo Contendere Plea.** **(1)** ***Advising and Questioning the Defendant.*** Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following: (A) any statement that the defendant gives under oath may be used against the defendant in a later prosecution for perjury or false statement; (B) the right to plead not guilty, or having already so pleaded, to persist in that plea; (C) the right to a jury trial; (D) the right to be represented by counsel — and if necessary have the court appoint counsel — at trial and at every other stage of the proceeding; (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses; (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere; (G) the nature of each charge to which the defendant is pleading;

(6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.	(H) any maximum possible penalty, including imprisonment, fine, special assessment, forfeiture, restitution, and term of supervised release; (I) any mandatory minimum penalty; (J) the court's obligation to apply the Sentencing Guidelines, and the court's authority to depart from those guidelines under some circumstances; and (K) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.
(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.	**(2)** ***Ensuring That a Plea Is Voluntary***. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement). **(3)** ***Determining the Factual Basis for a Plea***. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(e) Plea Agreement Procedure. (1) **In General.** The attorney for the government and the attorney for the defendant — or the defendant when acting pro se — may agree that, upon the defendant's entering a plea of guilty or nolo contendere to a charged offense, or to a lesser or related offense, the attorney for the government will: (A) move to dismiss other charges; or (B) recommend, or agree not to oppose the defendant's request for a particular sentence or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Any such recommendation or request is not binding on the court; or (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Such a plea agreement is binding on the court once it is accepted by the court. The court shall not participate in any discussions between the parties concerning any such plea agreement.	**(c) Plea Agreement Procedure.** (1) ***In General.*** An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and agree to a plea. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either the charged offense or a lesser or related offense, the plea agreement may specify that the attorney for the government will: (A) not bring, or will move to dismiss, other charges; (B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable (such a recommendation or request does not bind the court); or (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable (such a recommendation or request binds the court once the court accepts it).
(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, upon a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.	(2) ***Disclosing a Plea Agreement.*** The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.	**(3)** ***Judicial Consideration of a Plea Agreement.*** (A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report. (B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request. **(4)** ***Accepting a Plea Agreement.*** If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11 (c)(1)(A) or (C), the agreed disposition will be included in the judgment.
(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.	**(5)** ***Rejecting a Plea Agreement.*** If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must on the record: (A) inform the parties that the court rejects the plea agreement; (B) advise the defendant personally in open court — or, for good cause, in camera — that the court may not follow the plea agreement and give the defendant an opportunity to withdraw the plea; and (C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.	**(d)** ***Withdrawing a Guilty or Nolo Contendere Plea.*** A defendant may withdraw a plea of guilty or nolo contendere : **(1)** before the court accepts a plea of guilty or a plea of nolo contendere, for any, or no, reason; or **(2)** after the court accepts a plea of guilty or nolo contendere, but before it imposes sentence if: (A) the court rejects a plea agreement under Rule 11(c)(5); or (B) the defendant can show fair and just reasons for requesting the withdrawal. **(e)** ***Finality of Guilty or Nolo Contendere Plea.*** After the court imposes sentence the defendant may not withdraw a plea of guilty or nolo contendere and the plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.
(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: **(A)** a plea of guilty which was later withdrawn; **(B)** a plea of nolo contendere; **(C)** any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or **(D)** any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.	**(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements.** Except as otherwise provided in this subdivision, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: **(1)** a plea of guilty that was later withdrawn; **(2)** a plea of nolo contendere; **(3)** any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or **(4)** any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.	
(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.	**(g) Recording the Proceedings**. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).
(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.	**(h) Harmless Error**. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

Committee Notes
Rule 11
May 10, 2000

COMMITTEE NOTE

The language of Rule 11 has been amended and reorganized as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Amended Rule 11(b)(1) requires the court to apprise the defendant of his or her rights before accepting a plea of guilty or nolo contendere. The list is generally the same as that in the current rule except that the reference to parole has been removed and the judge is now required under Rule 11(b)(1)(H) to advise the defendant of the possibility of a fine and special assessment as a part of a maximum possible sentence. Also, the list has been re-ordered.

Rule 11(c)(1)(A) includes a change which recognizes a common type of plea agreement—that the government will "not bring" other charges.

The Committee considered whether to address the practice in some courts of using judges to facilitate plea agreements. The current rule states that "the court shall not participate in any discussions between the parties concerning such plea agreement." Some courts apparently believe that that language acts as a limitation only upon the judge taking the defendant's plea and thus permits other judges to serve as facilitators for reaching a plea agreement between the government and the defendant. *See, e.g., United States v. Torres*, 999 F.2d 376, 378 (9th Cir. 1993) (noting practice and concluding that presiding judge had not participated in a plea agreement that had resulted from discussions involving another judge). The Committee decided to leave the Rule as it is with the understanding that doing so was in no way intended either to approve or disapprove the existing law interpreting that provision.

Amended Rules 11(c)(3) to (5) address the topics of consideration, acceptance, and rejection of a plea agreement. The amendments are not intended to make any change in practice. The topics are discussed separately because in the past there has been some question about the possible interplay between the court's consideration of the guilty plea in conjunction with a plea agreement and sentencing and the ability of the defendant to withdraw a plea. *See United States v. Hyde*, 520 U.S. 670 (1997) (holding that plea and plea agreement need not be accepted or rejected as a single unit; "guilty pleas can be accepted while plea agreements are deferred, and the acceptance of the two can be separated in time."). Similarly, the

Committee decided to more clearly spell out in Rule 11(d) and 11(e) the ability of defendant to withdraw a plea. *See United States v. Hyde, supra.*

Amended Rule 11(e) is a new provision, taken from current Rule 32(e), that addresses the finality of a guilty or nolo contendere plea after the court imposes sentence. The provision makes it clear that it is not possible for a defendant to withdraw a plea after sentence is imposed.

Currently, Rule 11(e)(5) requires that unless good cause is shown, the parties are to give pretrial notice to the court that a plea agreement exists. That provision has been deleted. First, the Committee believed that although the provision was originally drafted to assist judges, under current practice few counsel would risk the consequences in the ordinary case of not informing the court that an agreement exists. Secondly, the Committee was concerned that there might be rare cases where the parties might agree that informing the court of the existence of an agreement might endanger a defendant or compromise an on-going investigation in a related case. In the end, the Committee believed that on balance, it would be preferable to remove the provision and reduce the risk of pretrial disclosure.

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections.	Rule 12. Pleadings And Pretrial Motions
(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and 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.	**(a) Pleadings.** Pleadings in criminal proceedings are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.
(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial: **(1)** Defenses and objections based on defects in the institution of the prosecution; or **(2)** Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or **(3)** Motions to suppress evidence; or **(4)** Requests for discovery under Rule 16; or **(5)** Requests for a severance of charges or defendants under Rule 14.	**(b) Pretrial Motions.** **(1)** ***In General.*** The provisions of Rule 47 apply to pretrial motions. **(2)** ***Motions That May Be Made Before Trial.*** The parties may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue. **(3)** ***Motions That Must Be Made Before Trial.*** The following must be raised before trial: (A) a motion alleging a defect in the institution of the prosecution; (B) a motion alleging a defect in the indictment or information — but at any time during the proceeding, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense; (C) a motion to suppress evidence; (D) a Rule 14 motion to sever charges or defendants; and (E) a Rule 16 motion for discovery.

	(4) ***Notice of the Government's Intent to Use Evidence.*** (A) *At the Government's Discretion.* At the arraignment or as soon afterward as practicable, the government may give notice to the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to that evidence before trial under Rule 12(b)(3)(C). (B) *At the Defendant's Request.* At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.
(c) Motion Date. Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing.	**(c) Motion Deadline.** The court may at the arraignment, or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.
(d) Notice by the Government of the Intention to Use Evidence. **(1) At the Discretion of the Government.** At the arraignment or as soon thereafter as is practicable, the government may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule. **(2) At the Request of the Defendant.** At the arraignment or as soon thereafter as is practicable the defendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the government's intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16.	
(e) Ruling on Motion. A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.	**(d) Ruling on a Motion.** The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

(f) Effect of Failure To Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.	**(e) Waiver of a Defense, Objection, or Request.** A party waives any Rule 12(b)(1) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.
(g) Records. A verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally.	**(f) Records.** All proceedings at a motion hearing, including any findings of fact and conclusions of law made by the court, must be recorded by a court reporter or a suitable recording device.
(h) Effect of Determination. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be continued in custody or that bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any Act of Congress relating to periods of limitations.	**(g) Defendant's Continued Custody or Release Status.** If the court grants a motion to dismiss based on a defect in the institution of the prosecution, in the indictment, or in the information, it may order the defendant to be released or detained under 18 U.S.C. § 3142 for a specified time until a new indictment or information is filed. This rule does not affect any federal statutory period of limitations.
(i) Production of Statements at Suppression Hearing. Rule 26.2 applies at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer is deemed a government witness.	**(h) Producing Statements at a Suppression Hearing.** Rule 26.2 applies at a suppression hearing under Rule 12(b)(3)(C). In a suppression hearing, a law enforcement officer is considered a government witness.

Committee Notes
Rule 12
May 10, 2000

COMMITTEE NOTE

The language of Rule 12 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The last sentence of current Rule 12(a), referring to the abolishment of "all other pleas, and demurrers and motions to quash" has been deleted as being unnecessary.

Rule 12(b) is modified to more clearly indicate that Rule 47 governs any pretrial motions filed under Rule 12, including form and content. The new provision also more clearly delineates those motions that *must* be filed pretrial and those that *may* be filed pretrial. No change in practice is intended.

Rule 12(b)(4) is composed of what is currently Rule 12(d). The Committee believed that that provision, which addresses the government's requirement to disclose discoverable information for the purpose of facilitating timely defense objections and motions, was more appropriately associated with the pretrial motions specified in Rule 12(b)(3).

Rule 12(c) includes a non-stylistic change. The reference to the "local rule" exception has been deleted to make it clear that judges should be encouraged to set deadlines for motions. The Committee believed that doing so promotes more efficient case management, especially when there is a heavy docket of pending cases. Although the rule permits some discretion in setting a date for motion hearings, the Committee believed that doing so at an early point in the proceedings would also promote judicial economy.

Moving the language in current Rule 12(d) caused the relettering of the subdivisions following Rule 12(c).

Although amended Rule 12(e) is a revised version of current Rule 12(f), the Committee intends to make no change in the current law regarding waivers of motions or defenses.

Rule 12.1. Notice of Alibi	Rule 12.1. Notice of Alibi Defense
(a) Notice by Defendant. Upon written demand of the attorney for the government stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such different time as the court may direct, upon the attorney for the government a written notice of the defendant's intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi.	**(a) Government's Request for Notice and Defendant's Response.** **(1)** ***Government's Request.*** The attorney for the government may request in writing that the defendant notify the attorney for the government of any intended alibi defense. The request must state the time, date, and place of the alleged offense. **(2)** ***Defendant's Response.*** Within 10 days after the request, or some other time the court directs, the defendant must serve written notice on the attorney for the government of any intended alibi defense. The defendant's notice must state the specific places where the defendant claims to have been at the time of the alleged offense and the names, addresses, and telephone numbers of the alibi witnesses on whom the defendant intends to rely.
(b) Disclosure of Information and Witness. Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the attorney for the government shall serve upon the defendant or the defendant's attorney a written notice stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied upon to rebut testimony of any of the defendant's alibi witnesses.	**(b) Disclosing Government Witnesses.** **(1)** ***Disclosure.*** If the defendant serves a Rule 12.1(a)(2) notice, the attorney for the government must disclose in writing to the defendant, or the defendant's attorney, the names, addresses, and telephone numbers of the witnesses the government intends to rely on to establish the defendant's presence at the scene of the alleged offense, and any government rebuttal witnesses to the defendant's alibi witnesses. **(2)** ***Time to Disclose.*** Unless the court directs otherwise, the attorney for the government must give notice under Rule 12.1(b)(1) within 10 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.
(c) Continuing Duty to Disclose. If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (a) or (b), the party shall promptly notify the other party or the other party's attorney of the existence and identity of such additional witness.	**(c) Continuing Duty to Disclose.** Both the attorney for the government and the defendant must promptly disclose in writing to the other party the name, address, and telephone numbers of any additional witness if: **(1)** the disclosing party learns of the witness before or during trial; and **(2)** the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had earlier known of the witness.

(d) Failure to Comply. Upon failure of either party to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.	**(d) Exceptions.** For good cause the court may grant an exception to any requirement of Rule 12.1 (a) -(c).
(e) Exceptions. For good cause shown, the court may grant an exception to any of the requirements of subdivisions (a) through (d) of this rule.	**(e) Failure to Comply.** If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the defendant's alibi. This rule does not limit the defendant's right to testify.
(f) Inadmissibility of Withdrawn Alibi. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connections with such intention, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.	**(f) Inadmissibility of Withdrawn Intent.** Evidence of an intent to rely on an alibi defense, later withdrawn, or of statements made in connection with that intent, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intent.

Committee Notes
Rule 12.1
May 10, 2000

COMMITTEE NOTE

The language of Rule 12.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Current Rules12.1(d) and 12.1(e) have been switched in the amended rule to improve the organization of the rule.

Finally, the amended rule includes a new requirement that in providing the names and addresses of alibi and any rebuttal witnesses, the parties must also provide the phone numbers of those witnesses. *See* Rule 12.1(a)(2), Rule 12.1(b)(1), and Rule 12.1(c). The Committee believed that requiring such information would facilitate locating and interviewing those witnesses.

Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition	Rule 12.2. Notice of Insanity Defense; Mental Examination
(a) Defense of Insanity. If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.	**(a) Notice of an Insanity Defense.** A defendant who intends to assert a defense of insanity at the time of the alleged offense must notify the attorney for the government in writing within the time provided for filing a pretrial motion, or at any later time the court directs. A defendant who fails to do so cannot rely on an insanity defense. The court may — for good cause — allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.
(b) Expert Testimony of Defendant's Mental Condition. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.	**(b) Notice of Expert Evidence of a Mental Condition.** If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on the issue of guilt, the defendant must — within the time provided for the filing of pretrial motions or at a later time as the court directs — notify the attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow late filing of the notice or grant additional time to the parties to prepare for trial or make any other appropriate order.
(c) Mental Examination of Defendant. In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. 4241 or 4242. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.	**(c) Mental Examination.** **(1)** ***Authority to Order Examination; Procedures.*** In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. § 4241 or § 4242. **(2)** ***Inadmissibility of a Defendant's Statements.*** No statement made by a defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced evidence.

(d) Failure to Comply. If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt.	**(d) Failure to Comply.** If the defendant fails to give notice under Rule 12.2(b) or does not submit to an examination when ordered under Rule 12.2(c), the court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt.
(e) Inadmissibility of Withdrawn Intention. Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.	**(e) Inadmissibility of Withdrawn Intention.** Evidence of an intention as to which notice was given under Rule 12.2(a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

Committee Notes
Rule 12.2
May 10, 2000

COMMITTEE NOTE

The language of Rule 12.2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 12.2 is one of those rules. Although this version of Rule 12.2 contains only "style" changes, another version of the rule is being published simultaneously in a separate pamphlet. That version of Rule 12.2 includes five significant amendments.

Rule 12.3. Notice of Defense Based upon Public Authority	Rule 12.3. Notice of Public-Authority Defense
(a) Notice by Defendant; Government Response; Disclosure of Witnesses. **(1) Defendant's Notice and Government's Response.** A defendant intending to claim a defense of actual or believed exercise of public authority on behalf of a law enforcement or Federal intelligence agency at the time of the alleged offense shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, serve upon the attorney for the Government a written notice of such intention and file a copy of such notice with the clerk. Such notice shall identify the law enforcement or Federal intelligence agency and any member of such agency on behalf of which and the period of time in which the defendant claims the actual or believed exercise of public authority occurred. If the notice identifies a Federal intelligence agency, the copy filed with the clerk shall be under seal. Within ten days after receiving the defendant's notice, but in no event less than twenty days before the trial, the attorney for the Government shall serve upon the defendant or the defendant's attorney a written response which shall admit or deny that the defendant exercised the public authority identified in the defendant's notice.	**(a) Notice of Defense and Disclosure of Witnesses.** **(1)** ***Notice in General.*** A defendant who intends to assert a defense of actual or believed exercise of public authority on behalf of a law-enforcement agency or federal intelligence agency at the time of the alleged offense must so notify the attorney for the government in writing and must file a copy of the notice with the clerk within the time provided for filing a pretrial motion, or at any later time the court directs. The notice filed with the clerk must be under seal if the notice identifies a federal intelligence agency under whose authority the defendant claims to have acted. **(2)** ***Contents of Notice.*** The notice must contain the following information: (A) the law-enforcement agency or federal intelligence agency involved; (B) the agency member on whose behalf the defendant claims to have acted; and (C) the time during which the defendant claims to have acted with public authority. **(3)** ***Response to Notice.*** An attorney for the government must serve a written response on the defendant or the defendant's attorney within 10 days after receiving the defendant's notice, but no later than 20 days before trial. The response must admit or deny that the defendant exercised the public authority identified in the defendant's notice.

(2) Disclosure of Witnesses. At the time that the Government serves its response to the notice or thereafter, but in no event less than twenty days before trial, the attorney for the Government may serve upon the defendant or the defendant's attorney a written demand for the names and addresses of the witnesses, if any, upon whom the defendant intends to rely in establishing the defense identified in the notice. Within seven days after receiving the Government's demand, the defendant shall serve upon the attorney for the Government a written statement of the names and addresses of any such witnesses. Within seven days after receiving the defendant's written statement, the attorney for the Government shall serve upon the defendant or the defendant's attorney a written statement of the names and addresses of the witnesses, if any, upon whom the Government intends to rely in opposing the defense identified in the notice.	**(4)** ***Disclosing Witnesses.*** (A) *Government's Request.* An attorney for the government may request in writing that the defendant disclose the name, address, and telephone number of each witness the defendant intends to rely on to establish a public-authority defense. The attorney for the government may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(1), or later, but must serve the request no later than 20 days before trial. (B) *Defendant's Response.* Within 7 days after receiving the government's request, the defendant must serve on an attorney for the government a written statement of the name, address, and telephone number of each witness. (C) *Government's Reply.* Within 7 days after receiving the defendant's statement, the attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name, address, and telephone number of each witness the government intends to rely on to oppose the defendant's public-authority defense.
(3) Additional Time. If good cause is shown, the court may allow a party additional time to comply with any obligation imposed by this rule.	**(5)** ***Additional Time.*** The court may for good cause allow a party additional time to comply with this rule.
(b) Continuing Duty to Disclose. If, prior to or during trial, a party learns of any additional witness whose identity, if known, should have been included in the written statement furnished under subdivision (a)(2) of this rule, that party shall promptly notify in writing the other party or the other party's attorney of the name and address of any such witness.	**(b) Continuing Duty to Disclose.** Both an attorney for the government and the defendant or the defendant's attorney must promptly disclose in writing to the other party the name, address, and telephone number of any additional witness if: **(1)** the disclosing party learns of the witness before or during trial; and **(2)** the witness should have been disclosed under Rule 12.3(a)(4) if the disclosing party had earlier known of the witness.
(c) Failure to Comply. If a party fails to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered in support of or in opposition to the defense, or enter such other order as it deems just under the circumstances. This rule shall not limit the right of the defendant to testify.	**(c) Failure to Comply.** If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the public-authority defense. This rule does not limit the defendant's right to testify.

(d) Protective Procedures Unaffected. This rule shall be in addition to and shall not supersede the authority of the court to issue appropriate protective orders, or the authority of the court to order that any pleading be filed under seal.	**(d) Protective Procedures Unaffected.** This rule does not limit the court's authority to issue appropriate protective orders or to order that any filings be under seal.
(e) Inadmissibility of Withdrawn Defense Based upon Public Authority. Evidence of an intention as to which notice was given under subdivision (a), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.	**(e) Inadmissibility of Withdrawn Defense Based upon Public Authority.** Evidence of an intention as to which notice was given under Rule 12.3(a), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

Committee Notes
Rule 12.3
May 10, 2000

COMMITTEE NOTE

The language of Rule 12.3 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The Committee considered the issue of whether (as currently provided in Rule 12.3) a defendant could invoke the defense of public authority on either an actual or believed exercise of public authority. The Committee ultimately decided that any attempt to provide the defendant with a "right" to assert the defense was not a matter within the purview of the Committee under the Rules Enabling Act. The Committee decided to retain the current language, which recognizes, as a nonsubstantive matter, that if the defendant intends to raise the defense, notice must be given. Thus, the Committee decided not to make any changes in the current rule regarding the availability of the defense.

Substantive changes have been made in Rule 12.3(a)(4) and 12.3(b). As in Rule 12.1, the Committee decided to include in the restyled rule the requirement that the parties provide the telephone numbers of any witnesses disclosed under the rule.

Rule 13. Trial Together of Indictments or Informations	Rule 13. Joint Trial of Separate Cases
The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is 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.	The court may order that separate cases be tried together as though brought in a single indictment or information if all offenses and all defendants could have been joined in a single indictment or information.

Committee Notes
Rule 13
May 10, 2000

COMMITTEE NOTE

The language of Rule 13 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 14. Relief from Prejudicial Joinder	Rule 14. Relief from Prejudicial Joinder
If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an 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. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.	**(a) Relief.** If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires. **(b) Defendants' Statements.** Before ruling on a defendant's motion to sever, the court may order the attorney for the government to deliver to the court for in camera inspection any defendants' statements that the government intends to use as evidence.

Committee Notes
Rule 14
May 10, 2000

COMMITTEE NOTE

The language of Rule 14 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The reference to a defendant's "confession" in the last sentence of the current rule has been deleted. The Committee believed that the reference to the "defendant's statements" in the amended rule would fairly embrace any confessions or admissions by a defendant.

Rule 15. Depositions	Rule 15. Depositions
(a) When Taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is detained pursuant to section 3144 of title 18, United States Code, the court on written motion of the witness and upon notice to the parties may direct that the witness' deposition be taken. After the deposition has been subscribed the court may discharge the witness.	**(a) When Taken.** **(1)** ***In General.*** A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant such motion due to exceptional circumstances in the case and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated book, paper, document, record, recording, data, or other material not privileged. **(2)** ***Detained Material Witness.*** A witness who is detained under 18 U.S.C. § 3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript.
(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition.	**(b) Notice.** **(1)** ***In General.*** A party seeking to take a deposition must give every other party reasonable written notice of the deposition's date and location. The notice must state the name and address of each deponent. If requested by a party receiving the notice, the court for good cause may change the deposition's date or location. **(2)** ***To the Custodial Officer.*** A party seeking to take the deposition must also notify the officer who has custody of the defendant of the scheduled date and location.

The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at the examination and keep the defendant in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause the defendant's removal from the place of the taking of the deposition, the defendant persists in conduct which is such as to justify exclusion from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but a failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.	**(c) Defendant's Presence.** **(1)** ***Defendant in Custody.*** The officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant: (A) waives in writing the right to be present; or (B) persists in disruptive conduct justifying exclusion after the court has warned the defendant that disruptive conduct will result in the defendant's exclusion. **(2)** ***Defendant Not in Custody.*** A defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant — absent good cause — waives both the right to appear and any objection to the taking and use of the deposition based on that right.
(c) Payment of Expenses. Whenever a deposition is taken at the instance of the government, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and the defendant's attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the government.	**(d) Expenses.** If the deposition was requested by the government the court may — or if the defendant is unable to bear the deposition expenses the court must — order the government to pay: **(1)** any reasonable travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition, and **(2)** the deposition transcript costs.

(d) How Taken. Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without that defendant's consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or the defendant's counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.	**(e) Taken.** Unless these rules or a court order provides otherwise, a deposition must be filed, and it must be taken in the same manner as a deposition in a civil action, except that: **(1)** A defendant may not be deposed without that defendant's consent. **(2)** The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial. **(3)** The government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial.
(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with that witness' deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering of all of it which is relevant to the part offered and any party may offer other parts.	**(f) Use as Evidence.** A party may use all or part of a deposition as provided by the Federal Rules of Evidence.
(f) Objections to Deposition Testimony. Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.	**(g) Objections.** A party objecting to deposition testimony or evidence must state the grounds for the objection during the deposition.
(g) Deposition by Agreement Not Precluded. Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court.	**(h) Agreed Depositions Permitted.** The parties may by agreement take and use a deposition with the court's consent.

Committee Notes
Rule 15
May 10, 2000

COMMITTEE NOTE

The language of Rule 15 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

In Rule 15(a), the list of materials to be produced has been amended to include the expansive term "data" to reflect the fact that in an increasingly technological culture, the information may exist in a format not already covered by the more conventional list, such as a book or document.

The last portion of current Rule 15(b), dealing with the defendant's presence at a deposition, has been moved to amended Rule 15(c).

Rule 15(d), which addresses the payment of expenses incurred by the defendant and the defendant's attorney, has been changed. Under the current rule, if the government requests the deposition, or if the defendant requests the deposition and is unable to pay for it, the court *may* direct the government to pay for travel and subsistence expenses for both the defendant and the defendant's attorney. In either case, the current rule requires the government to pay for the transcript. Under the amended rule, if the deposition was requested by the government, the court *must* require the government to pay reasonable subsistence and travel expenses and the cost of the deposition transcript. If the defendant is unable to pay the deposition expenses, the court *must* order the government to pay reasonable subsistence and travel expenses and the deposition transcript costs—regardless of who requested the deposition. Although the current rule places no apparent limits on the amount of funds that should be reimbursed, the Committee believed that insertion of the word "reasonable" was consistent with current practice.

Rule 15(f) has been revised to more clearly reflect that the admissibility of any deposition taken under the rule is governed not by the rule itself, but instead by the Federal Rules of Evidence.

Rule 16. Discovery and Inspection	Rule 16. Discovery and Inspection
(a) Governmental Disclosure of Evidence. **(1) Information Subject to Disclosure.** **(A) Statement of Defendant.** Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. Upon request of a defendant which is an organization such as a corporation, partnership, association, or labor union, the government must disclose to the defendant any of the foregoing statements made by a person who the government contends (1) was, at the time of making the statement, so situated as a director, officer, employee or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved.	**(a) Government's Disclosure.** **(1) *Information Subject to Disclosure.*** (A) *Defendant's Oral Statement.* Upon request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial. (B) *Defendant's Written or Recorded Statement.* Upon request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following: (i) any relevant written or recorded statement by the defendant if: (a) the statement is within the government's possession, custody, or control; and (b) the attorney for the government knows — or through due diligence could know — that the statement exists; (ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and (iii) the defendant's recorded testimony before a grand jury relating to the charged offense.
	(C) *Organizational Defendant.* Upon request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:

	(i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or (ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.
(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.	(D) *Defendant's Prior Record.* Upon request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows — or through due diligence could know — that the record exists.
(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.	(E) *Documents and Objects.* Upon the defendant's request, the government must permit the defendant to inspect and copy, or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control, and: (i) the item is material to the preparation of the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.	(F) *Reports of Examinations and Tests.* Upon request, the government must permit a defendant to inspect and copy, or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if: (i) the item is within the government's possession, custody, or control; (ii) the attorney for the government knows — or through due diligence could know — that the item exists; and (iii) the item is material to the preparation of the defense or the government intends to use the item in its case-in-chief at trial.
(E) Expert Witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.	(G) *Expert Testimony.* Upon request, the government must give to the defendant a written summary of any testimony the government intends to use in its case-in-chief at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.
(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.	**(2)** ***Information Not Subject to Disclosure.*** Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agent in connection with the investigation or prosecution of the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.
(3) Grand Jury Transcripts. Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.	**(3)** ***Grand Jury Transcripts.*** This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2.
[(4) Failure to Call Witness.] (Deleted Dec. 12, 1975)	

(b) The Defendant's Disclosure of Evidence. **(1) Information Subject to Disclosure.** **(A) Documents and Tangible Objects.** If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.	**(b) Defendant's Disclosure.** **(1) *Information Subject to Disclosure.*** (A) *Documents and Objects*. If the defendant requests disclosure under Rule 16(a)(1)(E), and the government complies, then the defendant must permit the government, upon request, to inspect and copy, or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if: (i) the item is within the defendant's possession, custody, or control; and (ii) the defendant intends to use the item in the defendant's case-in-chief at trial.
(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony.	(B) *Reports of Examinations and Tests*. If the defendant requests disclosure under Rule 16(a)(1)(F), then upon compliance and the government's request, the defendant must permit the government to inspect and copy, or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if: (i) the item is within the defendant's possession, custody, or control; and (ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.
(C) Expert Witnesses. Under the following circumstances, the defendant shall, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial: (i) if the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. This summary shall describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications.	(C) *Expert Testimony*. If the defendant requests disclosure under Rule 16(a)(1)(G), then upon compliance and the government's request, the defendant must give the government a written summary of any testimony the defendant intends to use as evidence at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for these opinions, and the witness's qualifications.

(2) Information Not Subject To Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorneys.	**(2)** ***Information Not Subject to Disclosure.*** Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of: (A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or (B) a statement made to the defendant, or the defendant's attorney or agent, by: (i) the defendant; (ii) a government or defense witness; or (iii) a prospective government or defense witness.
[(3) Failure to Call Witness.] (Deleted Dec. 12, 1975)	
(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.	**(c) Continuing Duty to Disclose.** A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court, if: **(1)** the evidence or material is subject to discovery or inspection under this rule; and **(2)** the other party previously requested, or the court ordered, its production.
(d) Regulation of Discovery. **(1) Protective and Modifying Orders.** Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.	**(d) Regulating Discovery.** **(1)** ***Protective and Modifying Orders.*** At any time the court may for good cause deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

(2) Failure To Comply With a Request. If at any time during the course of proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.	**(2)** ***Failure to Comply.*** If a party fails to comply with Rule 16, the court may: (A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions; (B) grant a continuance; (C) prohibit that party from introducing the undisclosed evidence; or (D) enter any other order that is just under the circumstances.
(e) Alibi Witnesses. Discovery of alibi witnesses is governed by Rule 12.1.	

Committee Notes
Rule 16
May 10, 2000

COMMITTEE NOTE

The language of Rule 16 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Current Rule 16(a)(1)(A) is now located in Rule 16(a)(1)(A), (B), and (C). Current Rule 16(a)(1)(B), (C), (D), and (E) have been relettered.

Amended Rule 16(b)(1)(B) includes a change that may be substantive in nature. Rule 16(a)(1)(E) and 16(a)(1)(F) require production of specified information if the government intends to "use" the information "in its case-in-chief at trial." The Committee believed that the language in revised Rule 16(b)(1)(B), which deals with a defendant's disclosure of information to the government, should track the similar language in revised Rule 16(a)(1). In Rule 16(b)(1)(B)(ii), the Committee changed the current provision which reads: "the defendant intends to *introduce* as evidence" to the "defendant intends to *use* the item . . ." The Committee recognized that this might constitute a substantive change in the rule but believed that it was a necessary conforming change with the provisions in 16(a)(1)(E) and (F), noted *supra*, regarding use of evidence by the government.

In amended Rule 16(d)(1), the last phrase in the current subdivision —which refers to a possible appeal of the court's discovery order—has been deleted. In the Committee's view, no substantive change results from that deletion. The language is unnecessary because the court, regardless of whether there is an appeal, will have maintained the record.

Finally, current Rule 16(e), which addresses the topic of notice of alibi witnesses, has been deleted as being unnecessarily duplicative of Rule 12.1.

Rule 17. Subpoena	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. A subpoena shall be issued by a United States magistrate judge in a proceeding before that magistrate judge, but it need not be under the seal of the court.	**(a) Content.** A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena — signed and sealed — to the party requesting it and that party must fill in the blanks before the subpoena is served.
(b) Defendants Unable to Pay. The court shall order at any time that a subpoena be issued for service on a named witness upon an ex parte application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. If the court 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 government.	**(b) Defendant Unable to Pay.** Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.
(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.	**(c) Producing Documents and Objects.** **(1)** A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them. **(2)** On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.
(d) Service. A subpoena may be served by the marshal, by a deputy marshal 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 by tendering to that person the fee for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof.	**(d) Service.** A marshal, deputy marshal, or any nonparty who is at least 18 years old, may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the United States, a federal officer, or a federal agency has requested the subpoena.

(e) Place of Service. **(1) In United States.** A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States. **(2) Abroad.** A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C., § 1783.	**(e) Place of Service.** (1) ***In the United States.*** A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States. (2) ***In a Foreign Country.*** If the witness is in a foreign country, 28 U.S.C. § 1783 governs the subpoena's service.
(f) For Taking Depositions; Place of Examination. **(1) Issuance.** An order to take a deposition authorizes the issuance by the clerk of the court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. **(2) Place.** The witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the trial court, taking into account the convenience of the witness and the parties.	**(f) Deposition Subpoena.** (1) ***Issuance.*** A court order to take a deposition authorizes the clerk in the district where the deposition is to be taken to issue a subpoena for any witness named or described in the order. (2) ***Place.*** After considering the convenience of the witness and the parties, the court may order — and the subpoena may require — the witness to appear anywhere the court designates.
(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate judge.	**(g) Contempt.** The court may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district.
(h) Information Not Subject to Subpoena. Statements made by witnesses or prospective witnesses may not be subpoenaed from the government or the defendant under this rule, but shall be subject to production only in accordance with the provisions of Rule 26.2.	**(h) Information Not Subject to a Subpoena.** No party may subpoena a statement of a witness or of a prospective witness under this rule. Rule 26.2 governs the production of the statements.

Committee Notes
Rule 17
May 10, 2000

COMMITTEE NOTE

The language of Rule 17 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

A potential substantive change has been made in Rule 17(c)(1); the word "data" has been added to the list of matters that may be subpoenaed. The Committee believed that inserting that term will reflect the fact that in an increasingly technological culture, the information may exist in a format not already covered by the more conventional list, such as a book or document.

Rule 17.1. Pretrial Conference	Rule 17.1. Pretrial Conference
At any time after the filing of the indictment or information the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. No admissions made by the defendant or the defendant's attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and the defendant's attorney. This rule shall not be invoked in the case of a defendant who is not represented by counsel.	On its own, or on a party's motion, the court may hold one or more pretrial conferences to promote a fair and expeditious trial. When a conference ends, the court must prepare and file a memorandum of any matters agreed to during the conference. The government may not use any statement made during the conference by the defendant or the defendant's attorney unless it is in writing and signed by the defendant and the defendant's attorney.

Committee Notes
Rule 17.1
May 10, 2000

COMMITTEE NOTE

The language of Rule 17.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Current Rule 17.1 prohibits the court from holding a pretrial conference where the defendant is not represented by counsel. It is unclear whether this would bar such a conference when the defendant invokes the constitutional right to self-representation. *See Faretta v. California*, 422 U.S. 806 (1975). The amended version makes clear that a pretrial conference may be held in these circumstances. Moreover, the Committee believed that pretrial conferences might be particularly useful in those cases where the defendant is proceeding pro se.

V. VENUE	**Title V. Venue**
Rule 18. Place of Prosecution and Trial	**Rule 18. Place of Prosecution and Trial**
Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.	Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district in which the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant and the witnesses, and the prompt administration of justice.

Committee Notes
Rule 18
May 10, 2000

COMMITTEE NOTE

The language of Rule 18 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 19. Rescinded.	Rule 19. [Rescinded.]

Rule 20. Transfer From the District for Plea and Sentence	Rule 20. Transfer for Plea and Sentence
(a) Indictment or Information Pending. A defendant arrested, held, or present in a district other than that in which an indictment or information is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending, and to consent to disposition of the case in the district in which that defendant was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is arrested, held, or present, and the prosecution shall continue in that district.	**(a) Consent to Transfer.** A prosecution may be transferred from the district where the indictment or information is pending, or from which a warrant on a complaint has been issued, to the district where the defendant is arrested, held, or present, if: **(1)** the defendant states in writing a wish to plead guilty or nolo contendere and to waive trial in the district where the indictment, information, or complaint is pending, consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district; and **(2)** the United States attorneys in both districts approve the transfer in writing. **(b) Clerk's Duties.** After receiving the defendant's statement and the required approvals, the clerk where the indictment, information, or complaint is pending must send the file, or a certified copy, to the clerk in the transferee district.
(b) Indictment or Information Not Pending. A defendant arrested, held, or present, in a district other than the district in which a complaint is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive venue and trial in the district in which the warrant was issued, and to consent to disposition of the case in the district in which that defendant was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon filing the written waiver of venue in the district in which the defendant is present, the prosecution may proceed as if venue were in such district.	
(c) Effect of Not Guilty Plea. If after the proceeding has been transferred pursuant to subdivision (a) or (b) of this rule the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced, and the proceeding shall be restored to the docket of that court. The defendant's statement that the defendant wishes to plead guilty or nolo contendere shall not be used against that defendant.	**(c) Effect of a Not Guilty Plea.** If the defendant pleads not guilty after the case has been transferred under Rule 20(a), the clerk must return the papers to the court where the prosecution began, and that court must restore the proceeding to its docket. The defendant's statement that the defendant wished to plead guilty or nolo contendere is not, in any civil or criminal proceeding, admissible against the defendant.

(d) Juveniles. A juvenile (as defined in 18 U.S.C. § 5031) who is arrested, held, or present in a district other than that in which the juvenile is alleged to have committed an act in violation of a law of the United States not punishable by death or life imprisonment may, after having been advised by counsel and with the approval of the court and the United States attorney for each district, consent to be proceeded against as a juvenile delinquent in the district in which the juvenile is arrested, held, or present. The consent shall be given in writing before the court but only after the court has apprised the juvenile of the juvenile's rights, including the right to be returned to the district in which the juvenile is alleged to have committed the act, and of the consequences of such consent.	**(d) Juveniles.** **(1)** ***Consent to Transfer.*** A juvenile, as defined in 18 U.S.C. § 5031, may be proceeded against as a juvenile delinquent in the district where the juvenile is arrested, held, or present, if: (A) the alleged offense that occurred in the other district is not punishable by death or life imprisonment; (B) an attorney has advised the juvenile; (C) the court has informed the juvenile of the juvenile's rights — including the right to be returned to the district where the offense allegedly occurred — and the consequences of waiving those rights; (D) the juvenile, after receiving the court's information about rights, consents in writing to be proceeded against in the transferee district, and files the consent in the transferee district; (E) the United States attorneys for both districts approve the transfer in writing; and (F) the transferee court approves the transfer. **(2)** ***Clerk's Duties.*** After receiving the juvenile's written consent and the required approvals, the clerk where the indictment or information or complaint is pending or where the alleged offense occurred must send the file, or a certified copy, to the clerk in the transferee district.

Committee Notes
Rule 20
May 10, 2000

COMMITTEE NOTE

The language of Rule 20 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

New Rule 20(d)(2) applies to juvenile cases and has been added to parallel a similar provision in Rule 20(b). The new provision provides that after the court has determined that the provisions in Rule 20(d)(1) have been completed and the transfer is approved, the file (or certified copy) must be transmitted from the original court to the transferee court.

Rule 21. Transfer From the District for Trial.	Rule 21. Transfer for Trial
(a) For Prejudice in the District. The court upon motion of the defendant shall transfer the proceeding as to that defendant to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.	**(a) For Prejudice.** Upon the defendant's motion, the court must transfer the proceeding as to that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.
(b) Transfer in Other Cases. For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to that defendant or any one or more of the counts thereof to another district.	**(b) For Convenience.** Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, as to that defendant to another district for the convenience of the parties and witnesses and in the interest of justice.
(c) Proceedings on Transfer. When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, and the prosecution shall continue in that district.	**(c) Proceedings on Transfer.** When the court orders a transfer, the clerk must send to the transferee district the file or a certified copy of it, and any bail taken. The prosecution will then continue in the transferee district.
	(d) Time to File a Motion to Transfer. A motion to transfer may be made at or before arraignment or at any other time the court or these rules prescribe.

Committee Notes
Rule 21
May 10, 2000

COMMITTEE NOTE

The language of Rule 21 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Amended Rule 21(d) consists of what was formerly Rule 22. The Committee believed that the substance of Rule 22, which addressed the issue of the timing of motions to transfer, was more appropriate for inclusion in Rule 21.

Rule 22. Time of Motion to Transfer	Rule 22. Time to File a Motion to Transfer
A motion to transfer under these rules may be made at or before arraignment or at such other time as the court or these rules may prescribe.	[Rescinded.]

Committee Notes
Rule 22
May 10, 2000

COMMITTEE NOTE

Rule 22 has been abrogated. The substance of the rule is now located in Rule 21(d).

VI. TRIAL	TITLE VI. TRIAL
Rule 23. Trial by Jury or by the Court	**Rule 23. Jury or Nonjury Trial**
(a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.	**(a) Jury Trial.** If the defendant is entitled to a jury trial, the trial must be by jury unless: **(1)** the defendant waives a jury trial in writing; **(2)** the government consents; and **(3)** the court approves.
(b) Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.	**(b) Jury Size.** **(1)** ***In General.*** A jury consists of 12 persons unless this rule provides otherwise. **(2)** ***Stipulation for a Smaller Jury.*** At any time before the verdict, the parties may, with the court's approval, stipulate in writing that: (A) the jury may consist of fewer than 12 persons; or (B) a jury of fewer than 12 persons may return a verdict if the court finds it necessary to excuse a juror for good cause after the trial begins. **(3)** ***Court Order for a Jury of 11.*** After the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror.
(c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.	**(c) Nonjury Trial.** In a case tried without a jury, the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or in a written decision or opinion.

Committee Notes
Rule 23
May 10, 2000

COMMITTEE NOTE

The language of Rule 23 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

In current Rule 23(b), the term "just cause" has been replaced with the more familiar term "good cause," that appears in other rules. No change in substance is intended.

Rule 24. Trial Jurors	Rule 24. Trial Jurors
(a) Examination. The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.	**(a) Examination.** **(1)** ***In General.*** The court may examine prospective jurors or may permit the attorneys for the parties to do so. **(2)** ***Court Examination.*** If the court examines the jurors, it must permit the attorneys for the parties to: (A) ask further questions that the court considers proper; or (B) submit further questions that the court may ask if it considers them proper.
(b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.	**(b) Peremptory Challenges.** Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly. **(1)** ***Capital Case.*** Each side has 20 peremptory challenges when the government seeks the death penalty. **(2)** ***Other Felony Case.*** The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year. **(3)** ***Misdemeanor Case.*** Each side has 3 peremptory challenges when the defendant is charged with a crime punishable by fine, imprisonment of one year or less, or both.

(c) Alternate Jurors.

(1) *In General.* The court may empanel no more than 6 jurors, in addition to the regular jury, to sit as alternate jurors. An alternate juror, in the order called, shall replace a juror who becomes or is found to be unable or disqualified to perform juror duties. Alternate jurors shall (i) be drawn in the same manner, (ii) have the same qualifications, (iii) be subject to the same examination and challenges, and (iv) take the same oath as regular jurors. An alternate juror has the same functions, powers, facilities and privileges as a regular juror.

(2) *Peremptory Challenges.* In addition to challenges otherwise provided by law, each side is entitled to 1 additional peremptory challenge if 1 or 2 alternate jurors are empaneled, 2 additional peremptory challenges if 3 or 4 alternate jurors are empaneled, and 3 additional peremptory challenges if 5 or 6 alternate jurors are empaneled. The additional peremptory challenges may be used to remove an alternate juror only, and the other peremptory challenges allowed by these rules may not be used to remove an alternate juror.

(3) *Retention of Alternate Jurors.* When the jury retires to consider the verdict, the court in its discretion may retain the alternate jurors during deliberations. If the court decides to retain the alternate jurors, it shall ensure that they do not discuss the case with any other person unless and until they replace a juror during deliberations. If an alternate replaces a regular juror after deliberations have begun, the court shall instruct the jury to begin its deliberations anew.

(c) Alternate Jurors.

(1) *In General.* The court may impanel up to 6 alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties.

(2) *Procedure.*

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

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

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

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

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

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

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

Committee Notes
Rule 24
May 10, 2000

COMMITTEE NOTE

The language of Rule 24 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

In restyling Rule 24(a), the Committee deleted the language that authorized the defendant to conduct voir dire of prospective jurors. The Committee believed that the current language was potentially ambiguous and could lead one incorrectly to conclude that a defendant, represented by counsel, could personally conduct voir dire or additional voir dire. The Committee believed that the intent of the current provision was to permit a defendant to participate personally in voir dire only if the defendant was acting pro se. Amended Rule 24(a) refers only to attorneys for the parties, i.e. the defense counsel and the attorney for the government, with the understanding that if the defendant is not represented by counsel, the court may still, in its discretion, permit the defendant to participate in voir dire. In summary, the Committee intends no change in practice.

Finally, the rule authorizes the court in multi-defendant cases to grant additional peremptory challenges to the defendants. If the court does so, the prosecution may request additional challenges in a multi-defendant case, not to exceed the total number available to the defendants jointly. The court, however, is not required to equalize the number of challenges where additional challenges are granted to the defendant.

Rule 25. Judge; Disability	Rule 25. Judge's Disability
(a) During Trial. If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying familiarity with the record of the trial, may proceed with and finish the trial.	**(a) During Trial.** Any judge regularly sitting in or assigned to the court may complete a jury trial if: **(1)** the judge before whom the trial began cannot proceed because of death, sickness, or other disability; and **(2)** the judge completing the trial certifies familiarity with the trial record.
(b) After Verdict or Finding of Guilt. If by reason of absence, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if that judge is satisfied that a judge who did not preside at the trial cannot perform those duties or that it is appropriate for any other reason, that judge may grant a new trial.	**(b) After a Verdict or Finding of Guilty.** **(1)** After a verdict or finding of guilty, any judge regularly sitting in or assigned to a court may complete the court's duties if the judge who presided at trial cannot perform those duties because of absence, death, sickness, or other disability. **(2)** The successor judge may grant a new trial if satisfied that: (A) a judge other than the one who presided at the trial cannot perform the post-trial duties; or (B) a new trial is necessary for some other reason.

Committee Notes
Rule 25
May 10, 2000

COMMITTEE NOTE

The language of Rule 25 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 25(b)(2) addresses the possibility of a new trial when a judge determines that no other judge could perform post-trial duties or when the judge determines that there is some other reason for doing so. The current rule indicates that those reasons must be "appropriate." The Committee, however, believed that a better term would be "necessary," because that term includes notions of manifest necessity. No change in meaning or practice is intended.

Rule 26. Taking of Testimony	Rule 26. Taking Testimony
In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress, or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.	In all trials the testimony of witnesses must be taken orally in open court, unless otherwise provided by an Act of Congress or by rules adopted under 28 U.S.C. §§ 2072-2077.

Rule 26.1. Determination of Foreign Law	Rule 26.1. Foreign Law Determination
A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.	A party intending to raise an issue of foreign law must provide the court and all parties with reasonable written notice. Issues of foreign law are questions of law, but in deciding such issues a court may consider any relevant material or source — including testimony — without regard to the Federal Rules of Evidence.

Committee Notes
Rule 26.1
May 10, 2000

COMMITTEE NOTE

The language of Rule 26.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 26.2. Production of Witness Statements	Rule 26.2. Producing a Witness's Statement
(a) Motion for Production. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the government or the defendant and the defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.	**(a) Motion to Produce.** After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government or the defendant and the defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in the possession and that relates to the subject matter of the witnesses's testimony.
(b) Production of Entire Statement. If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party.	**(b) Producing the Entire Statement.** If the entire statement relates to the subject matter of the witness's testimony, the court must order that the statement be delivered to the moving party.
(c) Production of Excised Statement. If the other party claims that the statement contains privileged information or matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that are privileged or that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over the defendant's objection must be preserved by the attorney for the government, and, if the defendant appeals a conviction, must be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.	**(c) Producing a Redacted Statement.** If the party who called the witness claims that the statement contains information that is privileged or does not relate to the subject matter of the witness's testimony, the court must inspect the statement in camera. After excising any privileged or unrelated portions, the court must order delivery of the redacted statement to the moving party. If the defendant objects to an excision, the court must preserve the entire statement with the excised portion indicated, under seal, as part of the record.
(d) Recess for Examination of Statement. Upon delivery of the statement to the moving party, the court, upon application of that party, may recess the proceedings so that counsel may examine the statement and prepare to use it in the proceedings.	**(d) Recess to Examine a Statement.** The court may recess the proceedings to allow time for a party to examine the statement and prepare for its use.
(e) Sanction for Failure to Produce Statement. If the other party elects not to comply with an order to deliver a statement to the moving party, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the attorney for the government who elects not to comply, shall declare a mistrial if required by the interest of justice.	**(e) Sanction for Failure to Produce or Deliver a Statement.** If the party who called the witness disobeys an order to produce or deliver a statement, the court must strike the witness's testimony from the record. If an attorney for the government disobeys the order, the court must declare a mistrial if justice so requires.

(f) Definition. As used in this rule, a "statement" of a witness means: **(1)** a written statement made by the witness that is signed or otherwise adopted or approved by the witness; **(2)** a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or **(3)** a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.	**(f) Definition.** As used in this rule, a witness's "statement" means: **(1)** a written statement that the witness makes and signs, or otherwise adopts or approves; **(2)** a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording; or **(3)** the witness's statement to a grand jury, however taken or recorded, or a transcription of such a statement.
(g) Scope of Rule. This rule applies at a suppression hearing conducted under Rule 12, at trial under this rule, and to the extent specified: **(1)** in Rule 32(c)(2) at sentencing; **(2)** in Rule 32.1(c) at a hearing to revoke or modify probation or supervised release; **(3)** in Rule 46(i) at a detention hearing; **(4)** in Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255; and **(5)** in Rule 5.1 at a preliminary examination.	**(g) Scope.** This rule applies at trial, at a suppression hearing under Rule 12, and to the extent specified in the following rules: **(1)** Rule 5.1(h) (preliminary hearing); **(2)** Rule 32(h)(2) (sentencing); **(3)** Rule 32.1(c) (hearing to revoke or modify probation or supervised release); **(4)** Rule 46(j) (detention hearing); and **(5)** Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255.

Committee Notes
Rule 26.2
May 10, 2000

COMMITTEE NOTE

The language of Rule 26.2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Current Rule 26.2(c) states that if the court withholds a portion of a statement, over the defendant's objection, "the attorney for the government" must preserve the statement. The Committee believed that the better rule would be for the court to simply seal the entire statement as a part of the record, in the event that there is an appeal.

Also, the terminology in Rule 26.2(c) has been changed. The rule now speaks in terms of a "redacted" statement instead of an "excised" statement. No change in practice is intended.

Finally, the list of proceedings has been placed in numerical order by rule in Rule 26.2(g).

Rule 26.3. Mistrial	Rule 26.3. Mistrial
Before ordering a mistrial, the court shall provide an opportunity for the government and for each defendant to comment on the propriety of the order, including whether each party consents or objects to a mistrial, and to suggest any alternatives.	Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives.

Committee Notes
Rule 26.3
May 10, 2000

COMMITTEE NOTE

The language of Rule 26.3 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 27. Proof of Official Record	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.	A party may prove an official record, an entry in such a record, or the lack of a record or entry in the same manner as in a civil action.

Committee Notes
Rule 27
May 10, 2000

COMMITTEE NOTE

The language of Rule 27 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 28. Interpreters	Rule 28. Interpreters
The court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government, as the court may direct.	The court may select, appoint, and fix the reasonable compensation for an interpreter. The compensation must be paid from funds provided by law or by the government, as the court may direct.

Committee Notes
Rule 28
May 10, 2000

COMMITTEE NOTE

The language of Rule 28 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 29. Motion for Judgment of Acquittal	Rule 29. Motion for Judgment of Acquittal
(a) Motion Before Submission to Jury. 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 the defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.	**(a) Before Submission to the Jury.** After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense as to which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.
(b) Reservation of Decision on Motion. The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves a decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.	**(b) Reserving Decision.** The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.
(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.	**(c) After Jury Verdict or Discharge.** **(1)** ***In General.*** A defendant may move for judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later, or within any other time the court fixes during the 7-day period. **(2)** ***Ruling on Motion.*** If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter judgment of acquittal. **(3)** ***No Prior Motion.*** A defendant is not required to move for judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

(d) Same: Conditional Ruling on Grant of Motion. If a motion for judgment of acquittal after verdict of guilty under this Rule is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed, specifying the grounds for such determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial has been granted conditionally and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. If such motion has been denied conditionally, the appellee on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.	**(d) Conditional Ruling on a Motion for a New Trial.** **(1)** ***Motion for a New Trial.*** If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination. **(2)** ***Finality.*** The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal. **(3)** ***Appeal.*** (A) *Grant of a Motion for a New Trial.* If the court conditionally grants a motion for a new trial, and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise. (B) *Denial of a Motion for a New Trial.* If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

Committee Notes
Rule 29
May 10, 2000

COMMITTEE NOTE

The language of Rule 29 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

In Rule 29(a), the first sentence abolishing "directed verdicts" has been deleted because it is unnecessary. The rule continues to recognize that a judge may sua sponte enter a judgment of acquittal.

Rule 29(c)(1) addresses the issue of the timing of a motion for acquittal. The amended rule now includes language that the motion must be made within 7 days after a guilty verdict or after the judge discharges the jury, whichever occurs later. That change reflects the fact that in a capital case or in case involving criminal forfeiture, for example, the jury may not be discharged until it has completed its sentencing duties. The court may still set another time for the defendant to make or renew the motion, if it does so within the 7-day period.

Rule 29.1. Closing Argument	29.1. Closing Argument
After the closing of evidence the prosecution shall open the argument. The defense shall be permitted to reply. The prosecution shall then be permitted to reply in rebuttal.	Closing arguments proceed in the following order: (a) the government argues; (b) the defense argues; and (c) the government rebuts.

Committee Notes
Rule 29.1
May 10, 2000

COMMITTEE NOTE

The language of Rule 29.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 30. Instructions	Rule 30. Jury Instructions
At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.	**(a) In General.** Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time during the trial that the court reasonably directs. When the request is made, the requesting party must furnish a copy to every other party. **(b) Ruling on a Request.** The court must inform the parties before closing arguments how it intends to rule on the requested instructions. **(c) Time for Giving Instructions.** The court may instruct the jury before or after the arguments are completed, or at both times. **(d) Objections to Instructions.** A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the jury's hearing and, on request, out of the jury's presence.

Committee Notes
Rule 30
May 10, 2000

COMMITTEE NOTE

The language of Rule 30 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted, below.

Rule 30(d) has been changed to clarify what, if anything, counsel must do to preserve error regarding an instruction or failure to instruct. The rule retains the requirement of a contemporaneous and specific objection (before the jury retires to deliberate). As the Supreme Court recognized in *Jones v. United States*, 119 S.Ct. 2090, 2102 (1999), read literally, current Rule 30 could be construed to bar any appellate review when in fact a court may conduct a limited review under a plain error standard. The topic of plain error is not addressed in Rule 30 because it is already covered in Rule 52. No change in practice is intended by the amendment.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 30 is one of those rules. This proposed revision of Rule 30 includes only proposed style changes. Another version of Rule 30 includes a substantive amendment that would authorize a court to require the parties to file requests for instructions before trial. That version of Rule 30 is being published simultaneously in a separate pamphlet.

Rule 31. Verdict	Rule 31. Jury Verdict
(a) Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.	**(a) Return.** The jury must return its verdict to a judge in open court. The verdict must be unanimous.
(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.	**(b) Partial Verdicts, Mistrial, and Retrial.** **(1)** ***Multiple Defendants.*** If there are multiple defendants, the jury may return a verdict at any time during its deliberations as to any defendant as to whom it has agreed. **(2)** ***Multiple Counts.*** If the jury cannot agree on all counts as to any defendant, the jury may return a verdict on those counts as to which it has agreed. **(3)** ***Mistrial and Retrial.*** If the jury cannot agree on a verdict as to all counts, the court may declare a mistrial as to those counts. The government may retry any defendant on any count as to which the jury could not agree.
(c) Conviction of Less 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.	**(c) Lesser Offense or Attempt.** A defendant may be found guilty of any of the following: **(1)** an offense necessarily included in the offense charged; **(2)** an attempt to commit the offense charged; or **(3)** an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right.
(d) Poll of Jury. After a verdict is returned but before the jury is discharged, the court shall, on a party's request, or may on its own motion, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.	**(d) Jury Poll.** After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.
(e) Criminal Forfeiture. [Abrogated][2]	**(e) Criminal Forfeiture.** [Abrogated]

[2] Supreme Court approved amendment in April 2000. The amendments take effect on December 1, 2000, unless Congress takes action otherwise.

Committee Notes
Rule 31
May 10, 2000

COMMITTEE NOTE

The language of Rule 31 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 31(b) has been amended to clarify that a jury may return partial verdicts, either as to multiple defendants or multiple counts, or both. *See, e.g., United States v. Cunningham*, 145 F.3d 1385, 1388-89 (D.C. Cir. 1998) (partial verdicts on multiple defendants and counts). No change in practice is intended.

VII. JUDGMENT	TITLE VII. POST-CONVICTION PROCEDURES
Rule 32. Sentence and Judgment	**Rule 32. Sentencing and Judgment**
(f) Definitions. For purposes of this rule — **(1)** "victim" means any individual against whom an offense has been committed for which a sentence is to be imposed, but the right of allocution under subdivision (c)(3)(E) may be exercised instead by — **(A)** a parent or legal guardian if the victim is below the age of eighteen years or incompetent; or **(B)** one or more family members or relatives designated by the court if the victim is deceased or incapacitated; if such person or persons are present at the sentencing hearing, regardless of whether the victim is present; and **(2)** "crime of violence or sexual abuse" means a crime that involved the use or attempted or threatened use of physical force against the person or property of another, or a crime under chapter 109A of title 18, United States Code.	**(a) Definitions.** The following definitions apply under this rule: **(1)** "Victim" means an individual against whom the defendant committed an offense for which the court will impose sentence. **(2)** "Crime of violence or sexual abuse" means: (A) a crime that involves the use, attempted use, or threatened use of physical force against another's person or property; or (B) a crime under 18 U.S.C. §§ 2241–2248 or §§ 2251-2257.
(a) In General; Time for Sentencing. When a presentence investigation and report are made under subdivision (b)(1), sentence should be imposed without unnecessary delay following completion of the process prescribed by subdivision (b)(6). The time limits prescribed in subdivision (b)(6) may be either shortened or lengthened for good cause.	**(b) Time of Sentencing.** **(1)** ***In General.*** The court must impose sentence without unnecessary delay. **(2)** ***Changing Time Limits.*** The court may, for good cause, change any time limits prescribed in Rule 32.

(b) Presentence Investigation and Report. **(1) When Made.** The probation officer must make a presentence investigation and submit a report to the court before sentence is imposed unless: **(A)** the court finds that the information in the record enables it to exercise its sentencing authority meaningfully under 18 U.S.C. § 3553; and **(B)** the court explains this finding on the record. Notwithstanding the preceding sentence, a presentence investigation and report, or other report containing information sufficient for the court to enter an order of restitution, as the court may direct, shall be required in any case in which restitution is required to be ordered.	**(c) Presentence Investigation.** **(1) *Required Investigation.*** (A) *In General.* The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless: (i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or (ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record. (B) *Restitution.* If the law requires restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.
(2) Presence of Counsel. On request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation.	**(2) *Interviewing the Defendant.*** The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.
(3) Nondisclosure. The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty.	

(4) Contents of the Presentence Report. The presentence report must contain — **(A)** information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment; **(B)** the classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. § 994(a), as the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. § 994(a)(1); and the probation officer's explanation of any factors that may suggest a different sentence — within or without the applicable guideline — that would be more appropriate, given all the circumstances; **(C)** a reference to any pertinent policy statement issued by the Sentencing Commission under 28 U.S.C. § 994(a)(2);	**(d) Presentence Report.** **(1)** ***Contents of the Report.*** The presentence report must contain the following information: (A) the defendant's history and characteristics, including: (i) any prior criminal record; (ii) the defendant's financial condition; and (iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment; (B) the kinds of sentences and the sentencing range provided by the Sentencing Commission's guidelines, and the probation officer's explanation of any factors that may suggest a more appropriate sentence within or without an applicable guideline; (C) a reference to any pertinent Sentencing Commission policy statement;
(D) verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed; **(E)** in appropriate cases, information about the nature and extent of nonprison programs and resources available for the defendant; **(F)** in appropriate cases, information sufficient for the court to enter restitution; **(G)** any report and recommendation resulting from a study ordered by the court under 18 U.S.C. § 3552(b); and **(H)** any other information required by the court.	(D) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed; (E) when appropriate, the nature and extent of nonprison programs and resources available to the defendant; (F) when the law permits the court to order restitution, information sufficient for such an order; (G) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation; and (H) any other information that the court requires.

(5) Exclusions. The presentence report must exclude: **(A)** any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation; **(B)** sources of information obtained upon a promise of confidentiality; or **(C)** any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.	**(2)** ***Exclusions.*** The presentence report must exclude the following: (A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program; (B) any sources of information obtained upon a promise of confidentiality; and (C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.
(6) Disclosure and Objections. **(A)** Not less than 35 days before the sentencing hearing — unless the defendant waives this minimum period — the probation officer must furnish the presentence report to the defendant, the defendant's counsel, and the attorney for the Government. The court may, by local rule or in individual cases, direct that the probation officer not disclose the probation officer's recommendation, if any, on the sentence.	**(e) Disclosing the Report and Recommendation.** **(1)** ***Time to Disclose.*** Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty. **(2)** ***Minimum Required Notice.*** The probation officer must give the presentence report to the defendant, the defendant's attorney, and the attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period. **(3)** ***Sentence Recommendation.*** By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.
(B) Within 14 days after receiving the presentence report, the parties shall communicate in writing to the probation officer, and to each other, any objections to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the presentence report. After receiving objections, the probation officer may meet with the defendant, the defendant's attorney, and the attorney for the Government to discuss those objections. The probation officer may also conduct a further investigation and revise the presentence report as appropriate.	**(f) Objecting to the Report.** **(1)** ***Time to Object.*** Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report. **(2)** ***Serving Objections.*** An objecting party must provide a copy of its objections to every other party and to the probation officer. **(3)** ***Action on Objections.*** After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

(C) Not later than 7 days before the sentencing hearing, the probation officer must submit the presentence report to the court, together with an addendum setting forth any unresolved objections, the grounds for those objections, and the probation officer's comments on the objections. At the same time, the probation officer must furnish the revisions of the presentence report and the addendum to the defendant, the defendant's counsel, and the attorney for the Government. **(D)** Except for any unresolved objection under subdivision (b)(6)(B), the court may, at the hearing, accept the presentence report as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.	(g) **Submitting the Report.** At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

(c) Sentence. **(1) Sentencing Hearing.** At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule on any unresolved objections in the presentence report. The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections. For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons. **(2) Production of Statements at Sentencing Hearing.** Rule 26.2(a)-(d) and (f) applies at a sentencing hearing under this rule. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the movant, the court may not consider the affidavit or testimony of the witness whose statement is withheld.	**(h) Sentencing.** **(1)** ***In General.*** At sentencing, the court: (A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report; (B) must give the defendant and the defendant's attorney a written summary of—or summarize in camera—any information excluded from the presentence report under Rule 32(d)(2) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information; (C) must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and (D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed. **(2)** ***Introducing Evidence; Producing Statements.*** The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party does not comply with a Rule 26.2(a) order to produce a witness's statement, the court must not consider that witness's testimony.
(3) Imposition of Sentence. Before imposing sentence, the court must: **(A)** verify that the defendant and the defendant's counsel have read and discussed the presentence report made available under subdivision (b)(6)(A). If the court has received information excluded from the presentence report under subdivision (b)(5) the court — in lieu of making that information available — must summarize it in writing, if the information will be relied on in determining sentence.	**(3)** ***Court Determinations.*** At sentencing, the court: (A) may accept any undisputed portion of the presentence report as a finding of fact; (B) must — for any disputed portion of the presentence report or other controverted matter — rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and (C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

The court must also give the defendant and the defendant's counsel a reasonable opportunity to comment on that information; **(B)** afford defendant's counsel an opportunity to speak on behalf of the defendant; **(C)** address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence; **(D)** afford the attorney for the Government an opportunity to speak equivalent to that of the defendant's counsel to speak to the court;	**(4)** ***Opportunity to Speak.*** (A) *By a Party.* Before imposing sentence, the court must: (i) provide the defendant's attorney an opportunity to speak on the defendant's behalf; (ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and (iii) provide the attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.
(E) if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence.	(B) *By a Victim.* Before imposing sentence, the court must address any victim of a crime of violence or sexual abuse who is present at sentencing and permit the victim to speak or submit any information concerning the sentence. Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present: (i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or (ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.
(4) In Camera Proceedings. The court's summary of information under subdivision (c)(3)(A) may be in camera. Upon joint motion by the defendant and the attorney for the Government, the court may hear in camera the statements — made under subdivision (c)(3)(B), (C), (D), and (E) — by the defendant, the defendant's counsel, the victim, or the attorney for the government.	(C) *In Camera Proceedings.* Upon a party's motion the court may hear in camera any statement made under Rule 32(h)(4).
	(5) ***Notice of Possible Departure from Sentencing Guidelines.*** Before the court may depart from the Guidelines calculation on a ground not identified as a ground for departure either in the presentence report or in a prehearing submission by a party, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specifically identify the ground on which the court is contemplating a departure.

(5) Notification of Right to Appeal. After imposing sentence in a case which has gone to trial on a plea of not guilty, the court must advise the defendant of the right to appeal. After imposing sentence in any case, the court must advise the defendant of any right to appeal the sentence, and of the right of the person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court must immediately prepare and file a notice of appeal on behalf of the defendant.	**(i) Defendant's Right to Appeal.** **(1)** ***Advice of a Right to Appeal.*** (A) *Appealing a Conviction.* If the defendant pleaded not guilty and was convicted, after sentencing the court must advise the defendant of the right to appeal the conviction. (B) *Appealing a Sentence.* After sentencing — regardless of the defendant's plea — the court must advise the defendant of any right to appeal the sentence. (C) *Appeal Costs.* The court must advise a defendant who is unable to pay appeal costs of the right to ask for permission to appeal in forma pauperis. **(2)** ***Clerk's Filing of Notice.*** If the defendant so requests, the clerk must immediately prepare and file a notice of appeal on the defendant's behalf.
(d) Judgment. **(1) In General.** A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk. **(2) Criminal Forfeiture.** Forfeiture procedures are governed by Rule 32.1. [1]	**(j) Judgment.** **(1)** ***In General.*** In the judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence. If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so enter judgment. The judge must sign the judgment, and the clerk must enter it. **(2)** ***Criminal Forfeiture.*** Forfeiture procedures are governed by Rule 32.2.
(e) Plea Withdrawal. If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.	

[1]The Supreme Court approved amendments in April 2000. The amendments take effect on December 1, 2000, unless Congress takes action otherwise.

Committee Notes
Rule 32
May 10, 2000

COMMITTEE NOTE

The language of Rule 32 [which reflects the amendments transmitted to Congress by the Supreme Court on April 17, 2000] has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The rule has been completely reorganized to make it easier to follow and apply. For example, the definitions in the rule have been moved to the first sections and the sequencing of the sections generally follows the procedure for presentencing and sentencing procedures.

Under current Rule 32(c)(1), the court is required to "rule on any unresolved objections in the presentence report." The rule does not specify, however, whether that provision should be read literally to mean every objection that might have been made to the report or only on those objections that might in some way actually affect the sentence. The Committee believed that a broad reading of the current rule might place an unreasonable burden on the court without providing any real benefit to the sentencing process. Revised Rule 32(h)(3) narrows the requirement for court findings to those instances when the objection addresses a "controverted matter." If the objection satisfies that criterion, the court must either make a finding on the objection or decide that a finding is not required because the matter will not affect sentencing or that the matter will not be considered at all in sentencing.

Rule 32(h)(4)(B) includes a change permitting a victim of a crime under 18 U.S.C. §§ 2251-57 (child pornography and related offenses) to address the court at sentencing. The Committee considered those victims to be similar to victims of sexual offenses under 18 U.S.C. §§ 2241-48, who already possess that right.

Rule 32(h)(4)(C) includes a change concerning who may request an in camera proceeding. Under current Rule 32(c)(4), the parties must file a joint motion for an in camera proceeding to hear the statements by defense counsel, the defendant, the attorney for the government, or any victim. Under the revised rule, any party may move that the court hear in camera any statement—by a party or a victim—made under revised Rule 32(h)(4).

Rule 32(h)(5) is a new provision that reflects *Burns v. United States*, 501 U.S. 129, 138-39 (1991). In *Burns*, the Court held that before a sentencing court could depart upward on a ground, not previously identified in the presentence report as a ground for departure, Rule 32 requires the court to give the parties reasonable notice that it is contemplating such

a ruling and to identify the specific ground for the departure. The Court also indicated that because the procedural entitlements in Rule 32 apply equally to both parties, it was equally appropriate to frame the issue as whether notice is required before the sentencing court departs either upward or downward. *Id.* at 135, n.4.

Finally, current Rule 32(e), which addresses the ability of a defendant to withdraw a guilty plea, has been moved to Rule 11(e).

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 32 is one of those rules. In revising Rule 32, the Committee decided to also propose a substantive change that would limit the occasions that the sentencing judge would have to rule on unresolved objections to the presentence report. That version of Rule 32 is being published simultaneously in a separate pamphlet.

Rule 32.1. Revocation or Modification of Probation or Supervised Release.	Rule 32.1. Revoking or Modifying Probation or Supervised Release
(a) Revocation of Probation or Supervised Release. **(1) Preliminary Hearing.** Whenever a person is held in custody on the ground that the person has violated a condition of probation or supervised release, the person shall be afforded a prompt hearing before any judge, or a United States magistrate who has been given the authority pursuant to 28 U.S.C. § 636 to conduct such hearings, in order to determine whether there is probably cause to hold the person for a revocation hearing. The person shall be given **(A)** notice of the preliminary hearing and its purpose and of the alleged violation; **(B)** an opportunity to appear at the hearing and present evidence in the person's own behalf; **(C)** upon request, the opportunity to question witnesses against the person unless, for good cause, the federal magistrate decides that justice does not require the appearance of the witness; and **(D)** notice of the person's right to be represented by counsel. The proceedings shall be recorded stenographically or by an electronic recording device. If probable cause is found to exist, the person shall be held for a revocation hearing. The person may be released pursuant to Rule 46(c) pending the revocation hearing. If probable cause is not found to exist, the proceeding shall be dismissed.	**(a) Initial Appearance.** **(1)** ***In Custody.*** A person held in custody for a violation of probation or supervised release must be taken without unnecessary delay before a magistrate judge. (A) If the defendant is held in custody in the district where an alleged violation occurred, the initial appearance must be in that district. (B) If the defendant is held in custody in a district other than where an alleged violation occurred, the initial appearance must be in that district, or in an adjacent district if the appearance can occur more promptly there. **(2)** ***Upon a Summons.*** When a person appears in response to a summons for a violation of probation or supervised release, a magistrate judge must proceed under this rule. **(3)** ***Advice.*** The judge must inform the person of the following: (A) the alleged violation of probation or supervised release; (B) the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; (C) the person's right, if held in custody, to a preliminary hearing under Rule 32.1(b)(1); and (D) the person's right not to make a statement concerning any alleged violation, and that any statement made may be used against the person.
	(4) ***Appearance in the District With Jurisdiction.*** If the person is arrested or appears in the district that has jurisdiction to conduct a revocation hearing — either originally or by transfer of jurisdiction — the court must proceed under Rule 32.1(b)–(e).

	(5) ***Appearance in a District Lacking Jurisdiction.*** If the person is arrested or appears in a district that does not have jurisdiction to conduct a revocation hearing, the magistrate judge must: (A) if the alleged violation occurred in the district of arrest, conduct a preliminary hearing under Rule 32.1(b) and either: (i) transfer the person to the district that has jurisdiction, if the judge finds probable cause to believe that a violation occurred; or (ii) dismiss the proceedings and so notify the court that has jurisdiction, if the judge finds no probable cause to believe that a violation occurred; or (B) if the alleged violation did not occur in the district of arrest, transfer the person to the district that has jurisdiction if: (i) the government produces certified copies of the judgment, warrant, and warrant application; and (ii) the judge finds that the person is the same person named in the warrant.
	(6) ***Release or Detention.*** The magistrate judge may release or detain the person under 18 U.S.C. § 3143(a) pending further proceedings. The burden of establishing that the person will not flee or pose a danger to any other person or to the community rests with the person.
	(b) Revocation. **(1)** ***Preliminary Hearing.*** (A) *In General.* If a person is in custody for violating a condition of probation or supervised release, a magistrate judge must conduct a prompt hearing to determine whether there is probable cause to believe that a violation occurred. The person may waive the hearing.

	(B) *Requirements.* The hearing must be recorded by a court reporter or by a suitable recording device. The judge must give the person: (i) notice of the hearing and its purpose, the alleged violation of probation or supervised release, and the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; (ii) an opportunity to appear at the hearing and present evidence; and (iii) upon request, an opportunity to question an adverse witness, unless the judge determines that the interest of justice does not require the witness to appear.
	(C) *Referral.* If the judge finds probable cause, the judge must conduct a revocation hearing. If the judge does not find probable cause, the judge must dismiss the proceeding.
(2) Revocation Hearing. The revocation hearing, unless waived by the person, shall be held within a reasonable time in the district of jurisdiction. The person shall be given: **(A)** written notice of the alleged violation; **(B)** disclosure of the evidence against the person; **(C)** an opportunity to appear and to present evidence in the person's own behalf; **(D)** the opportunity to question adverse witnesses; and **(E)** notice of the person's right to be represented by counsel.	**(2) *Revocation Hearing.*** Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to: (A) written notice of the alleged violation; (B) disclosure of the evidence against the person; (C) an opportunity to appear, present evidence, and question adverse witnesses unless the court determines that the interest of justice does not require the witness to appear; and (D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel.

(b) Modification of Probation or Supervised Release. A hearing and assistance of counsel are required before the terms or conditions of probation or supervised release can be modified, unless the relief to be granted to the person on probation or supervised release upon the person's request or on the court's own motion is favorable to the person, and the attorney for the government, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of the term of probation or supervised release is not favorable to the person for the purposes of this rule.	**(c) Modification.** **(1)** ***In General.*** Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to an attorney. **(2)** ***Exceptions.*** A hearing is not required if: (A) the person waives the hearing; or (B) the relief sought is favorable to the person and does not extend the term of probation or of supervised release; and (C) the attorney for the government has received notice of the relief sought, has had a reasonable opportunity to object, and has not done so.
	(d) Disposition of the Case. The court's disposition of the case is governed by 18 U.S.C. § 3563 and § 3565 (probation) and § 3583 (supervised release).
(c) Production of Statements. **(1) In General.** Rule 26.2(a)-(d) and (f) applies at any hearing under this rule. **(2) Sanctions for Failure to Produce Statement.** If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.	**(e) Producing Statements.** Rule 26.2(a)–(d) and (f) applies at a hearing under this rule. If a party does not comply with a Rule26.2(a) order to produce a witness's statement, the court cannot consider that witness's testimony.

Committee Notes
Rule 32.1
May 10, 2000

COMMITTEE NOTE

The language of Rule 32.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 32.1 has been completely revised and expanded. The Committee believed that it was important to spell out more completely in this rule the various procedural steps that must be met when dealing with a revocation or modification of probation or supervised release. To that end, some language formerly located in Rule 40 has been moved to revised Rule 32.1. Throughout the rule, the terms "magistrate judge," and "court" (*see* revised Rule 1(b)(Definitions) are used to reflect that in revocation cases, initial proceedings in both felony and misdemeanor cases will normally be conducted before a magistrate judge, although a district judge may also conduct them. But the revocation decision must be made by a district judge if the offense of conviction was a felony. *See* 18 U.S.C. § 3401(i) (recognizing that district judge may designate a magistrate judge to conduct hearing and submit proposed findings of fact and recommendations).

Revised Rule 32.1(a)(1)-(4) is new material. Presently, there is no provision in the rules for conducting initial appearances for defendants charged with violating probation or supervised release—although some districts apply such procedures. Although the rule labels these proceedings as initial appearances, the Committee believed that it was best to separate those proceedings from Rule 5 proceedings, because the procedures differ for persons who are charged with violating conditions of probation or supervised release. The Committee has added a requirement in Rule 32.1(a)(3)(D) that the person be apprised of the right to remain silent concerning the alleged violation of the terms of probation or supervised release. Although a question may arise as to whether the person has any residual privilege not to present incriminating information regarding the offense that originally lead to the conviction and terms of probation or supervised release, the person should have a privilege with regard to the alleged violation leading to the Rule 32.1 proceedings.

Revised Rule 32.1(a)(5) is derived from current Rule 40(d).

Revised Rule 32.1(a)(6), which is derived from current Rule 32.1(a)(1)(D), provides that the defendant bears the burden of showing that he or she will not flee or pose a danger pending a hearing on the revocation of probation or supervised release. The Committee believes that the new language is not a substantive change because it makes no change in practice.

Rule 32.1(b)(1)(B)(iii) and Rule 32.1(b)(2)(C) address the ability of a releasee to question adverse witnesses at the preliminary and revocation hearing. Those provisions recognize that the court should apply a balancing test at the hearing itself when considering the releasee's asserted right to cross-examine adverse witnesses. The court is to balance the person's interest in the constitutionally guaranteed right to confrontation against the government's good cause for denying it. *See, e.g.*, *Morrissey v. Brewer*, 408 U.S. 471, 489 (1973); *United States v. Comito*, 177 F.3d 1166 (9th Cir. 1999); *United States v. Walker*, 117 F.3d 417 (9th Cir. 1997); *United States v. Zentgraf*, 20 F.3d 906 (8th Cir. 1994).

Rule 32.1(c)(2)(A) permits the person to waive a hearing to modify the conditions of probation or supervised release. Although that language is new to the rule, the Committee believes that it reflects current practice.

The remainder of revised Rule 32.1 is derived from the current Rule 32.1.

Rule 32.2. Criminal Forfeiture	Rule 32.2. Criminal Forfeiture
(a) Notice to the Defendant. A court shall not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.	**(a) Notice to the Defendant.** A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.
(b) Entry of Preliminary Order of Forfeiture; Post Verdict Hearing. (1) As soon as practicable after entering a guilty verdict or accepting a plea of guilty or *nolo contendere* on any count in an indictment or information with regard to which criminal forfeiture is sought, the court shall determine what property is subject to forfeiture under the applicable statute. If forfeiture of specific property is sought, the court shall determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment against the defendant, the court shall determine the amount of money that the defendant will be ordered to pay. The court's determination may be based on evidence already in the record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt. (2) If the court finds that property is subject to forfeiture, it shall promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment or directing the forfeiture of specific property without regard to any third party's interest in all or part of it. Determining whether a third party has such an interest shall be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c). (3) The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party rights. At sentencing—or at any time before sentencing if the defendant consents—the order of forfeiture becomes final as to the defendant and shall be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.	**(b) Entering Preliminary Order of Forfeiture; Post-Verdict Hearing.** **(1)** ***In General.*** As soon as practicable after entering a guilty verdict or accepting a plea of guilty or nolo contendere on any count in an indictment or information with regard to which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If forfeiture of specific property is sought, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment against the defendant, the court must determine the amount of money that the defendant will be ordered to pay. The court's determination may be based on evidence already in the record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt. **(2)** ***Preliminary Order.*** If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment or directing the forfeiture of specific property without regard to any third party's interest in all or part of it. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c). **(3)** ***Seizing Property.*** The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party rights. At sentencing—or at any time before sentencing if the defendant consents—the order of forfeiture becomes final as to the defendant and must be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

(4) Upon a party's request in a case in which a jury returns a verdict of guilty, the jury shall determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.	(4) ***Jury Determination.*** Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.
(c) Ancillary Proceeding; Final Order of Forfeiture. (1) If, as prescribed by statute, a third party files a petition asserting an interest in the property to be forfeited, the court shall conduct an ancillary proceeding but no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment. (A) In the ancillary proceeding, the court may, on motion, dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true. (B) After disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.	**(c) Ancillary Proceeding; Final Order of Forfeiture.** **(1)** ***In General.*** If, as prescribed by statute, a third party files a petition asserting an interest in the property to be forfeited, the court must conduct an ancillary proceeding but no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment. (A) In the ancillary proceeding, the court may, on motion, dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true. (B) After disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.
(2) When the ancillary proceeding ends, the court shall enter a final order of forfeiture by amending the preliminary order as necessary to account for any third-party rights. If no third party files a timely claim, the preliminary order becomes the final order of forfeiture, if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the property that is forfeitable under the applicable statute. The defendant may not object to the entry of the final order of forfeiture on the ground that the property belongs, in whole or in part, to a codefendant or third party, nor may a third party object to the final order on the ground that the third party had an interest in the property. (3) If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all petitions, unless the court determines that there is no just reason for delay. (4) An ancillary proceeding is not part of sentencing.	**(2)** ***Entering a Final Order.*** When the ancillary proceeding ends, the court must enter a final order of forfeiture by amending the preliminary order as necessary to account for any third-party rights. If no third party files a timely petition, the preliminary order becomes the final order of forfeiture, if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the property that is forfeitable under the applicable statute. The defendant may not object to the entry of the final order of forfeiture on the ground that the property belongs, in whole or in part, to a codefendant or third party, nor may a third party object to the final order on the ground that the third party had an interest in the property. **(3)** ***Multiple Petitions.*** If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all petitions, unless the court determines that there is no just reason for delay. **(4)** ***Ancillary Proceeding.*** An ancillary proceeding is not part of sentencing.

(d) Stay Pending Appeal. If a defendant appeals from a conviction or order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party's rights or interests. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but shall not transfer any property interest to a third party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.	**(d) Stay Pending Appeal.** If a defendant appeals from a conviction or order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party's rights or interests. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but must not transfer any property interest to a third party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.
(e) Subsequently Located Property; Substitute Property. (1) On the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that: (A) is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or (B) is substitute property that qualifies for forfeiture under an applicable statute.	**(e) Subsequently Located Property; Substitute Property.** **(1)** ***In General.*** On the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that: (A) is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or (B) is substitute property that qualifies for forfeiture under an applicable statute.
(2)If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court shall: (A) enter an order forfeiting that property, or amend an existing preliminary or final order to include it; and (B) if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c). (3) There is no right to trial by jury under Rule 32.2(e).	**(2)** ***Procedure.*** If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court must: (A) enter an order forfeiting that property, or amend an existing preliminary or final order to include it; and (B) if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c). **(3)** ***Jury Trial Limited.*** There is no right to trial by jury under Rule 32.2(e).

Committee Notes
Rule 32.2
May 10, 2000

COMMITTEE NOTE

The language of Rule 32.2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 33. New Trial	Rule 33. New Trial
On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require. If trial was by the court without a jury, the court may— on defendant's motion for new trial— vacate the judgment, take additional testimony, and direct the entry of a new judgment. A motion for a new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty. But if an appeal is pending, the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds may be made only within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period.	**(a) Defendant's Motion.** Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment. **(b) Time to File.** **(1)** ***Newly Discovered Evidence.*** A defendant must file a motion for a new trial grounded on newly discovered evidence within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case. **(2)** ***Other Grounds.*** A defendant must file a motion for a new trial grounded on any reason other than newly discovered evidence within 7 days after the verdict or finding of guilty, or within such further time the court sets during the 7-day period.

Committee Notes
Rule 33
May 10, 2000

COMMITTEE NOTE

The language of Rule 33 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 34. Arrest of Judgment	Rule 34. Arresting Judgment
The court on motion of a defendant 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 7 days after verdict or finding of guilty, or after plea of guilty or *nolo contendere,* or within such further time as the court may fix during the 7-day period.	**(a) In General.** Upon the defendant's motion or on its own, the court must arrest judgment if: **(1)** the indictment or information does not charge an offense; or **(2)** the court did not have jurisdiction of the charged offense. **(b) Time to File.** The defendant must move to set aside a verdict or finding of guilty within 7 days after verdict or finding of guilty, or after plea of guilty or nolo contendere, or within such further time as the court may set during the 7-day period.

Committee Notes
Rule 34
May 10, 2000

COMMITTEE NOTE

The language of Rule 34 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 35. Correction or Reduction of Sentence	Rule 35. Correcting or Reducing a Sentence
(a) Correction of Sentence on Remand. The court shall correct a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to be unreasonable, upon remand of the case to the court– **(1)** for imposition of a sentence in accord with the findings of the court of appeals; or **(2)** for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.	**(a) Correcting Clear Error.** Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.
(b) Reduction of Sentence for Substantial Assistance. If the Government so moves within one year after the sentence is imposed, the court may reduce a sentence to reflect a defendant's subsequent, substantial assistance in investigating or prosecuting another person in accordance with the guidelines and policy statements issued by the Sentencing Commission under 28 U.S.C. § 994. The court may consider a government motion to reduce a sentence made one year or more after the sentence is imposed if the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after sentence is imposed. In evaluating whether substantial assistance has been rendered, the court may consider the defendant's pre-sentence assistance. In applying this subdivision, the court may reduce the sentence to a level below that established by statute as a minimum sentence.	**(b) Reducing a Sentence for Substantial Assistance.** **(1)** ***In General.*** Upon the government's motion made within one year of sentencing, the court may reduce a sentence if: (A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and (B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements. **(2)** ***Later Motion.*** The court may consider a government motion to reduce a sentence made one year or more after sentencing if the defendant's substantial assistance involved information not known until more than one year after sentencing. **(3)** ***Evaluating Substantial Assistance.*** In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance. **(4)** ***Below Statutory Minimum.*** When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.
(c) Correction of Sentence by Sentencing Court. The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as the result of arithmetical, technical, or other clear error.	

Committee Notes
Rule 35
May 10, 2000

COMMITTEE NOTE

The language of Rule 35 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The Committee deleted current Rule 35(a) (Correction on Remand). That rule, which currently addresses the issue of the district court's actions following a remand on the issue of sentencing, was added by Congress in 1984. P.L. No. 98-473. The rule cross-references 18 U.S.C. § 3742, also enacted in 1984, which provides detailed guidance on the various options available to the appellate courts in addressing sentencing errors. In reviewing both provisions, the Committee concluded that Rule 35(a) was no longer needed. First, the statute clearly covers the subject matter, and second, it is not necessary to address an issue that would be very clear to a district court following a decision by a court of appeals.

Former Rule 35(c), which addressed the authority of the court to correct certain errors in the sentence, is now located in Rule 35(a).

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 35 is one of those rules. Another version of Rule 35, which includes a substantive change, is being published simultaneously in a separate pamphlet. That version includes an amendment that would authorize a court to hear a motion to reduce a sentence, more than one year after sentence was imposed, when the defendant's substantial assistance involved information known to the defendant within one year after sentencing, but no motion was filed because the significance or usefulness of the information was not apparent until after the one year period had elapsed.

Rule 36. Clerical Mistakes.	Rule 36. Clerical Error
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.	After giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission.

Committee Notes
Rule 36
May 10, 2000

COMMITTEE NOTE

The language of Rule 36 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

VIII. APPEAL	
Rule 37. Taking Appeal. [Abrogated 1968.]	**Rule 37. [Reserved]**

Rule 38. Stay of Execution	**Rule 38. Staying a Sentence or a Disability**
(a) Stay of Execution. A sentence of death shall be stayed if an appeal is taken from the conviction or sentence.	**(a) Death Sentence.** The court must stay a death sentence if the defendant appeals the conviction or sentence.
(b) Imprisonment. A sentence of imprisonment shall be stayed if an appeal is taken from the conviction or sentence and the defendant is released pending disposition of appeal pursuant to Rule 9(b) of the Federal Rules of Appellate Procedure. If not stayed, the court may recommend to the Attorney General that the defendant be retained at, or transferred to, a place of confinement near the place of trial or the place where an appeal is to be heard, for a period reasonably necessary to permit the defendant to assist in the preparation of an appeal to the court of appeals.	**(b) Imprisonment.** **(1)** ***Stay Granted.*** If the defendant is released pending appeal, the court must stay a sentence of imprisonment. **(2)** ***Stay Denied.*** If the defendant is not released pending appeal, the court may recommend to the Attorney General that the defendant be confined near the place of the trial or appeal for a period reasonably necessary to permit the defendant to assist in preparing the appeal.
(c) Fine. A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the district court or by the court of appeals upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating such defendant's assets.	**(c) Fine.** If the defendant appeals, the district court, or the court of appeals under Federal Rule of Appellate Procedure 8, may stay a sentence to pay a fine or a fine and costs. The court may stay the sentence on any terms considered proper and may require the defendant to: **(1)** deposit all or part of the fine and costs into the district court's registry pending appeal; **(2)** post a bond to pay the fine and costs; or **(3)** submit to an examination concerning the defendant's assets and, if appropriate, order the defendant to refrain from dissipating assets.
(d) Probation. A sentence of probation may be stayed if an appeal from the conviction or sentence is taken. If the sentence is stayed, the court shall fix the terms of the stay.	**(d) Probation.** If the defendant appeals, the court may stay a sentence of probation. The court must set the terms of any stay.

(e) Notice to Victims and Restitution. [2] A sanction imposed as part of the sentence pursuant to 18 U.S.C. 3555 or 3556 may, if an appeal of the conviction or sentence is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may issue such orders as may be reasonably necessary to ensure compliance with the sanction upon disposition of the appeal, including the entering of a restraining order or an injunction or requiring a deposit in whole or in part of the monetary amount involved into the registry of the district court or execution of a performance bond.	**(e) Restitution and Notice to Victims.** **(1)** ***In General.*** If the defendant appeals, the district court, or the court of appeals under Federal Rule of Appellate Procedure 8, may stay — on any terms considered appropriate — any sentence providing for notice under 18 U.S.C. § 3555 or restitution under 18 U.S.C. § 3556. **(2)** ***Ensuring Compliance.*** The court may issue any order reasonably necessary to ensure compliance with a notice or restitution order after disposition of an appeal, including: (A) a restraining order; (B) an injunction; (C) an order requiring the defendant to deposit all or part of any monetary restitution into the district court's registry; or (D) an order requiring the defendant to post a bond.
(f) Disabilities. A civil or employment disability arising under a Federal statute by reason of the defendant's conviction or sentence may, if an appeal is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may enter a restraining order or an injunction, or take any other action that may be reasonably necessary to protect the interest represented by the disability pending disposition of the appeal.	**(f) Forfeiture**. A stay of a forfeiture order is governed by Rule 32.2(d). **(g) Disability.** If the defendant's conviction or sentence creates a civil or employment disability under federal law, the district court, or the court of appeals under Federal Rule of Appellate Procedure 8, may stay the disability pending appeal on any terms considered appropriate. The court may issue any order reasonably necessary to protect the interest represented by the disability pending appeal, including a restraining order or an injunction.

[2] The Supreme Court approved amendments in April 2000. The amendments take effect on December 1, 2000, unless Congress takes action otherwise.

Committee Notes
Rule 38
May 10, 2000

COMMITTEE NOTE

The language of Rule 38 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The reference to Appellate Rule 9(b) is deleted. The Committee believed that the reference was unnecessary and its deletion was not intended to be substantive in nature.

Rule 39. Supervision of Appeal [Abrogated 1968]	Rule 39. [Reserved]

IX. SUPPLEMENTARY AND SPECIAL PROCEEDINGS	TITLE VIII. SUPPLEMENTARY AND SPECIAL PROCEEDINGS
Rule 40. Commitment to Another District	**Rule 40. Arrest for Failing to Appear in Another District**
(a) Appearance Before Federal Magistrate Judge. If a person is arrested in a district other than that in which the offense is alleged to have been committed, that person shall be taken without unnecessary delay before the nearest available federal magistrate judge, in accordance with the provisions of Rule 5. Preliminary proceedings concerning the defendant shall be conducted in accordance with Rules 5 and 5.1, except that if no preliminary examination is held because an indictment has been returned or an information filed or because the defendant elects to have the preliminary hearing conducted in the district in which the prosecution is pending, the person shall be held to answer upon a finding that such person is the person named in the indictment, information, or warrant. If held to answer, the defendant shall be held to answer in the district court in which the prosecution is pending — provided that a warrant is issued in that district if the arrest was made without a warrant — upon production of the warrant or a certified copy thereof. The warrant or certified copy may be produced by facsimile transmission.	**(a) In General.** A person arrested under a warrant issued in another district for failing to appear — as required by the terms of that person's release under 18 U.S.C. §§ 3141 - 3156 or by a subpoena — must be taken without unnecessary delay before a magistrate judge in the district of the arrest. **(b) Proceedings.** The judge must proceed under Rule 5(c)(2) as applicable. **(c) Release or Detention Order.** The judge may modify any previous release or detention order issued in another district, but must state in writing the reasons for doing so.
(b) Statement by Federal Magistrate Judge. In addition to the statements required by Rule 5, the federal magistrate judge shall inform the defendant of the provisions of Rule 20.	
(c) Papers. If a defendant is held or discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.	
(d) Arrest of Probationer or Supervised Releasee. If a person is arrested for a violation of probation or supervised release in a district other than the district having jurisdiction, such person must be taken without unnecessary delay before the nearest available federal magistrate judge. The person may be released under Rule 46(c). The federal magistrate judge shall: **(1)** Proceed under Rule 32.1 if jurisdiction over the person is transferred to that district; **(2)** Hold a prompt preliminary hearing if the alleged violation occurred in that district, and either (i) hold the person to answer in the district court of the district having jurisdiction or (ii) dismiss the proceedings and so notify the court; or **(3)** Otherwise order the person held to answer in the district court of the district having jurisdiction upon production of certified copies of the judgment, the warrant, and the application for the warrant, and upon a finding that the person before the magistrate judge is the person named in the warrant.	

(e) Arrest for Failure to Appear. If a person is arrested on a warrant in a district other than that in which the warrant was issued, and the warrant was issued because of the failure of the person named therein to appear as required pursuant to a subpoena or the terms of that person's release, the person arrested must be taken without unnecessary delay before the nearest available federal magistrate judge. Upon production of the warrant or a certified copy thereof and a finding that the person before the magistrate judge is the person named in the warrant, the federal magistrate judge shall hold the person to answer in the district in which the warrant was issued.	
(f) Release or Detention. If a person was previously detained or conditionally released, pursuant to chapter 207 of title 18, United States Code, in another district where a warrant, information, or indictment issued, the federal magistrate judge shall take into account the decision previously made and the reasons set forth therefor, if any, but will not be bound by that decision. If the federal magistrate judge amends the release or detention decision or alters the conditions of release, the magistrate judge shall set forth the reasons therefor in writing.	

Committee Notes
Rule 40
May 10, 2000

COMMITTEE NOTE

The language of Rule 40 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 40 has been completely revised. The Committee believed that it would be much clearer and more helpful to locate portions of Rule 40 in Rules 5 (initial appearances), 5.1 (preliminary hearings), and 32.1 (revocation or modification of probation or supervised release). Accordingly, current Rule 40(a) has been relocated in Rules 5 and 5.1. Current Rule 40(b) has been relocated to Rule 5(c)(2)(B) and current Rule 40(c) has been moved to Rule 5(c)(2)(F).

Current Rule 40(d) has been relocated in Rule 32.1(a)(5). Current Rule 40(e)(1) is now located in revised Rule 40(a). Current Rule 40(e)(2) is now in revised Rule 40(b) and current Rule 40(f) is revised Rule 40(c).

Rule 41. Search and Seizure	Rule 41. Search and Seizure
(a) Authority to Issue Warrant. Upon the request of a federal law enforcement officer or an attorney for the government, a search warrant authorized by this rule may be issued (1) by a federal magistrate judge, or a state court of record within the federal district, for a search of property or for a person within the district and (2) by a federal magistrate judge for a search of property or for a person either within or outside the district if the property or person is within the district when the warrant is sought but might move outside the district before the warrant is executed.	**(a) Scope and Definitions.** **(1)** ***Scope.*** This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.
	(2) ***Definitions.*** The following definitions apply under this rule: (A) "Property" includes documents, books, papers, any other tangible objects, and information. (B) "Daytime" means the hours between 6:00 a.m. and 10:00 p.m. according to local time. (C) "Federal law enforcement officer" means a government agent (other than an attorney for the government) who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.

	(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government: **(1)** a magistrate judge having authority in the district — or if none is reasonably available, a judge of a state court of record in the district — may issue a warrant to search for and seize a person or property located within the district; and **(2)** a magistrate judge may issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move outside the district before the warrant is executed.
(b) Property or Persons Which May be Seized With a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of the crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.	**(c) Persons or Property Subject to Search or Seizure.** A warrant may be issued for any of the following: **(1)** evidence of the commission of a crime; **(2)** contraband, fruits of crime, or other items illegally possessed; **(3)** property designed for use, intended for use, or used in committing a crime; or **(4)** a person to be arrested or a person who is unlawfully restrained.

(c) Issuance and Contents. **(1) Warrant Upon Affidavit.** A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate judge or state judge and establishing grounds for issuing the warrant. If the federal magistrate judge or state judge is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, that magistrate judge or state judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate judge or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit.	**(d) Obtaining a Warrant.** **(1)** ***Probable Cause.*** After receiving an affidavit or other information, a magistrate judge or a judge of a state court of record must issue the warrant if there is probable cause to search for and seize a person or property under Rule 41(c). **(2)** ***Requesting a Warrant in the Presence of a Judge.*** (A) *Warrant on an Affidavit.* When a federal law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces. (B) *Warrant on Sworn Testimony.* The judge may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony if doing so is reasonable under the circumstances. (C) *Recording Testimony.* Testimony taken in support of a warrant must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit.
The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States.	
It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorized its execution at times other than daytime. It shall designate a federal magistrate judge to whom it shall be returned.	

(2) Warrant Upon Oral Testimony. **(A) General Rule.** If the circumstances make it reasonable to dispense, in whole or in part, with a written affidavit, a Federal magistrate judge may issue a warrant based upon sworn testimony communicated by telephone or other appropriate means, including facsimile transmission. **(B) Application.** The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate judge. The Federal magistrate judge shall enter, verbatim, what is so read to such magistrate judge on a document to be known as the original warrant. The Federal magistrate judge may direct that the warrant be modified.	**(3) *Requesting a Warrant by Telephonic or Other Means.*** (A) *In General.* A magistrate judge may issue a warrant based on information communicated by telephone or other appropriate means, including facsimile transmission. (B) *Recording Testimony.* Upon learning that an applicant is requesting a warrant, a magistrate judge must: (i) place under oath the applicant and any person on whose testimony the application is based; and (ii) make a verbatim record of the conversation with a suitable recording device, if available, or by court reporter, or in writing.
(C) Issuance. If the Federal magistrate judge is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that the grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate judge shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate judge's name on the duplicate original warrant. The Federal magistrate judge shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.	

(D) Recording and Certification of Testimony. When a caller informs the Federal magistrate judge that the purpose of the call is to request a warrant, the Federal magistrate judge shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. If a voice recording device is available, the Federal magistrate judge shall record by means of such device all of the call after the caller informs the Federal magistrate judge that the purpose of the call is to request a warrant. Otherwise a stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the Federal magistrate judge shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the Federal magistrate judge shall file a signed copy with the court.	(C) *Certifying Testimony.* The magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's accuracy, and file a copy of the record and the transcription with the clerk. Any written verbatim record must be signed by the magistrate judge and filed with the clerk. (D) *Suppression Limited.* Absent a finding of bad faith, evidence obtained from a warrant issued under Rule 41(d)(3)(A) is not subject to suppression on the ground that issuing the warrant in that manner was unreasonable under the circumstances.
(E) Contents. The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.	**(e) Issuing the Warrant.** **(1)** ***In General.*** The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it and deliver a copy to the district clerk. **(2)** ***Contents of the Warrant.*** The warrant must identify the person or property to be searched or covertly observed, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to: (A) execute the warrant within a specified time no longer than 10 days; (B) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution of the warrant at another time; and (C) return the warrant to the magistrate judge designated in the warrant.

(F) Additional Rule for Execution. The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.	**(3)** ***Warrant by Telephonic or Other Means.*** If a magistrate judge decides to issue a warrant under Rule 41(d)(3)(A), the following additional procedures apply: (A) *Preparing a Proposed Duplicate Original Warrant.* The applicant must prepare a "proposed duplicate original warrant" and must read or otherwise transmit the contents of that document verbatim to the magistrate judge. (B) *Preparing an Original Warrant.* The magistrate judge must enter the contents of the proposed duplicate original warrant into an original warrant. (C) *Modifications.* The magistrate judge may direct the applicant to modify the proposed duplicate original warrant. In that case, the judge must also modify the original warrant.
(G) Motion to Suppress Precluded. Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.	(D) *Signing the Original Warrant and the Duplicate Original Warrant.* Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact time when it is issued, and direct the applicant to sign the judge's name on the duplicate original warrant.

(d) Execution and Return with Inventory. 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.	**(f) Executing and Returning the Warrant.** **(1)** ***Notation of Time.*** The officer executing the warrant must enter on the face of the warrant the exact date and time it is executed. **(2)** ***Inventory.*** An officer executing the warrant must also prepare and verify an inventory of any property seized and must do so in the presence of: (A) another officer, and (B) the person from whom, or from whose premises, the property was taken, if present; or (C) if either of these persons is not present, at least one other credible person. **(3)** ***Receipt.*** The officer executing the warrant must: (A) give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or (B) leave a copy of the warrant and receipt at the place where the officer took the property.
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 federal magistrate judge shall upon request deliver a copy of the inventory to the person from or from whose premises the property was taken and to the applicant for the warrant.	**(4)** ***Return.*** The officer executing the warrant must promptly return it— together with a copy of the inventory — to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.	**(g) Motion to Return Property.** A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.
(f) Motion to Suppress. A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.	**(h) Motion to Suppress.** A defendant may move to suppress evidence in the court where the trial will occur, as Rule 12 provides.
(g) Return of Papers to Clerk. The federal magistrate judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.	**(i) Forwarding Papers to the Clerk.** The magistrate judge to whom the warrant is returned must attach to the warrant a copy of the return, inventory, and all other related papers and must deliver them to the clerk in the district where the property was seized.
(h) Scope and Definitions. This rule does not modify any act, 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 and any other tangible objects. The term "daytime" is used in this rule mean hours from 6:00 a.m. to 10:00 p.m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean an government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.	

Committee Notes
Rule 41
May 10, 2000

COMMITTEE NOTE

The language of Rule 41 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. Rule 41 has been completely reorganized to make it easier to read and apply its key provisions.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 41 is one of those rules. Another version of Rule 41, which includes a substantive change that would permit a judge to issue a warrant for a covert entry for purposes of noncontinuous observation, is being published simultaneously in a separate pamphlet.

Rule 42. Criminal Contempt	Rule 42. Criminal Contempt
(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.	**(a) Disposition After Notice.** Any person who commits criminal contempt may be punished for that contempt after prosecution on notice. **(1)** ***Notice.*** The court must give the person notice in open court, in an order to show cause, or in an arrest order. The notice must: (A) state the time and place of the trial; (B) allow the defendant a reasonable time to prepare a defense; and (C) state the essential facts constituting the charged criminal contempt and describe it as such. **(2)** ***Appointing a Prosecutor.*** The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt. **(3)** ***Trial and Disposition.*** A person being prosecuted for criminal contempt is entitled to a jury trial in any case in which federal law so provides and must be released or detained as Rule 46 provides. If the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents. Upon a finding or verdict of guilty, the court must impose the punishment.
(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.	**(b) Summary Disposition.** Notwithstanding any other provision of these rules, the court may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies. The contempt order must recite the facts, be signed by the judge, and be filed with the clerk.

Committee Notes
Rule 42
May 10, 2000

COMMITTEE NOTE

The language of Rule 42 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The revised rule is intended to more clearly set out the procedures for conducting a criminal contempt proceeding. The current rule implicitly recognizes that an attorney for the government may be involved in the prosecution of such cases. Revised Rule 42(a)(2) now explicitly addresses the appointment of a "prosecutor" and adopts language to reflect the holding in *Young v. United States ex rel Vuitton*, 481 U.S. 787 (1987). In that case the Supreme Court indicated that ordinarily the court should request that an attorney for the government prosecute the contempt; only if that request is denied, should the court appoint a private prosecutor. The rule envisions that a disinterested counsel should be appointed to prosecute the contempt.

Finally, Rule 42(b) has been amended to make it clear that a court may summarily punish a person for committing contempt in the court's presence without regard to whether other rules, such as Rule 32 (sentencing procedures), might otherwise apply. *See, e.g., United States v. Martin-Trigona*, 759 F.2d 1017 (2d Cir. 1985).

X. GENERAL PROVISIONS	TITLE IX. GENERAL PROVISIONS
Rule 43. Presence of the Defendant	**Rule 43. Defendant's Presence**
(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.	**(a) When Required.** Unless this rule provides otherwise, the defendant must be present at: **(1)** the initial appearance, arraignment, and plea; **(2)** every trial stage, including jury impanelment and the return of the verdict; and **(3)** sentencing.
(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict, and the imposition of sentence, will not be prevented and the defendant will be considered to have waived the right to be present whenever a defendant, initially present at trial, or having pleaded guilty or nolo contendere, **(1)** is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), **(2)** in a noncapital case, is voluntarily absent at the imposition of sentence, or **(3)** after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.	**(b) When Not Required.** A defendant need not be present under any of the following circumstances: **(1)** ***Organizational Defendant.*** The defendant is an organization represented by counsel who is present. **(2)** ***Misdemeanor Offense.*** The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur in the defendant's absence. **(3)** ***Conference or Hearing on a Legal Question.*** The proceeding involves only a conference or hearing on a question of law. **(4)** ***Sentence Correction.*** The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).

(c) Presence Not Required. A defendant need not be present: **(1)** when represented by counsel and the defendant is an organization, as defined in 18 U.S.C. § 18; **(2)** when the offense is punishable by fine or by imprisonment for not more than one year or both, and the court, with the written consent of the defendant, permits arraignment, plea, trial, and imposition of sentence in the defendant's absence; **(3)** when the proceeding involves only a conference or hearing upon a question of law; or **(4)** when the proceeding involves a reduction or correction of sentence under Rule 35(b) or (c) or 18 U.S.C. § 3582(c).	**(c) Waiving Continued Presence.** **(1)** ***In General.*** A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances: (A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial; (B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or (C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.
	(2) ***Waiver's Effect.*** If the defendant waives the right to be present under this rule, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

Committee Notes
Rule 43
May 10, 2000

COMMITTEE NOTE

The language of Rule 43 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 43 is one of those rules. Another version of Rule 43, which recognizes that the proposed Rules 5 and 10 would authorize video teleconferencing of certain proceedings, is being published simultaneously in a separate pamphlet.

Rule 44. Right to and Assignment of Counsel	Rule 44. Right to and Appointment of Counsel
(a) Right to Assigned Counsel. Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent that defendant at every stage of the proceedings from initial appearance before the federal magistrate judge or the court through appeal, unless the defendant waives such appointment.	**(a) Right to Appointed Counsel.** A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right.
(b) Assignment Procedure. The procedures for implementing the right set out in subdivision (a) shall be those provided by law and by local rules of court established pursuant thereto.	**(b) Appointment Procedure.** Federal law and local court rules govern the procedure for implementing the right to counsel.
(c) Joint Representation. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as maybe appropriate to protect each defendant's right to counsel.	**(c) Inquiry Into Joint Representation.** **(1)** ***Joint Representation***. Joint representation occurs when: (A) two or more defendants have been charged jointly under Rule 8(b) or have been joined for trial under Rule 13; and (B) the defendants are represented by the same counsel, or counsel who are associated in law practice. **(2)** ***Court's Responsibilities in Cases of Joint Representation.*** The court must promptly inquire about the propriety of joint representation and must personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel.

Committee Notes
Rule 44
May 10, 2000

COMMITTEE NOTE

The language of Rule 44 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Revised Rule 44 now refers to the "appointment" of counsel, rather than the assignment of counsel; the Committee believed the former term was more appropriate. *See* 18 U.S.C. § 3006A. In Rule 44(c), the term "assigned or appointed" has been deleted as being unnecessary, without changing the court's responsibility to conduct an inquiry where joint representation occurs.

Rule 45. Time	Rule 45. Computing and Extending Time
(a) Computation. In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of some paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When a period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in these rules, "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.	**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules, any local rule, or any court order: **(1)** ***Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period. **(2)** ***Exclusion from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days. **(3)** ***Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or a day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible. **(4)** ***"Legal Holiday" Defined.*** As used in this rule, "legal holiday" means: (A) New Year's Day; (B) Martin Luther King, Jr.'s Birthday; (C) Presidents' Day;
	(D) Memorial Day; (E) Independence Day; (F) Labor Day; (G) Columbus Day; (H) Veterans' Day; (I) Thanksgiving Day; (J) Christmas Day; and (K) any other day declared a holiday by the President, Congress, or the state where the district court is held.

(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but the court may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them.	**(b) Extending Time.** **(1)** ***In General.*** When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made: (A) before the originally prescribed or previously extended time expires; or (B) after the time expires if the party failed to act due to excusable neglect. **(2)** ***Exceptions.*** The court may not extend the time to take any action under Rules 29, 33, 34, and 35, except as stated in those rules.
[(c) Unaffected by Expiration of Term.] Rescinded Feb. 28, 1966, eff. July 1, 1966.	
(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 5 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 an affidavit, the affidavit shall be served with the motion; and opposing affidavits may be served not less than 1 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 that party and the notice or other paper is served by mail, 3 days shall be added to the prescribed period.	**(c) Additional Time After Service by Mail.** When these rules permit or require a party to act within a specified period after a notice or a paper has been served on that party, three days are added to the period if service occurs by mail.

Committee Notes
Rule 45
May 10, 2000

COMMITTEE NOTE

The language of Rule 45 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

In Rule 45(a)(4)(C), the term "Presidents' Day" is used instead of "Washington's Birthday"—the term used in the statute. The former term reflects the prevalent modern usage and was selected to conform the rule to the recently restyled Federal Rules of Appellate Procedure.

Rule 45(d), which governs the timing of written motions and affidavits, has been moved to Rule 47.

Rule 46. Release from Custody	Rule 46. Release from Custody; Supervising Detention
(a) Release Prior to Trial. Eligibility for release prior to trial shall be in accordance with 18 U.S.C. §§ 3142 and 3144.	**(a) Before Trial.** The provisions of 18 U.S.C. §§ 3142 and 3144 govern pretrial release.
(b) Release During Trial. A person released before trial shall continue on release during trial under the same terms and conditions as were previously imposed unless the court determines that other terms and conditions or termination of release are necessary to assure such person's presence during the trial or to assure that such person's conduct will not obstruct the orderly and expeditious progress of the trial.	**(b) During Trial.** A person released before trial continues on release during trial under the same terms and conditions. But the court may order different terms and conditions or terminate the release if necessary to ensure that the person will be present during trial or that the person's conduct will not obstruct the orderly and expeditious progress of the trial.
(c) Pending Sentence and Notice of Appeal. Eligibility for release pending sentence or pending notice of appeal or expiration of the time allowed for filing notice of appeal, shall be in accordance with 18 U.S.C. § 3143. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.	**(c) Pending Sentencing or Appeal.** The provisions of 18 U.S.C. § 3143 govern release pending sentencing or appeal. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.
	(d) Pending Hearing on a Violation of Probation or Supervised Release. Rule 32.1(a)(6) governs release pending a hearing on a violation of probation or supervised release.
(d) Justification of Sureties. Every surety, except a corporate surety which is approved as provided by law, shall justify by affidavit and may be required to describe in the affidavit the property by which the surety proposes to justify and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by the surety and remaining undischarged and all the other liabilities of the surety. No bond shall be approved unless the surety thereon appears to be qualified.	**(e) Surety.** The court must not approve a bond unless any surety appears to be qualified. Every surety, except a legally approved corporate surety, must demonstrate by affidavit that its assets are adequate. The court may require the affidavit to describe the following: **(1)** the property that the surety proposes to use as security; **(2)** any encumbrance on that property; **(3)** the number and amount of any other undischarged bonds and bail undertakings the surety has issued; and **(4)** any other liability of the surety.

(e) Forfeiture. **(1) Declaration.** If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail. **(2) Setting Aside.** The court may direct that a forfeiture be set aside in whole or in part, upon such conditions as the court may impose, if a person released upon an execution of an appearance bond with a surety is subsequently surrendered by the surety into custody or if it otherwise appears that justice does not require the forfeiture.	**(f) Bail Forfeiture.** **(1)** ***Declaration.*** The court must declare the bail forfeited if a condition of the bond is breached. **(2)** ***Setting Aside.*** The court may set aside in whole or in part a bail forfeiture upon any condition the court may impose, if: (A) the surety later surrenders into custody the person released on the surety's appearance bond; or (B) it appears that justice does not require bail forfeiture.
(3) Enforcement. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses. **(4) Remission.** After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.	**(3)** ***Enforcement.*** (A) *Default Judgment and Execution.* If it does not set aside a bail forfeiture, the court must upon the government's motion enter a default judgment. (B) *Jurisdiction and Service.* By entering into a bond, each surety submits to the district court's jurisdiction and irrevocably appoints the district clerk as its agent to receive service of any filings affecting its liability. (C) *Motion to Enforce.* The court may upon the government's motion enforce the surety's liability without an independent action. The government must serve any motion, and notice as the court prescribes, on the district clerk. If so served, the clerk must promptly mail a copy to the surety at its last known address. **(4)** ***Remission.*** After entering a judgment under Rule 46(f)(3), the court may remit in whole or in part the judgment under the same conditions specified in Rule 46(f)(2).
(f) Exoneration. When a condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody.	**(g) Exoneration.** The court must exonerate the surety and release any bail when a bond condition has been satisfied or when the court has set aside or remitted the forfeiture. The court must exonerate a surety who deposits cash in the amount of the bond or timely surrenders the defendant into custody.

(g) Supervision of Detention Pending Trial. The court shall exercise supervision over the detention of defendants and witnesses within the district pending trial for the purpose of eliminating all unnecessary detention. The attorney for the government shall make a biweekly report to the court listing each defendant and witness who has been held in custody pending indictment, arraignment, or trial for a period in excess of ten days. As to each witness so listed the attorney for the government shall make a statement of the reasons why such witness should not be released with or without the taking of a deposition pursuant to Rule 15(a). As to each defendant so listed the attorney for the government shall make a statement of the reasons why the defendant is still held in custody.	**(h) Supervising Detention Pending Trial.** **(1)** ***In General.*** To eliminate unnecessary detention, the court must supervise the detention within the district of any defendants awaiting trial and of any persons held as material witnesses. **(2)** ***Reports.*** The attorney for the government must report biweekly to the court, listing each material witness held in custody for more than 10 days pending indictment, arraignment, or trial. For each material witness listed in the report, the attorney for the government must state why the witness should not be released with or without a deposition being taken under Rule 15(a).
(h) Forfeiture of Property. Nothing in this rule or in chapter 207 of title 18, United States Code, shall prevent the court from disposing of any charge by entering an order directing forfeiture of property pursuant to 18 U.S.C. 3142(c)(1)(B)(xi) if the value of the property is an amount that would be an appropriate sentence after conviction of the offense charged and if such forfeiture is authorized by statute or regulation.	**(i) Forfeiture of Property.** The court may dispose of a charged offense by ordering forfeiture of 18 U.S.C. § 3142(c)(1)(B)(xi) property under 18 U.S.C. § 3146 (b), if a fine in the amount of the property's value would be an appropriate sentence for the charged offense.
(i) Production of Statements. **(1) In General.** Rule 26.2(a)-(d) and (f) applies at a detention hearing held under 18 U.S.C. § 3142, unless the court, for good cause shown, rules otherwise in a particular case. **(2) Sanctions for Failure to Produce Statement.** If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, at the detention hearing the court may not consider the testimony of a witness whose statement is withheld.	**(j) Producing Statements.** **(1)** ***In General.*** Unless the court for good cause rules otherwise, Rule 26.2(a)–(d) and (f) applies at a detention hearing under 18 U.S.C. § 3142. **(2)** ***Sanctions for Failure to Produce a Statement.*** If a party disobeys a Rule 26.2(a) order to produce a witness's statement, the court must not consider that witness's testimony at the detention hearing.

Committee Notes
Rule 46
May 10, 2000

COMMITTEE NOTE

The language of Rule 46 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Although the general rule is that an appeal to a circuit court deprives the district court of jurisdiction, Rule 46(c) recognizes the apparent exception to that rule—that the district court retains jurisdiction to decide whether the defendant should be detained, even if a notice of appeal has been filed. *See, e.g.*, *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996), *cert. denied*, 522 U.S. 1006 (1997) (initial decision of whether to release defendant pending appeal is to be made by district court); *United States v. Affleck*, 765 F.2d 944 (10th Cir. 1985); *Jago v. United States District Court*, 570 F.2d 618 (6th Cir. 1978) (release of defendant pending appeal must first be sought in district court). *See also* Federal Rule of Appellate Procedure 9(b) and the accompanying Committee Note.

Revised Rule 46(b) deletes the requirement that the attorney for the government file bi-weekly reports with the court concerning the status of any defendants in pretrial detention. The Committee believed that the requirement was no longer necessary in light of the Speedy Trial Act provisions. 18 U.S.C. §§ 3161, et. seq. On the other hand, the requirement that the attorney for the government file reports regarding detained material witnesses has been retained in the rule.

Rule 46(i) addresses the ability of a court to order forfeiture of property where a defendant has failed to appear as required by the court. The language in the current rule, Rule 46(h), was originally included by Congress. The new language has been restyled with no change in substance or practice intended. Under this provision, the court may only forfeit property as permitted under 18 U.S.C. §§ 3146(b) and 3142(c)(1)(B)(xi). The term "appropriate sentence" means a sentence that is consistent with the Sentencing Guidelines.

Rule 47. Motions	Rule 47. Motions and Supporting Affidavits
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.	**(a) In General.** A party applying to the court for an order must do so by motion. **(b) Form and Content of a Motion.** A motion — except when made during a trial or hearing — must be in writing unless the court permits the party to make the motion by other means. A motion must state the grounds on which it is based and the relief or order sought. A motion may be supported by affidavit.
	(c) Timing of a Motion. A party must serve a written motion — other than one that the court may hear ex parte — and any hearing notice at least 5 days before the hearing date, unless a rule or court order sets a different period. For good cause, the court may set a different period upon ex parte application. **(d) Affidavit Supporting a Motion.** The moving party must serve any supporting affidavit with the motion. A responding party must serve any opposing affidavit at least one day before the hearing, unless the court permits later service.

Committee Notes
Rule 47
May 10, 2000

COMMITTEE NOTE

The language of Rule 47 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

In Rule 47(a), the word "orally" has been deleted. The Committee believed first, that the term should not act as a limitation on those who are not able to speak orally and second, a court may wish to entertain motions through electronic or other reliable means.

[**Reporter's Note**: In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what is considered at least one major substantive change. Deletion of the term "orally" in Rule 47 comports with a similar change in Rule 26, regarding the taking of testimony during trial, which is one of the rules being published simultaneously in a separate pamphlet. In place of that word, the Committee substituted the broader phrase "by other means."]

Rule 48. Dismissal	Rule 48. Dismissal
(a) By Attorney for Government. The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information, or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant. **(b) By Court.** If there is unnecessary delay in presenting the charge to the grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information, or complaint.	**(a) By the Government.** The government may with leave of court dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent. **(b) By the Court.** The court may dismiss an indictment, information, or complaint if unnecessary delay occurs in: **(1)** presenting a charge to a grand jury; **(2)** filing an information against a defendant; or **(3)** bringing a defendant to trial.

Committee Notes
Rule 48
May 10, 2000

COMMITTEE NOTE

The language of Rule 48 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The Committee considered the relationship between Rule 48(b) and the Speedy Trial Act. *See* 18 U.S.C. §§ 3161, et seq. Rule 48(b), of course, operates independently from the Act. *See, e.g.*, *United States v. Goodson*, 204 F.3d 508 (4th Cir. 2000) (noting purpose of Rule 48(b)); *United States v. Carlone*, 666 F.2d 112 (7th Cir. 1981) (suggesting that Rule 48(b) could provide alternate basis in an extreme case, without reference to Speedy Trial Act); *United States v. Balochi*, 527 F.2d 562, 563-64 (4th Cir. 1976) (per curiam) (Rule 48(b) is broader in compass). In re-promulgating Rule 48(b), the Committee intends no change in the relationship between that rule and the Speedy Trial Act.

Rule 49. Service and Filing of Papers	Rule 49. Serving and Filing Papers
(a) Service: When Required. Written motions other than those which are heard *ex parte,* written notices, designations of record on appeal and similar papers shall be served upon each of the parties.	**(a) When Required.** A party must serve on every other party any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.
(b) Service: How Made. Whenever under these rules or by an order of the court service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party personally is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided in civil actions.	**(b) How Made.** Service must be made in the manner provided for a civil action. When these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party unless the court orders otherwise.
(c) Notice of Orders. Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party a notice thereof and shall make a note in the docket of the mailing. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted by Rule 4(b) of the Federal Rules of Appellate Procedure.	**(c) Notice of a Court Order.** When the court issues an order on any post-arraignment motion, the clerk must provide notice in a manner provided for a civil action. Except as Federal Rule of Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve — or authorize the court to relieve — a party's failure to appeal within the allowed time.
(d) Filing. Papers required to be served shall be filed with the court. Papers shall be filed in the manner provided in civil actions.	**(d) Filing.** A party must file with the court a copy of any paper the party is required to serve. A paper must be filed in the manner provided for a civil action.
[**(e)** Abrogated April 27, 1995, eff. December 1, 1995]	

Committee Notes
Rule 49
May 10, 2000

COMMITTEE NOTE

The language of Rule 49 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules.

Rule 49(c) has been amended to reflect changes in the Civil Rules of Procedure which permit (but do not require) a court to provide notice of its orders and judgments through electronic means. *See* Federal Rules of Civil Procedure 5(b) and 77(d). As amended, Rule 49(c) now parallels a similar extant provision in Rule 49(b), regarding service of papers.

Rule 50. Calendars; Plan for Prompt Disposition	Rule 50. Prompt Disposition
(a) Calendars. The district courts may provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings as far as practicable. **(b) Plans for Achieving Prompt Disposition of Criminal Cases.** To minimize undue delay and to further the prompt disposition of criminal cases, each district court shall conduct a continuing study of the administration of criminal justice in the district court and before United States magistrate judges of the district and shall prepare plans for the prompt disposition of criminal cases in accordance with the provisions of Chapter 208 of Title 18, United States Code.	Scheduling preference must be given to criminal proceedings as far as practicable.

Committee Notes
Rule 50
May 10, 2000

COMMITTEE NOTE

The language of Rule 50 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The first sentence in current Rule 50(a), which says that a court may place criminal proceedings on a calendar, has been deleted. The Committee believed that the sentence simply stated a truism and was no longer necessary.

Current Rule 50(b), which simply mirrors 18 U.S.C. § 3165, has been deleted in its entirety. The rule was added in 1971 to meet congressional concerns in pending legislation about deadlines in criminal cases. Provisions governing deadlines were later enacted by Congress and protections were provided in the Speedy Trial Act. The Committee concluded that in light of those enactments, Rule 50(b) was no longer necessary.

Rule 51. Exceptions Unnecessary.	Rule 51. Preserving Claimed Error
Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does thereafter prejudice that party.	**(a) Exceptions Unnecessary.** Exceptions to rulings or orders of the court are unnecessary. **(b) Preserving a Claim of Error.** A party may preserve a claim of error by informing the court — when the court ruling or order is made or sought — of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

Committee Notes
Rule 51
May 10, 2000

COMMITTEE NOTE

The language of Rule 51 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The Rule includes a new sentence that explicitly states that any rulings regarding evidence are governed by Federal Rule of Evidence 103. The sentence was added because of concerns about the Supersession Clause, 28 U.S.C. § 2072(b), of the Rules Enabling Act, and the possibility that an argument might have been made that Congressional approval of this rule would supersede that Rule of Evidence.

Rule 52. Harmless Error and Plain Error	Rule 52. Harmless and Plain Error
(a) Harmless Error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.	**(a) Harmless Error.** Any error, defect, irregularity, or variance that does not affect substantial rights must 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.	**(b) Plain Error.** A plain error or defect that affects substantial rights may be considered even though it was not brought to the court's attention.

Committee Notes
Rule 52
May 10, 2000

COMMITTEE NOTE

The language of Rule 52 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 53. Regulation of Conduct in the Court Room.	Rule 53. Courtroom Photographing and Broadcasting Prohibited
The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court.	Except as otherwise provided by statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.

Committee Notes
Rule 53
May 10, 2000

COMMITTEE NOTE

The language of Rule 53 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Although the word "radio" has been deleted from the rule, the Committee does not believe that the amendment is a substantive change but rather one that accords with judicial interpretation applying the current rule to other forms of broadcasting and functionally equivalent means. *See, e.g., United States v. Hastings*, 695 F.2d 1278, 1279, n. 5 (11th Cir. 1983) (television proceedings prohibited); *United States v. McVeigh*, 931 F. Supp. 753 (D. Colo. 1996) (release of tape recordings of proceedings prohibited). Given modern technology capabilities, the Committee believed that a more generalized reference to "broadcasting" is appropriate.

Also, although the revised rule does not explicitly recognize exceptions within the rules themselves, the restyled rule recognizes that other rules might permit, for example, video teleconferencing, which clearly involves "broadcasting" of the proceedings, even if only for limited purposes.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. That separate publication includes substantive amendments to Rules 5 and 10 that would permit video teleconferencing of initial appearances and arraignments and would thus impact on Rule 53.

Rule 54. Application and Exception	Rule 54. (Reserved)[1]
(a) Courts. These rules apply to all criminal proceedings in the United States District Courts; in the District Court of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263); and in the District Court of the Virgin Islands; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that the prosecution of offenses in the District Court of the Virgin Islands shall be by indictment or information as otherwise provided by law.	
(b) Proceedings. **(1) Removed Proceedings.** These rules apply to criminal prosecutions removed to the United States district courts from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law. **(2) Offenses Outside a District or State.** These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, except that such proceedings may be had in any district authorized by 18 U.S.C. § 3238. **(3) Peace Bonds.** These rules do not alter the power of judges of the United States or of United States magistrate judges to hold security of the peace and for good behavior under Revised Statutes, § 4069, 50 U.S.C. § 23, but in such cases the procedure shall conform to these rules so far as they are applicable. **(4) Proceedings Before United States Magistrate Judges.** Proceedings involving misdemeanors and other petty offenses are governed by Rule 58. **(5) Other Proceedings.** These rules are not applicable to extradition and rendition of fugitives; civil forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. Except as provided in Rule 20(d) they do not apply to proceedings under 18 U.S.C. Chapter 403 — Juvenile Delinquency — so far as they are inconsistent with that chapter. They do not apply to summary trials for offenses against the navigation laws under Revised Statutes §§ 4300-4305, 33 U.S.C. §§ 391-396, or to proceedings involving disputes between seamen under Revised Statutes §§ 4079-4081, as amended, 22 U.S.C. §§ 256-258, or to proceedings for fishery offenses under the Act of June 28, 1937, c. 392, 50 Stat. 325-327, 16 U.S.C. §§ 772-772i, or to proceedings against a witness in a foreign country under 28 U.S.C. § 1784.	

[1] All of Rule 54 was moved to Rule 1.

(c) Application of Terms. As used in these rules the following terms have the designated meanings. "Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in Puerto Rico, in a territory or in any insular possession. "Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney, when applicable to cases arising under the laws of Guam the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein, and when applicable to cases arising under the laws of the Northern Mariana Islands the Attorney General of the Northern Mariana Islands or any other person or persons as may be authorized by the laws of the Northern Marianas to act therein. "Civil action" refers to a civil action in a district court. 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 act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12. "District court" includes all district courts named in subdivision (a) of this rule. "Federal magistrate judge" means a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates. "Judge of the United States" includes a judge of the district court, court of appeals, or the Supreme Court. "Law" includes statutes and judicial decisions.	

"Magistrate judge" includes a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States, another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates, and a state or local judicial officer, authorized by 18 U.S.C. § 3041 to perform the functions prescribed by Rules 3, 4, and 5. "Oath" includes affirmations. "Petty offense" is defined in 18 U.S.C. § 19. "State" includes District of Columbia, Puerto Rico, territory and insular possession. "United States magistrate judge" means the officer authorized by 28 U.S.C. §§ 631-639.	

Committee Notes
Rule 54
May 10, 2000

COMMITTEE NOTE

Certain provisions in current Rule 54 have been moved to revised Rule 1 as part of a general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. Other provisions in Rule 54 have been deleted as being unnecessary.

Rule 55. Records	Rule 55. Records
The clerk of the district court and each United States magistrate judge shall keep records in criminal proceedings in such form as the Director of the Administrative Office of the United States Courts may prescribe. The clerk shall enter in the records each order or judgment of the court and the date such entry is made.	The clerk of the district court must keep records of criminal proceedings in the form prescribed by the Director of the Administrative Office of the United States Courts. The clerk must enter in the records every court order or judgment and the date of entry.

Committee Notes
Rule 55
May 10, 2000

COMMITTEE NOTE

The language of Rule 55 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 56. Courts and Clerks	Rule 56. When Court Is Open
The district court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.	**(a) In General.** A district court is considered always open for any filing, and for issuing and returning process, making a motion, or entering an order. **(b) Office Hours.** The clerk's office — with the clerk or a deputy in attendance — must be open during business hours on all days except Saturdays, Sundays, and legal holidays. **(c) Special Hours.** A court may provide by local rule or order that its clerk's office will be open for specified hours on Saturdays or legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, Presidents' Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

Committee Notes
Rule 56
May 10, 2000

COMMITTEE NOTE

The language of Rule 56 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

In Rule 56(c) the term "Presidents' Day" is used in lieu of the term, "Washington's Birthday." Although the latter term is used in the statute, the former reflects the prevalent modern usage and is the term used in the recently restyled Federal Rules of Appellate Procedure. *See also* Rule 45(a).

Rule 57. Rules by District Courts	Rule 57. District Court Rules
(a) In General **(1)** Each district court acting by a majority of its district judges may, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice. A local rule shall be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. § 2072 and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States. **(2)** A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of nonwillful failure to comply with the requirement.	**(a) In General.** **(1)** Each district court acting by a majority of its district judges may, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice. A local rule must be consistent with — but not duplicative of — federal statutes and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. **(2)** A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of an unintentional failure to comply with the requirement.
(b) Procedure When There Is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.	**(b) Procedure When There Is No Controlling Law.** A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator was furnished with actual notice of the requirement before the noncompliance.
(c) Effective Date and Notice. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of the rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and shall be made available to the public.	**(c) Effective Date and Notice.** A local rule adopted under this Rule takes effect on the date specified by the district court and remains in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of local rules and their amendments, when promulgated, must be furnished to the judicial council and the Administrative Office of the United States Courts and must be made available to the public.

Committee Notes
Rule 57
May 10, 2000

COMMITTEE NOTE

The language of Rule 57 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 58. Procedure for Misdemeanors and Other Petty Offenses	Rule 58. Petty Offenses and Other Misdemeanors
(a) Scope. **(1) In General.** This rule governs the procedure and practice for the conduct of proceedings involving misdemeanors and other petty offenses, and for appeals to district judges in such cases tried by United States magistrate judges. **(2) Applicability of Other Federal Rules of Criminal Procedure.** In proceedings concerning petty offenses for which no sentence of imprisonment will be imposed the court may follow such provisions of these rules as it deems appropriate, to the extent not inconsistent with this rule. In all other proceedings the other rules govern except as specifically provided in this rule. **(3) Definition.** The term "petty offenses for which no sentence of imprisonment will be imposed" as used in this rule, means any petty offenses as defined in 18 U.S.C. § 19 as to which the court determines, that, in the event of conviction, no sentence of imprisonment will actually be imposed.	**(a) Scope.** (1) ***In General.*** These rules apply in petty offense and other misdemeanor cases and on appeal to a district judge in a case tried by a magistrate judge, unless this rule provides otherwise. (2) ***Petty Offense Case Without Imprisonment.*** In a case involving a petty offense for which no sentence of imprisonment will be imposed, the court may follow any provision of these rules that is not inconsistent with this rule and that the court considers appropriate. (3) ***Definition.*** As used in this rule, the term "petty offense for which no sentence of imprisonment will be imposed" means a petty offense for which the court determines that, in the event of conviction, no sentence of imprisonment will be imposed.
(b) Pretrial Procedures. **(1) Trial Document.** The trial of a misdemeanor may proceed on an indictment, information, or complaint or, in the case of a petty offense, on a citation or violation notice.	**(b) Pretrial Procedure.** (1) ***Charging Document.*** The trial of a misdemeanor may proceed on an indictment, information, or complaint. The trial of a petty offense may also proceed on a citation or violation notice.

(2) Initial Appearance. At the defendant's initial appearance on a misdemeanor or other petty offense charge, the court shall inform the defendant of: **(A)** the charge, and the maximum possible penalties provided by law, including payment of a special assessment under 18 U.S.C. § 3013, and restitution under 18 U.S.C. § 3663; **(B)** the right to retain counsel; **(C)** the right to request the appointment of counsel if the defendant is unable to retain counsel, unless the charge is a petty offense for which an appointment of counsel is not required; **(D)** the right to remain silent and that any statement made by the defendant may be used against the defendant; **(E)** the right to trial, judgment, and sentencing before a district judge, unless: (i) the charge is a Class B misdemeanor motor-vehicle offense, a Class C misdemeanor, or an infraction; or (ii) the defendant consents to trial, judgment, and sentencing before the magistrate judge; **(F)** the right to trial by jury before either a United States magistrate judge or a district judge, unless the charge is a petty offense; and **(G)** the right to a preliminary examination in accordance with 18 U.S.C. § 3060, and the general circumstances under which the defendant may secure pretrial release, if the defendant is held in custody and charged with a misdemeanor other than a petty offense.	**(2)** ***Initial Appearance.*** At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following: (A) the charge, and the minimum and maximum penalties, including special assessment under 18 U.S.C. § 3013 and restitution under 18 U.S.C. § 3556; (B) the right to retain counsel; (C) the right to request the appointment of counsel if the defendant is unable to retain counsel — unless the charge is a petty offense for which the appointment of counsel is not required; (D) the right to remain silent and that the prosecution may use against the defendant any statement that the defendant makes; (E) the right to trial, judgment, and sentencing before a district judge — unless: (i) the charge is a Class B misdemeanor motor-vehicle offense, a Class C misdemeanor, or an infraction; or (ii) the defendant consents to trial, judgment, and sentencing before a magistrate judge; (F) the right to a jury trial before either a magistrate judge or a district judge — unless the charge is a petty offense; and (G) if the defendant is held in custody and charged with a misdemeanor other than a petty offense, the right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release.

(3) Consent and Arraignment. **(A) Plea Before a United States Magistrate Judge.** A magistrate judge shall take the defendant's plea in a Class B misdemeanor charging a motor vehicle-offense, a class C misdemeanor, or an infraction. In every other misdemeanor case, a magistrate judge may take the plea only if the defendant consents either in writing or orally on the record to be tried before the magistrate judge and specifically waives trial before a district judge. The defendant may plead not guilty, guilty, or with the consent of the magistrate judge, nolo contendere. **(B) Failure to Consent.** In a misdemeanor case — other than a Class B misdemeanor charging a motor-vehicle offense, a Class C misdemeanor, or an infraction — magistrate judge shall order the defendant to appear before a district judge for further proceedings on notice, unless the defendant consents to the trial before the magistrate judge.	**(3)** ***Arraignment.*** (A) *Plea Before a Magistrate Judge.* A magistrate judge may take the defendant's plea in a Class B misdemeanor charging a motor vehicle-offense, a class C misdemeanor, or an infraction. In every other misdemeanor case, a magistrate judge may take the plea only if the defendant consents either in writing or on the record to be tried before a magistrate judge and specifically waives trial before a district judge. The defendant may plead not guilty, guilty, or with the consent of the magistrate judge, nolo contendere. (B) *Failure to Consent.* Except for a Class B misdemeanor charging a motor-vehicle offense, a Class C misdemeanor, or an infraction, the magistrate judge must order a defendant who does not consent to trial before a magistrate judge to appear before a district judge for further proceedings.
(c) Additional Procedures Applicable Only to Petty Offenses for Which No Sentence of Imprisonment Will be Imposed. With respect to petty offenses for which no sentence of imprisonment will be imposed, the following additional procedures are applicable: **(1) Plea of Guilty or Nolo Contendere.** No plea of guilty or nolo contendere shall be accepted unless the court is satisfied that the defendant understands the nature of the charge and the maximum possible penalties provided by law. **(2) Waiver of Venue for Plea and Sentence.** A defendant who is arrested, held, or present in a district other than that in which the indictment, information, complaint, citation, or violation notice is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive venue and trial in the district in which the proceeding is pending, and to consent to disposition of the case in the district in which that defendant was arrested, is held, or is present. Unless the defendant thereafter pleads not guilty, the prosecution shall be had as if venue were in such district, and notice of same shall be given to the magistrate judge in the district where the proceeding was originally commenced. The defendant's statement of a desire to plead guilty or nolo contendere is not admissible against the defendant.	**(c) Additional Procedures in Certain Petty Offense Cases.** The following procedures also apply in cases involving a petty offense for which no sentence of imprisonment will be imposed: **(1)** ***Guilty or Nolo Contendere Plea.*** The court must not accept a guilty or nolo contendere plea unless satisfied that the defendant understands the nature of the charge and the maximum possible penalty. **(2)** ***Waiving Venue.*** (A) *Conditions of Waiving Venue.* If a defendant is arrested, held, or present in a district different from the one where the indictment, information, complaint, citation, or violation notice is pending, the defendant may state in writing a desire to plead guilty or nolo contendere, to waive venue and trial in the district where the proceeding is pending, and to consent to the court's disposing of the case in the district where the defendant was arrested, is held, or is present.
	(B) *Effect of Waiving Venue.* Unless the defendant later pleads not guilty, the prosecution will proceed in the district where the defendant was arrested, is held, or is present. The district clerk must notify the clerk in the original district of the defendant's waiver of venue. The defendant's statement of a desire to plead guilty or nolo contendere is not admissible against the defendant.

(3) Sentence. The court shall afford the defendant an opportunity to be heard in mitigation. The court shall then immediately proceed to sentence the defendant, except that in the discretion of the court, sentencing may be continued to allow an investigation by the probation service or submission of additional information by either party. **(4) Notification of Right to Appeal.** After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal including any right to appeal the sentence. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except the court shall advise the defendant of any right to appeal the sentence.	**(3)** ***Sentencing.*** The court must give the defendant an opportunity to be heard in mitigation and then proceed immediately to sentencing. The court may, however, postpone sentencing to allow the probation service to investigate or to permit either party to submit additional information. **(4)** ***Notice of a Right to Appeal.*** After imposing sentence in a case tried on a not-guilty plea, the court must advise the defendant of a right to appeal the conviction and of any right to appeal the sentence. If the defendant was convicted on a plea of guilty or nolo contendere, the court must advise the defendant of any right to appeal the sentence.
(d) Securing the Defendant's Appearance; Payment in Lieu of Appearance. **(1) Forfeiture of Collateral.** When authorized by local rules of the district court, payment of a fixed sum may be accepted in suitable cases in lieu of appearance and as authorizing termination of the proceedings. Local rules may make provision for increases in fixed sums not to exceed the maximum fine which could be imposed. **(2) Notice to Appear.** If a defendant fails to pay a fixed sum, request a hearing, or appear in response to a citation or violation notice, the clerk or a magistrate judge may issue a notice for the defendant to appear before the court on a date certain. The notice may also afford the defendant an additional opportunity to pay a fixed sum in lieu of appearance, and shall be served upon the defendant by mailing a copy to the defendant's last known address. **(3) Summons or Warrant.** Upon an indictment or a showing by one of the other documents specified in subdivision (b)(1) of probable cause to believe that an offense has been committed and that the defendant has committed it, the court may issue an arrest warrant or, if no warrant is requested by the attorney for the prosecution, a summons. The showing of probable cause shall be made in writing upon oath or under penalty of perjury, but the affiant need not appear before the court. If the defendant fails to appear before the court in response to a summons, the court may summarily issue a warrant for the defendant's immediate arrest and appearance before the court.	**(d) Paying a Fixed Sum in Lieu of Appearance.** **(1)** ***In General.*** If the court has a local rule governing forfeiture of collateral, the court may accept a fixed-sum payment in lieu of the defendant's appearance and end the case, but the fixed sum may not exceed the maximum fine allowed by law. **(2)** ***Notice to Appear.*** If the defendant fails to pay a fixed sum, request a hearing, or appear in response to a citation or violation notice, the district clerk or a magistrate judge may issue a notice for the defendant to appear before the court on a date certain. The notice may give the defendant an additional opportunity to pay a fixed sum in lieu of appearance. The district clerk must serve the notice on the defendant by mailing a copy to the defendant's last known address. **(3)** ***Summons or Warrant.*** Upon an indictment, or upon a showing by one of the other charging documents specified in Rule 58(b)(1) of probable cause to believe that an offense has been committed and that the defendant has committed it, the court may issue an arrest warrant or, if no warrant is requested by the attorney for the government, a summons. The showing of probable cause must be made under oath or under penalty of perjury, but the affiant need not appear before the court. If the defendant fails to appear before the court in response to a summons, the court may summarily issue a warrant for the defendant's arrest.
(e) Record. Proceedings under this rule shall be taken down by a reporter or recorded by suitable sound equipment.	**(e) Record.** The court must record any proceedings under this rule by using a court reporter or suitable recording device.
(f) New Trial. The provisions of Rule 33 shall apply.	**(f) New Trial.** Rule 33 applies to a motion for a new trial.

(g) Appeal. **(1) Decision, Order, Judgment or Sentence by a District Judge.** An appeal from a decision, order, judgment or conviction or sentence by a district judge shall be taken in accordance with the Federal Rules of Appellate Procedure. **(2) Decision, Order, Judgment or Sentence by a United States Magistrate Judge.** **(A) Interlocutory Appeal.** A decision or order by a magistrate judge which, if made by a district judge, could be appealed by the government or defendant under any provision of law, shall be subject to an appeal to a district judge provided such appeal is taken within 10 days of the entry of the decision or order. An appeal shall be taken by filing with the clerk of court a statement specifying the decision or order from which an appeal is taken and by serving a copy of the statement upon the adverse party, personally or by mail, and by filing a copy with the magistrate judge. **(B) Appeal from Conviction or Sentence.** An appeal from a judgment of conviction or sentence by a magistrate judge to a district judge shall be taken within 10 days after entry of judgment. An appeal shall be taken by filing with the clerk of the court a statement specifying the judgment from which an appeal is taken, and by serving a copy of the statement upon the United States Attorney, personally or by mail, and by filing a copy with the magistrate judge.	**(g) Appeal.** (1) ***From a District Judge's Order or Judgment.*** The Federal Rules of Appellate Procedure govern an appeal from a district judge's order or a judgment of conviction and sentence. (2) ***From a Magistrate Judge's Order or Judgment.*** (A) *Interlocutory Appeal.* Either party may appeal an order of a magistrate judge to a district judge within 10 days of its entry if a district judge's order could similarly be appealed. The party appealing must file a notice with the clerk specifying the order being appealed and serve a copy on the adverse party. (B) *Appeal from a Conviction or Sentence.* A defendant may appeal a magistrate judge's judgment of conviction or sentence to a district judge within 10 days of its entry. To appeal, the defendant must file a notice with the clerk specifying the judgment being appealed and serve a copy on the attorney for the government.
(C) Record. The record shall consist of the original papers and exhibits in the case together with any transcript, tape, or other recording of the proceedings and a certified copy of the docket entries which shall be transmitted promptly to the clerk of court. For purposes of the appeal, a copy of the record of such proceedings shall be made available at the expense of the United States to a person who establishes by affidavit the inability to pay or give security therefor, and the expense of such copy shall be paid by the Director of the Administrative Office of the United States Courts. **(D) Scope of Appeal.** The defendant shall not be entitled to a trial de novo by a district judge. The scope of appeal shall be the same as an appeal from a judgment of a district court to a court of appeals.	(C) *Record.* The record consists of the original papers and exhibits in the case; any transcript, tape, or other recording of the proceedings; and a certified copy of the docket entries. For purposes of the appeal, a copy of the record of the proceedings must be made available to a defendant who establishes by affidavit an inability to pay or give security for the record. The Director of the Administrative Office of the United States Courts must pay for those copies. (D) *Scope of Appeal.* The defendant is not entitled to a trial de novo by a district judge. The scope of the appeal is the same as in an appeal to the court of appeals from a judgment entered by a district judge.
(3) Stay of Execution; Release Pending Appeal. The provisions of Rule 38 relating to stay of execution shall be applicable to a judgment of conviction or sentence. The defendant may be released pending an appeal in accordance with the provisions of law relating to release pending appeal from a judgment of a district court to a court of appeals.	**(3) *Stay of Execution and Release Pending Appeal.*** Rule 38 applies to a stay of a judgment of conviction or sentence. The court may release the defendant pending appeal under the law relating to release pending appeal from a district court to a court of appeals.

Committee Notes
Rule 58
May 10, 2000

COMMITTEE NOTE

The language of Rule 58 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The title of the rule has been changed to "Petty Offenses and Other Misdemeanors." In Rule 58(c)(2)(B) (regarding waiver of venue), the Committee amended the rule to require that the "district clerk," instead of the magistrate judge, inform the original district clerk if the defendant waives venue and the prosecution proceeds in the district where the defendant was arrested. The Committee intends no change in practice.

In Rule 58(g)(1) and (g)(2)(A), the Committee deleted as unnecessary the word "decision" because its meaning is covered by existing references to an "order, judgment, or sentence" by a district judge or magistrate judge. In the Committee's view, deletion of that term does not amount to a substantive change.

Rule 59. Effective Date	Rule 59. Effective Date
These rules take effect on the day which is 3 months subsequent to the adjournment of the first regular session of the 79th Congress, but if that day is prior to September 1, 1945, then they take effect on September 1, 1945. They govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.	[Abrogated.]

Committee Notes
Rule 59
May 10, 2000

COMMITTEE NOTE

Rule 59, which dealt with the effective date of the Federal Rules of Criminal Procedure, is no longer necessary and has been abrogated.

Rule 60. Title	Rule 60. Title[2]
These rules may be known and cited as the Federal Rules of Criminal Procedure.	

[2] This was moved to Rule 1(b).

Committee Notes
Rule 60
May 10, 2000

COMMITTEE NOTE

The language of Rule 60, which reflected the title of the Federal Rules of Criminal Procedure, has been deleted as being unnecessary.

8B

APPENDIX B

SUBSTANTIVE PACKAGE
RULES 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41 & 43

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

~~**Rule 5. Initial Appearance Before the Magistrate Judge**~~

~~**(a) In General.** Except as otherwise provided in this rule, an officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate judge or, if a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate judge, a complaint, satisfying the probable cause requirements of Rule 4(a), shall be promptly filed. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of~~

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* New matter is underlined; matter to be omitted is lined through.

~~this rule. An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest and an attorney for the government moves promptly, in the district in which the warrant was issued, to dismiss the complaint.~~

~~**(b) Misdemeanors and Other Petty Offenses.** If the charge against the defendant is a misdemeanor or other petty offense triable by a United States magistrate judge under 18 U.S.C. § 3401, the magistrate judge shall proceed in accordance with Rule 58.~~

~~**(c) Offenses Not Triable by the United States Magistrate Judge.** If the charge against the defendant is not triable by the United States magistrate judge, the defendant shall not be called upon to plead. The magistrate judge shall inform~~

~~the defendant of the complaint against the defendant and of any affidavit filed therewith, of the defendant's right to retain counsel or to request the assignment of counsel if the defendant is unable to obtain counsel, and of the general circumstances under which the defendant may secure pretrial release. The magistrate judge shall inform the defendant that the defendant is not required to make a statement and that any statement made by the defendant may be used against the defendant. The magistrate judge shall also inform the defendant of the right to a preliminary examination. The magistrate judge shall allow the defendant reasonable time and opportunity to consult counsel and shall detain or conditionally release the defendant as provided by statute or in these rules. A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district~~

~~court. If the defendant waives preliminary examination, the magistrate judge shall forthwith hold the defendant to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate judge shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if the defendant is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by~~

~~a federal magistrate judge. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.~~

Rule 5. Initial Appearance

(a) In General.

(1) ***Appearance Upon Arrest.***

(A) A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides.

(B) A person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge.

(2) ***Exceptions.***

(A) An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if:

(i) the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest; and

(ii) an attorney for the government moves promptly, in the district where the warrant was issued, to dismiss the complaint.

(B) If a defendant is arrested for a violation of probation or supervised release, Rule 32.1 applies.

(C) If a defendant is arrested for failing to appear in another district, Rule 40 applies.

(3) ***Appearance Upon a Summons.*** When a defendant appears in response to a summons under Rule 4, a magistrate judge must proceed under Rule 5(d) or (e), as applicable.

(b) Complaint Required. If a defendant is arrested without a warrant, a complaint meeting Rule 4(a)'s requirement of probable cause must be promptly filed in the district where the offense was allegedly committed.

(c) Initial Appearance; Transfer to Another District.

(1) ***Arrest in the District Where the Offense Was Allegedly Committed.*** If the defendant is arrested in the district where the offense was allegedly committed:

(A) the initial appearance must be in that district; and

(B) if a magistrate judge is not reasonably available, the initial appearance may be before a state or local judicial officer.

(2) ***Arrest in District Other Than the District Where the Offense Was Allegedly Committed.*** If the defendant is arrested in a district other than where the offense was allegedly committed, the following procedures apply:

(A) the initial appearance must be in that district, or in an adjacent district if the appearance can occur more promptly there;

(B) the judge must inform the defendant of the provisions of Rule 20;

(C) if the defendant was arrested without a warrant, the district court where the prosecution is pending must first issue a

warrant before the magistrate judge transfers the defendant to that district;

(D) the judge must conduct a preliminary hearing as required under Rule 5.1 or Rule 58(b)(2)(G);

(E) the judge must transfer the defendant to the district where the prosecution is pending if:

(i) the government produces the warrant, a certified copy of the warrant, a facsimile of either, or other appropriate form of either; and

(ii) the judge finds that the defendant is the same person named in the indictment, information, or warrant; and

(F) when a defendant is transferred or discharged, the court must promptly transmit the papers and any

bail to the clerk in the district where the prosecution is pending.

(d) Procedure in a Felony Case.

(1) *Advice.* If the offense charged is a felony, the judge must inform the defendant of the following:

(A) the complaint against the defendant, and any affidavit filed with it;

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

(C) the circumstances, if any, under which the defendant may secure pretrial release;

(D) any right to a preliminary hearing; and

(E) the defendant's right not to make a statement, and that any statement made may be used against the defendant.

(2) ***Consultation with Counsel.*** The judge must allow the defendant reasonable opportunity to consult with counsel.

(3) ***Detention or Release.*** The judge must detain or release the defendant as provided by statute or these rules.

(4) ***Plea.*** A defendant may be asked to plead only under Rule 10.

(e) **Procedure in a Misdemeanor Case.** If the defendant is charged with a misdemeanor only, the judge must inform the defendant in accordance with Rule 58(b)(2).

(f) **Video Teleconferencing.** Video teleconferencing may be used to conduct an appearance under this rule if the defendant waives the right to be present.

[ALTERNATIVE VERSION]

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

Rule 5
Substantive Change Package
May 10, 2000

COMMITTEE NOTE

The language of Rule 5 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

Rule 5 has been completely revised to more clearly set out the procedures for initial appearances and to recognize that such appearances may be required at various stages of a criminal proceeding, for example, where a defendant has been arrested for violating the terms of probation.

Rule 5(a), which governs initial appearances by an arrested defendant before a magistrate judge, includes several changes. The first is a clarifying change; revised Rule 5(a)(1) provides that a person making the arrest must bring the defendant "without unnecessary delay" before a magistrate judge, instead of the current reference to "nearest available" magistrate. This language parallels changes in Rule 4 and reflects the view that time is of the essence. The Committee intends no change in practice. In using the term, the Committee recognizes that on occasion there may be necessary delay in presenting the defendant, for example, due to weather conditions or other natural causes. A second change is non-stylistic, and reflects the stated preference (as in other provisions throughout the rules) that the defendant be brought before a federal judicial officer. Only if a magistrate judge is not available should the defendant be taken before a state or local officer.

The third sentence in current Rule 5(a), which states that a magistrate judge must proceed in accordance with the rule where a defendant is arrested without a warrant or given a summons, has been deleted because it is unnecessary.

Rule 5(a)(1)(B) codifies the caselaw reflecting that the right to an initial appearance applies not only when a person is arrested within the United States but also when the an arrest occurs outside the United States. *See, e.g.*, *United States v. Purvis*, 768 F.2d 1237 (11th Cir. 1985); *United States v. Yunis*, 859 F.2d 953 (D.C. Cir. 1988). In these circumstances, the Committee believes—and the rule so provides—that the initial appearance should be before a federal magistrate judge rather than a state or local judicial officer.

Rule 5(a)(2)(A) consists of language currently located in Rule 5, that addresses the procedure to be followed where a defendant has been arrested under a warrant issued on a complaint charging solely a violation of 18 U.S.C. § 1073 (unlawful flight to avoid prosecution). Rule 5(a)(2)(B) and 5(a)(2)(C) are new provisions. They are intended to make it clear that when a defendant is arrested for a violating probation or supervised release, or

for failing to appear in another district, Rules 32.1 and 40 apply. No change in practice is intended.

Rule 5(a)(3) is new and fills a perceived gap in the rules. It recognizes that a defendant may be subjected to an initial appearance under this rule if a summons was issued under Rule 4, instead of an arrest warrant. If the defendant is appearing pursuant to a summons in a felony case, Rule 5(d) applies and if the defendant is appearing in a misdemeanor case, Rule 5(e) applies.

Rule 5(b) carries forward the requirement in former Rule 5(a) that if the defendant is arrested without a warrant, a complaint must be promptly filed.

Rule 5(c) is a new provision and sets out where an initial appearance is to take place. If the defendant is arrested in the district where the offense was allegedly committed, under Rule 5(c)(1), the defendant must be taken to a magistrate in that district. If no magistrate is reasonably available, a state or local judicial officer may conduct the initial appearance. On the other hand, if the defendant is arrested in a district other than the district where the offense was allegedly committed, Rule 5(c)(2) governs. In those instances, the defendant must be taken to a magistrate within the district of arrest, unless the appearance can take place more promptly in an adjacent distinct. The Committee recognized that in some cases, the nearest magistrate may actually be across a district's lines. The remainder of Rule 5(c)(2) includes material formerly located in Rule 40.

Rule 5(d), derived from current Rule 5(c), has been retitled to more clearly reflect the subject of that subdivision, the procedure to be used if the defendant is charged with a felony. Rule 5(d)(4) has been added to make clear that a defendant may only be called upon to enter a plea under the provisions of Rule 10. That language is intended to reflect and reaffirm current practice.

The remaining portions of current Rule 5(c) have been moved to Rule 5.1, which deals with preliminary hearings in felony cases.

[**Alternate Version for Video Teleconferencing—Defendant's Consent Required.** The major substantive change is in new Rule 5(e), which permits video teleconferencing for an appearance under this rule, if the defendant consents. This change reflects the growing practice among state courts to use video teleconferencing to conduct initial proceedings. A similar amendment has been made to Rule 10 concerning arraignments. In amending Rules 5, 10, and 43 (which generally requires the defendant's presence at all proceedings), the Committee was very much aware of the argument that permitting a defendant to appear by video teleconferencing might be considered an erosion of an important element of the judicial process. The Committee nonetheless believed that in appropriate circumstances the court, and the defendant, should have the option of using video teleconferencing, as long as the defendant consents to that procedure. The question of when it would be appropriate for a defendant to consent is not spelled out in the rule. That is left to the defendant and the

court in each case. Nor does the rule specify any particular technical requirements regarding the system to be used.

[**Alternate Version for Video Teleconferencing —Defendant's Consent Not Required:** The major substantive change is in new Rule 5(e), which permits video teleconferencing for an appearance under this rule, even if the defendant does not consent. This change reflects the growing practice among state courts to use video teleconferencing to conduct initial proceedings. A similar amendment has been made to Rule 10 concerning arraignments. In amending Rules 5, 10, and 43 (which generally requires the defendant's presence at all proceedings), the Committee was very much aware of the argument that permitting a defendant to appear by video teleconferencing might be considered an erosion of an important element of the judicial process. The Committee nonetheless believed that in appropriate circumstances the court should have the option of using video teleconferencing, even if the defendant does not consent to that procedure. The question of when it would be appropriate to do so is not spelled out in the rule. That is left to the court in each case. Nor does the rule specify any particular technical requirements regarding the system to be used.]

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 5 is one of those rules. In revising Rule 5, the Committee decided to also propose a substantive change that would permit video teleconferencing of initial appearances. Another version of Rule 5, which does not include proposed Rule 5(f) is being published simultaneously in a separate pamphlet. The version published here, in turn, includes two alternatives for conducting video teleconferences. One version requires that the defendant consent to the procedure. The other version does not require a defendant's consent. The Committee decided to publish alternate versions to obtain a wider range of public comments on the proposal, and in recognition of the view of some that if the defendant is required to consent, video teleconferencing will rarely be used and its benefits largely unrealized.

~~**Rule 5.1. Preliminary Examination.**~~

~~**(a) Probable Cause Finding.** If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate judge shall forthwith hold the defendant to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine adverse witnesses and may introduce evidence. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.~~

~~**(b) Discharge of Defendant.** If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate judge shall dismiss the complaint~~

~~and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.~~

~~**(c) Records.** After concluding the proceeding the federal magistrate judge shall transmit forthwith to the clerk of the district court all papers in the proceeding. The magistrate judge shall promptly make or cause to be made a record or summary of such proceeding.~~

~~(1) On timely application to a federal magistrate judge, the attorney for a defendant in a criminal case may be given the opportunity to have the recording of the hearing on preliminary examination made available to that attorney in connection with any further hearing or preparation for trial. The court may, by local rule, appoint the place for and define the conditions under which such opportunity may be afforded counsel.~~

~~(2) On application of a defendant addressed to the court or any judge thereof, an order may issue that the federal magistrate judge make available a copy of the transcript, or of a portion thereof, to defense counsel. Such order shall provide for prepayment of costs of such transcript by the defendant unless the defendant makes a sufficient affidavit that the defendant is unable to pay or to give security therefor, in which case the expense shall be paid by the Director of the Administrative Office of the United States Courts from available appropriated funds. Counsel for the government may move also that a copy of the transcript, in whole or in part, be made available to it, for good cause shown, and an order may be entered granting such motion in whole or in part, on appropriate terms, except that the government need not prepay costs nor furnish security therefor.~~

~~**(d) Production of Statements.**~~

~~(1) In General. Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the court, for good cause shown, rules otherwise in a particular case.~~

~~(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.~~

Rule 5.1. Preliminary Hearing in a Felony Case

(a) In General. If a defendant is charged with a felony, a magistrate judge must conduct a preliminary hearing unless:

(1) the defendant waives the hearing;

(2) the defendant is indicted; or

(3) the government files an information under Rule 7(b).

(b) Election of District

A defendant arrested in a district other than where the offense was allegedly committed may elect to have the preliminary hearing conducted in the district where the prosecution is pending.

(c) Scheduling. The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than 10 days after the initial appearance if the defendant is in custody and no later than 20 days if not in custody.

(d) Extending the Time. With the defendant's consent and upon a showing of good cause — taking into account the public interest in the prompt disposition of criminal cases — a magistrate judge may extend the time limits in Rule 5.1(c) one or more times. If the defendant does not consent, the magistrate judge may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay.

(e) **Hearing and Finding.** At the preliminary hearing, the defendant may cross-examine adverse witnesses and may introduce evidence but cannot object to evidence on the ground that it was unlawfully acquired. If the magistrate judge finds probable cause to believe an offense has been committed and the defendant committed it, the magistrate judge must promptly require the defendant to appear for further proceedings.

(f) **Discharging the Defendant.** If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.

(g) **Records.** The preliminary hearing must be recorded by a court reporter or by a suitable recording device. A recording of the proceeding may be made available to any

party upon request. A copy of the recording and a transcript may be provided to any party upon request and upon payment as required by applicable Judicial Conference regulations.

(h) Production of Statements.

(1) ***In General.*** Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the magistrate judge for good cause rules otherwise in a particular case.

(2) ***Sanctions for Failure to Produce Statement.*** If a party disobeys a Rule 26.2(a) order to deliver a statement to the moving party, the magistrate judge must not consider the testimony of a witness whose statement is withheld.

Rule 5.1
Substantive Change Package
May 10, 2000

COMMITTEE NOTE

The language of Rule 5.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

First, the title of the rule has been changed. Although the underlying statute, 18 U.S.C. § 3060, uses the phrase *preliminary examination*, the Committee believes that the phrase *preliminary hearing* is more accurate. What happens at this proceeding is more than just an examination; it includes an evidentiary hearing, argument, and a judicial ruling. Further, the phrase *preliminary hearing* predominates in actual usage.

Rule 5.1(a) is composed of the first sentence of the second paragraph of current Rule 5(c). Rule 5.1(b) addresses the ability of a defendant to elect where a preliminary hearing will be held. That provision rule is taken from current Rule 40(a).

Rule 5.1(c) and (d) include material currently located in Rule 5(c): scheduling and extending the time limits for the hearing. Although the rule continues to refer to proceedings before a "court," the Committee is aware that in most districts, magistrate judges perform these functions. That point is also reflected in the definition of "court" in Rule 1(b), which in turn recognizes that magistrate judges may be authorized to act.

Rule 5.1(d) contains a significant change in practice. The revised rule includes language that expands the authority of a United States Magistrate Judge to grant a continuance for a preliminary hearing conducted under the rule. Currently, the rule authorizes a magistrate judge to grant a continuance only in those cases in which the defendant has consented to the continuance. If the defendant does not consent, then the government must present the matter to a district court judge, usually on the same day. The proposed amendment conflicts with 18 U.S.C. § 3060, which tracks the original language of the rule and permits only district court judges to grant continuances when the defendant objects. The Committee believes that this restriction is an anomaly and that it can lead to needless consumption of judicial and other resources. Magistrate judges are routinely required to make probable cause determinations and other difficult decisions regarding the defendant's liberty interests, reflecting that the magistrate judge's role has developed toward a higher level of responsibility for pre-indictment matters. The Committee believes that the change in the rule will provide greater judicial economy and that it is entirely appropriate to seek this change to the rule through the Rules Enabling Act procedures. *See* 28 U.S.C. § 2072(b). Under those procedures, approval by Congress of this rule change would supersede the parallel provisions in 18 U.S.C. § 3060.

Rule 5.1(e), addressing the issue of probable cause, contains the language currently located in Rule 5.1(a), with the exception of the sentence, "The finding of probable cause may be based upon hearsay evidence in whole or in part." That language was included in the original promulgation of the rule in 1972. Similar language was added to Rule 4 in 1974. In the Committee Note on the 1974 amendment, the Advisory Committee explained that the language was included to make it clear that a finding of probable cause may be based upon hearsay, noting that there had been some uncertainty in the federal system about the propriety of relying upon hearsay at the preliminary examination. *See* Advisory Committee Note to Rule 5.1 (citing cases and commentary). Federal law is now clear on that proposition. Thus, the Committee believed that the reference to hearsay was no longer necessary. Further, the Committee believed that the matter was best addressed in Rule 1101(d)(3), Federal Rules of Evidence. That rule explicitly states that the Federal Rules of Evidence do not apply to "preliminary examinations in criminal cases,...issuance of warrants for arrest, criminal summonses, and search warrants." The Advisory Committee Note accompanying that rule recognizes that: "The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable." The Committee did not intend to make any substantive changes in practice by deleting the reference to hearsay evidence.

Rule 5.1(f), which deals with the discharge of a defendant, consists of former Rule 5.1(b).

Rule 5.1(g) is a revised version of the material in current Rule 5.1(c). Instead of including detailed information in the rule itself concerning records of preliminary hearings, the Committee opted simply to direct the reader to the applicable Judicial Conference regulations governing records. The Committee did not intend to make any substantive changes in the way in which those records are currently made available.

Finally, although the rule speaks in terms of initial appearances being conducted before a magistrate judge, Rule 1(c) makes clear that a district judge may perform any function in these rules that a magistrate judge may perform.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 5.1 is one of those rules. In revising Rule 5.1, the Committee decided to also propose a substantive change that would permit a United States Magistrate Judge to grant a continuance for a preliminary hearing conducted under the rule where the defendant has not consented to such a continuance. Another version of Rule 5.1 that does not include that proposed change is being published simultaneously in a separate pamphlet.

~~**Rule 10. Arraignment**~~

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

Rule 10. Arraignment

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

(1) ensuring that the defendant has a copy of the indictment or information;

(2) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and then

(3) asking the defendant to plead to the indictment or information.

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

(1) the defendant has been charged by indictment or misdemeanor information;

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

(3) the court accepts the waiver.

(c) **Video Teleconferencing.** Video teleconferencing may be used to arraign a defendant if the defendant waives the right to be arraigned in open court.

[ALTERNATIVE VERSION]

(c) **Video Teleconferencing.** Video teleconferencing may be used to arraign a defendant.

Rule 10
Substantive Change Package
May 10, 2000

COMMITTEE NOTE

The language of Rule 10 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Read together, Rules 10 and 43 require the defendant to be physically present in court for the arraignment. *See, e.g.*, *Valenzuela-Gonzales v. United States*, 915 F.2d 1276, 1280 (9th Cir. 1990)(Rules 10 and 43 are broader in protection than the Constitution). The amendments to Rule 10 create two exceptions to that requirement. The first provides that the court may hold an arraignment in the defendant's absence when the defendant has waived the right to be present in writing and the court consents to that waiver. The second permits the court to hold arraignments by video teleconferencing, when the defendant is at a different location. A conforming amendment has also been made to Rule 43.

In amending Rule 10 and Rule 43, the Committee was concerned that permitting a defendant to be absent from the arraignment could be viewed as an erosion of an important element of the judicial process. First, it may be important for a defendant to see and experience first-hand the formal impact of the reading of the charge. Second, it may be necessary for the court to personally see and speak with the defendant at the arraignment, especially when there is a real question whether the defendant actually understands the gravity of the proceedings. And third, there may be difficulties in providing the defendant with effective and confidential assistance of counsel if counsel, but not the defendant, appears at the arraignment.

The Committee nonetheless believed that in appropriate circumstances the court, and the defendant, should have the option of conducting the arraignment in the defendant's absence. The question of when it would be appropriate for a defendant to waive an appearance is not spelled out in the rule. That is left to the defendant and the court in each case.

A critical element to the amendment is that no matter how convenient or cost effective a defendant's absence might be, the defendant's right to be present in court stands unless he or she waives that right in writing. Under the amendment, both the defendant and the defendant's attorney must sign the waiver. Further, the amendment requires that the waiver specifically state that the defendant has received a copy of the charging instrument.

If the trial court has reason to believe that in a particular case the defendant should not be permitted to waive the right, the court may reject the waiver and require that the

defendant actually appear in court. That might be particularly appropriate when the court wishes to discuss substantive or procedural matters in conjunction with the arraignment and the court believes that the defendant's presence is important in resolving those matters.

The amendment does not permit waiver of an appearance when the defendant is charged with a felony information. In that instance, the defendant is required by Rule 7(b) to be present in court to waive the indictment. Nor does the amendment permit a waiver of appearance when the defendant is standing mute, (see Rule 11(a)(4)) or entering a conditional plea, (see Rule 11(a)(2)), a nolo contendere plea, (see Rule 11(a)(3)), or a guilty plea, (see Rule 11(a)(1)). In each of those instances the Committee believed that it was more appropriate for the defendant to appear personally before the court.

It is important to note that the amendment does not permit the defendant to waive the arraignment itself, which may be a triggering mechanism for other rules.

[**Alternate Version for Video Teleconferencing—Defendant's Consent Required.** Rule 10(c) addresses the second substantive change in the rule. That provision permits the court to conduct arraignments through video teleconferencing, if the defendant waives the right to be arraigned in court. Although the practice is now used in state courts and in some federal courts, Rules 10 and 43 have generally prevented federal courts from using that method for arraignments in criminal cases. *See, e.g.*, *Valenzuela-Gonzales v. United States*, *supra* (Rules 10 and 43 mandate physical presence of defendant at arraignment and that arraignment take place in open court; thus, pilot program for video teleconferencing not permitted). A similar amendment was proposed by the Committee in 1993 and published for public comment. The amendment was later withdrawn from consideration in order to consider the results of several planned pilot programs for civil cases. Upon further consideration, the Committee believed that the benefits of using video teleconferencing outweighed the costs of doing so. This amendment also parallels an amendment in Rule 5.1(d) that would permit initial appearances to be conducted by video teleconferencing.

The arguments for opposing video teleconferencing of arraignments generally parallel those noted, *supra*, for permitting the defendant to waive the right to be personally brought before a judicial officer. Yet, if one accepts the argument that the defendant may voluntarily waive a personal appearance altogether at the arraignment, the same defendant should be able to consent to an arraignment from a remote location. Further, the Committee was persuaded in part by the fact that some districts deal with a very high volume of arraignments of defendants who are in custody and because of the distances involved, must be transported long distances. That potentially presents security risks to law enforcement and court personnel.

Although the rule requires the defendant to waive a personal appearance for an arraignment, the rule does not require that the waiver for video teleconferencing be in writing. Nor does it require that the defendant waive that appearance in person, in open court. It would normally be sufficient for the defendant to waive an appearance while participating through a video teleconference.]

[Alternate Version for Video Teleconferencing—Defendant's Consent Not Required. Rule 10(c) addresses the second substantive change in the rule. That provision permits the court to conduct arraignments through video teleconferencing, even if the defendant does not waive the right to be arraigned in court. Although the practice is now used in state courts and in some federal courts, Rules 10 and 43 have generally prevented federal courts from using that method for arraignments in criminal cases. *See, e.g.*, *Valenzuela-Gonzales v. United States*, *supra* (Rules 10 and 43 mandate physical presence of defendant at arraignment and that arraignment take place in open court; thus, pilot program for video teleconferencing not permitted). A similar amendment was proposed by the Committee in 1993 and published for public comment. The amendment was later withdrawn from consideration in order to consider the results of several planned pilot programs for civil cases. Upon further consideration, the Committee believed that the benefits of using video teleconferencing outweighed the costs of doing so. This amendment also parallels an amendment in Rule 5 that would permit initial appearances to be conducted by video teleconferencing. In providing for video teleconferencing of arraignments, even without the consent of the defendant, the Committee was persuaded in part by the fact that some districts deal with a very high volume of arraignments of defendants who are in custody and because of the distances involved, must be transported long distances. That potentially presents security risks to law enforcement and court personnel. The Committee believed that the beneficial use of video teleconferenced arraignments would be lost if the defendant's consent was required. Indeed, the pilot programs noted, *supra*, were hampered by the fact that defendants rarely consented to use of video teleconferencing.]

The amendment leaves to the courts the decision first, whether to permit video arraignments, and second, the procedures to be used. The Committee was satisfied that the technology has progressed to the point that video teleconferencing can address the concerns raised in the past about the ability of the court and the defendant to see each other and for the defendant and counsel to be in contact with each other, either at the same location or by a secure remote connection.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 10 is one of those rules. This proposed revision of Rule 10 includes an amendment that would permit the defendant to waive any appearance at an arraignment and a second amendment that would permit use of video teleconferencing for arraignments. Another version of Rule 10, which does not include these significant amendments is being published simultaneously in a separate pamphlet. This version of Rule 10, in turn, includes alternate language relating to video teleconferencing, with or without the defendant's consent. One version requires that the defendant consent to the procedure.

The other version does not require a defendant's consent. The Committee opted to publish alternate versions to obtain a wider range of public comments on the proposal, and in recognition of the view of some that if the defendant is required to consent, the beneficial uses of video teleconferencing will rarely be used.

~~Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition~~

~~(a) Defense of Insanity.~~ ~~If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.~~

~~(b) Expert Testimony of Defendant's Mental Condition.~~ ~~If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental~~

~~condition of the defendant bearing upon the issue of guilt, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.~~

~~**(c) Mental Examination of Defendant.** In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. 4241 or 4242. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be~~

~~admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.~~

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

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

Rule 12.2. Notice of Insanity Defense; Mental Examination

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

(b) **Notice of Expert Evidence of a Mental Condition.** If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must — within the time provided for the filing of pretrial motions or at a later time as the court directs — notify the attorney for the government in writing of this intention

and file a copy of the notice with the clerk. The court may, for good cause, allow late filing of the notice or grant additional time to the parties to prepare for trial or make any other appropriate order.

(c) Mental Examination.

(1) ***Authority to Order Examination; Procedures.***

(A) The court may upon motion of an attorney for the government order the defendant to submit to a competency examination under 18 U.S.C. § 4241.

(B) If the defendant provides notice under Rule 12.2(a), the court must, upon the government's motion, order the defendant to be examined under 18 U.S.C. § 4242. If the defendant provides notice under Rule 12.2(b) the court may, upon the government's motion,

order the defendant to be examined under procedures ordered by the court.

(2) ***Disclosing Results and Reports of Capital Sentencing Examination.*** The results and reports of any examination conducted solely under Rule 12.2(c)(1) after notice under Rule 12.2(b)(2) must be sealed and must not be disclosed to any attorney for the government or the defendant unless the defendant is found guilty of one or more capital crimes and the defendant confirms an intent to offer during sentencing proceedings expert evidence on mental condition.

(3) ***Disclosing Results and Reports of the Defendant's Expert Examination.*** After disclosure under Rule 12.2(c)(2) of the results and reports of the government's examination, the defendant must disclose to the government the results and reports of

any examination on mental condition conducted by the defendant's expert about which the defendant intends to introduce expert evidence.

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

(A) has introduced evidence of incompetency or after notice under Rule 12.2(a) or (b)(1), or

(B) has introduced expert evidence after notice under Rule 12.2(b)(2).

(d) **Failure to Comply.** If the defendant fails to give notice under Rule 12.2(b) or does not submit to an examination when ordered under Rule 12.2(c), the court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt or the issue of punishment in a capital case.

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

Rule 12.2
Substantive Change Package
May 10, 2000

COMMITTEE NOTE

The language of Rule 12.2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The substantive changes to Rule 12.2 are designed to address five issues. First, the amendments clarify that a court may order a mental examination for a defendant who has indicated an intention to raise a defense of mental condition bearing on the issue of guilt. Second, the defendant is required to give notice of an intent to present expert evidence of the defendant's mental condition during a capital sentencing proceeding. Third, the amendments address the ability of the trial court to order a mental examination for a defendant who has given notice of an intent to present evidence of mental condition during capital sentencing proceedings and when the results of that examination may be disclosed. Fourth, the amendment addresses the timing of disclosure of the results and reports of the defendant's expert examination. Finally, the amendment extends the sanctions for failure to comply with the rule's requirements to the punishment phase of a capital case.

Under current Rule 12.2(b), a defendant who intends to offer expert testimony on the issue of his or her mental condition on the question of guilt must provide a pretrial notice of that intent. The amendment extends that notice requirement to a defendant who intends to offer expert evidence, testimonial or otherwise, on his or her mental condition during a capital sentencing proceeding. As several courts have recognized, the better practice is to require pretrial notice of that intent so that any mental examinations can be conducted without unnecessarily delaying capital sentencing proceedings. *See, e.g., United States v. Beckford*, 962 F. Supp. 748, 754-64 (E.D. Va. 1997); *United States v. Haworth*, 942 F. Supp. 1406, 1409 (D.N.M. 1996). The amendment adopts that view.

A change to Rule 12.2(c)(1) clarifies the authority of the court to order mental examinations for a defendant. As currently written, the subdivision implies that the trial court has discretion to grant a government motion for a mental examination of a defendant who has indicated under Rule 12.2(a) an intent to raise the defense of insanity. But the corresponding statute, 18 U.S.C. § 4242, requires the court to order an examination if the defendant has provided notice of an intent to raise that defense and the government moves for the examination. The amendment conforms Rule 12.2(c) to the statute. Any examination conducted on the issue of the insanity defense would thus be conducted in accordance with the procedures set out in the statutory provision.

While the authority of a trial court to order a mental examination of a defendant who has registered an intent to raise the insanity defense seems clear, the authority under the rule to order an examination of a defendant who intends only to present expert testimony on his or her mental condition on the issue of guilt is not as clear. Some courts have concluded that a court may order such an examination. *See, e.g., United States v. Stackpole*, 811 F.2d 689, 697 (1st Cir. 1987); *United States v. Buchbinder*, 796 F.2d 910, 915 (1st Cir. 1986); and *United States v. Halbert*, 712 F.2d 388 (9th Cir. 1983). In *United States v. Davis*, 93 F.3d 1286 (6th Cir. 1996), however, the court in a detailed analysis of the issue concluded that the district court lacked the authority under the rule to order a mental examination of a defendant who had provided notice of an intent to offer evidence on a defense of diminished capacity. The court noted first that the defendant could not be ordered to undergo commitment and examination under 18 U.S.C. § 4242, because that provision relates to situations when the defendant intends to rely on the defense of insanity. The court also rejected the argument that the examination could be ordered under Rule 12.2(c) because this was, in the words of the rule, an "appropriate case." The court concluded, however, that the trial court had the inherent authority to order such an examination.

The amendment clarifies that the authority of a court to order a mental examination under Rule 12.2(c)(1)(B) extends to those cases when the defendant has provided notice, under Rule 12.2(b), of an intent to present expert testimony on the defendant's mental condition, either on the merits or at capital sentencing. *See, e.g., United States v. Hall*, 152 F.3d 381 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1767 (1999).

The amendment to Rule 12.2(c)(1) is not intended to affect any statutory or inherent authority a court may have to order other mental examinations.

The amendment leaves to the court the determination of what procedures should be used for a court-ordered examination on the defendant's mental condition (apart from insanity). As currently provided in the rule, if the examination is being ordered in connection with the defendant's stated intent to present an insanity defense, the procedures are dictated by 18 U.S.C. § 4242. On the other hand, if the examination is being ordered in conjunction with a stated intent to present expert testimony on the defendant's mental condition (not amounting to a defense of insanity) either at the guilt or sentencing phases, no specific statutory counterpart is available. Accordingly, the court is given the discretion to specify the procedures to be used. In so doing, the court may certainly be informed by other provisions, which address hearings on a defendant's mental condition. *See, e.g.*, 18 U.S.C. § 4241, et. seq.

Additional changes address the question when the results of an examination ordered under Rule 12.2(b)(2) may, or must, be disclosed. The Supreme Court has recognized that use of a defendant's statements during a court-ordered examination may compromise the defendant's right against self-incrimination. *See Estelle v. Smith*, 451 U.S. 454 (1981) (defendant's privilege against self-incrimination violated when he was not advised of right to remain silent during court-ordered examination and prosecution introduced statements during capital sentencing hearing). But subsequent cases have indicated that the defendant

waives the privilege if the defendant introduces expert testimony on his or her mental condition. *See, e.g., Powell v. Texas*, 492 U.S. 680, 683-84 (1989); *Buchanan v. Kentucky*, 483 U.S. 402, 421-24 (1987); *Presnell v. Zant*, 959 F.2d 1524, 1533 (11th Cir. 1992); *Williams v. Lynaugh*, 809 F.2d 1063, 1068 (5th Cir. 1987); *United States v. Madrid*, 673 F.2d 1114, 1119-21 (10th Cir. 1982). That view is reflected in Rule 12.2(c) which indicates that the statements of the defendant may be used against the defendant only after the defendant has introduced testimony on his or her mental condition. What the current rule does not address is if, and to what extent, the prosecution may see the results of the examination, which may include the defendant's statements, when evidence of the defendant's mental condition is being presented solely at a capital sentencing proceeding.

The proposed change in Rule 12.2(c)(2) adopts the procedure used by some courts to seal or otherwise insulate the results of the examination until it is clear that the defendant will introduce expert evidence about his or her mental condition at a capital sentencing hearing; i.e., after a verdict of guilty on one or more capital crimes, and a reaffirmation by the defendant of an intent to introduce expert mental-condition evidence in the sentencing phase. *See, e.g., United States v. Beckford*, 962 F. Supp. 748 (E.D. Va. 1997). Most courts that have addressed the issue have recognized that if the government obtains early access to the accused's statements, it will be required to show that it has not made any derivative use of that evidence. Doing so can consume time and resources. *See, e.g., United States v. Hall*, *supra*, 152 F.3d at 398 (noting that sealing of record, although not constitutionally required, "likely advances interests of judicial economy by avoiding litigation over [derivative use issue]").

Except as provided in Rule 12.2(c)(3), the rule does not address the time for disclosing results and reports of any expert examination conducted by the defendant. New Rule 12.2(c)(3) provides that upon disclosure under subdivision (c)(2) of the results and reports of the government's examination, disclosure of the results and reports of the defendant's expert examination is mandatory, if the defendant intends to introduce expert evidence relating to the examination.

Rule 12.2(c), as previously written, restricted admissibility of the defendant's statements during the course of an examination conducted under the rule to an issue respecting mental condition on which the defendant "has introduced testimony" — expert or otherwise. As amended, Rule 12.2(c)(4) provides that the admissibility of such evidence in a capital sentencing proceeding is triggered only by the defendant's introduction of expert evidence. The Committee believed that, in this context, it was appropriate to limit the government's ability to use the results of its expert mental examination to instances in which the defendant has first introduced expert evidence on the issue.

Rule 12.2(d) has been amended to extend sanctions for failure to comply with the rule to the penalty phase of a capital case. The selection of an appropriate remedy for the failure of a defendant to provide notice or submit to an examination under subdivisions (b) and (c) is entrusted to the discretion of the court. While subdivision (d) recognizes that the court may exclude the evidence of the defendant's own expert in such a situation, the court should

also consider "the effectiveness of less severe sanctions, the impact of preclusion on the evidence at trial and the outcome of the case, the extent of prosecutorial surprise or prejudice, and whether the violation was willful." *Taylor v. Illinois*, 484 U.S. 400, 414 n.19 (1988) (citing *Fendler v. Goldsmith*, 728 F.2d 1181 (9th Cir. 1983)).

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 12.2 is one of those rules. As outlined in the Committee Note, this proposed revision of Rule 12.2 includes five substantive amendments. Another version of Rule 12.2, which does not include these significant amendments, is being published simultaneously in a separate pamphlet.

~~**Rule 26. Taking of Testimony**~~

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

Rule 26. Taking Testimony

(a) In General. In all trials the testimony of witnesses must be taken in open court, unless otherwise provided by an Act of Congress or by rules adopted under 28 U.S.C. §§ 2072-2077.

(b) Transmitting Testimony from Different Location. In the interest of justice, the court may authorize contemporaneous video presentation in open court of testimony from a witness who is at a different location if:

(1) the requesting party establishes compelling circumstances for such transmission;

(2) appropriate safeguards for the transmission are used; and

(3) the witness is unavailable within the meaning of Rule 804(a)(4)-(5) of the Federal Rules of Evidence.

Rule 26
Substantive Change Package
May 10, 2000

COMMITTEE NOTE

The language of Rule 26 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 26(a) is amended, by deleting the word "orally," to accommodate witnesses who are not able to present oral testimony in open court and may need, for example, a sign language interpreter. The change conforms the rule, in that respect, to Federal Rule of Civil Procedure 43.

A substantive change has been made to Rule 26(b). That amendment permits a court to receive the video transmission of an absent witness if certain conditions are met. As currently written, Rule 26 indicates that normally only testimony given in open court will be considered, unless otherwise provided by these rules, an Act of Congress, or any other rule adopted by the Supreme Court. An example of a rule that provides otherwise is Rule 15. That Rule recognizes that depositions may be used to preserve testimony if there are exceptional circumstances in the case and it is in the interest of justice to do so. If the person is "unavailable" under Federal Rule of Evidence 804(a), then the deposition may be used at trial as substantive evidence. The amendment to Rule 26(b) extends the logic underlying that exception to contemporaneous video testimony of an unavailable witness. The amendment generally parallels a similar provision in Federal Rule of Civil Procedure 43.

The Committee believed that permitting use of video transmission of testimony only in those instances when deposition testimony could be used is a prudent and measured step. The proponent of the testimony must establish that there are exceptional circumstances for such transmission. A party against whom a deposition may be introduced at trial will normally have no basis for objecting if contemporaneous testimony is used instead. Indeed, the use of such transmitted testimony is in most regards superior to other means of presenting testimony in the courtroom. The participants in the courtroom can see for themselves the demeanor of the witness and hear any pauses in the testimony, matters that are not normally available in non-video deposition testimony. Although deposition testimony is normally taken with all counsel and parties present with the witness, those are not absolute requirements. *See, e.g., United States v. Salim*, 855 F.2d 944, 947-48 (2d Cir. 1988) (conviction affirmed where deposition testimony used although defendant and her counsel were not permitted in same room with witness, witness's lawyer answered some questions, lawyers were not permitted to question witness directly, and portions of proceedings were not transcribed verbatim).

The Committee recognized that there is a need for the trial court to impose appropriate safeguards and procedures to insure the accuracy and quality of the transmission, the ability of the jurors to hear and view the testimony, and the ability of the judge, counsel, and the witness to hear and understand each other during questioning. *See, e.g., United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999). Deciding what safeguards are appropriate is left to the sound discretion of the trial court.

The Committee believed that including the requirement of "unavailability" as that term is defined in Federal Rule of Evidence 804(a)(4) to (5) will insure that the defendant's Confrontation Clause rights are not infringed. In deciding whether to permit contemporaneous transmission of the testimony of a government witness, the Supreme Court's decision in *Maryland v. Craig*, 497 U.S. 836 (1990) is instructive. In that case, the prosecution presented the testimony of a child sexual assault victim from another room by one-way closed circuit television. The Court outlined four elements which underlie Confrontation Clause issues: (1) physical presence; (2) the oath; (3) cross-examination; and (4) the opportunity for the trier-of-fact to observe the witness's demeanor. *Id.* at 847. The Court rejected the notion that a defendant's Confrontation Clause rights could be protected only if all four elements were present. The trial court had explicitly concluded that the procedure was necessary to protect the child witness, i.e., the witness was psychologically unavailable to testify in open court. The Supreme Court noted that any harm to the defendant resulting from the transmitted testimony was minimal because the defendant received most of the protections contemplated by the Confrontation Clause, i.e., the witness was under oath, counsel could cross-examine the absent witness, and the jury could observe the demeanor of the witness. *See also United States v. Gigante*, *supra* (use of remote transmission of unavailable witness's testimony did not violate confrontation clause).

Although the amendment is not limited to instances such as those encountered in *Craig*, it is limited to situations when the witness is unavailable for any of the reasons set out in Federal Rule of Evidence 804(a)(4) and (5). Whether under particular circumstances a proposed transmission will satisfy some, or all, of the four protective factors identified by the Supreme Court in *Craig,* is a decision left to the trial court.

By defining unavailability—for the purposes of this rule—in the context of Federal Rule of Evidence 804(a)(4) and (5), the rule indicates a preference for remote transmission of live testimony as opposed to a deposition. The Committee was aware that Rule 804(a)(5) generally recognizes a preference for deposition testimony where the ground for unavailability in that rule is based upon the witness's absence from the jurisdiction. Under Rule 804(a)(5), a proponent may not rely upon the hearsay exceptions, other than the exception for former testimony in 804(b)(1), unless the proponent first demonstrates that the declarant is absent from the jurisdiction and that the proponent has been unable to obtain the declarant's attendance or testimony. The Committee recognizes that the amendment may have an impact on the operation of Rule 804, for example, in those cases where the declarant's ability to testify by remote transmission may preclude counsel from relying upon Rule 804(a)(5).

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 26 is one of those rules. This proposed revision of Rule 26 includes an amendment that would authorize a court to receive testimony from a remote location. Another version of Rule 26, which does not include this significant amendment, is being published simultaneously in a separate pamphlet.

~~**Rule 30. Instructions**~~

~~At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.~~

Rule 30. Jury Instructions

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

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

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

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

object out of the jury's hearing and, on request, out of the jury's presence.

Rule 30
Substantive Change Package
May 10, 2000

COMMITTEE NOTE

The language of Rule 30 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted, below.

Rule 30(a) is amended to reflect a change in the timing of requests for instructions and now mirrors Federal Rule of Civil Procedure 51. As currently written, the trial court may not direct the parties to file such requests before trial without violating Rules 30 and 57. While the amendment falls short of requiring all requests to be made before trial in all cases, the amendment permits a court to do so in a particular case or as a matter of local practice under local rules promulgated under Rule 57.

Rule 30(d) has been changed to clarify what, if anything, counsel must do to preserve error regarding an instruction or failure to instruct. The rule retains the requirement of a contemporaneous and specific objection (before the jury retires to deliberate). As the Supreme Court recognized in *Jones v. United States*, 119 S.Ct. 2090, 2102 (1999), read literally, current Rule 30 could be construed to bar any appellate review absent a timely objection when in fact a court may conduct a limited review under a plain error standard. The topic of plain error is not addressed in Rule 30 because it is already covered in Rule 52. No change in practice is intended by the amendment.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 30 is one of those rules. This proposed revision of Rule 30 includes an amendment that would authorize a court to require the parties to file requests for instructions before trial. Another version of Rule 30, which does not include this substantive amendment, is being published simultaneously in a separate pamphlet.

~~Rule 32. Sentence and Judgment~~

~~(a) In General; Time for Sentencing.~~ ~~When a presentence investigation and report are made under subdivision (b)(1), sentence should be imposed without unnecessary delay following completion of the process prescribed by subdivision (b)(6). The time limits prescribed in subdivision (b)(6) may be either shortened or lengthened for good cause.~~

~~**(b) Presentence Investigation and Report.**~~

~~**(1) When Made.** The probation officer must make a presentence investigation and submit a report to the court before sentence is imposed unless:~~

~~**(A)** the court finds that the information in the record enables it to exercise its sentencing authority meaningfully under 18 U.S.C. § 3553; and~~

~~**(B)** the court explains this finding on the record.~~

~~Notwithstanding the preceding sentence, a presentence investigation and report, or other report containing information sufficient for the court to enter an order of restitution, as the court may direct, shall be required in any case in which restitution is required to be ordered.~~

~~**(2) Presence of Counsel.** On request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation.~~

~~**(3) Nondisclosure.** The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty.~~

~~**(4) Contents of the Presentence Report.** The presentence report must contain —~~

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

~~(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. § 994(a), as the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. § 994(a)(1); and the probation officer's explanation of any factors that may suggest a different sentence — within or without

~~the applicable guideline — that would be more appropriate, given all the circumstances;~~

~~(C) a reference to any pertinent policy statement issued by the Sentencing Commission under 28 U.S.C. § 994(a)(2);~~

~~(D) verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;~~

~~(E) in appropriate cases, information about the nature and extent of nonprison programs and resources available for the defendant;~~

~~(F) in appropriate cases, information sufficient for the court to enter restitution;~~

~~(G) any report and recommendation resulting from a study ordered by the court under 18 U.S.C. § 3552(b); and~~

~~(II) any other information required by the court.~~

~~**(5) Exclusions.** The presentence report must exclude:~~

~~(A) any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation;~~

~~(B) sources of information obtained upon a promise of confidentiality; or~~

~~(C) any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.~~

~~**(6) Disclosure and Objections.**~~

~~(A) Not less than 35 days before the sentencing hearing — unless the defendant waives this minimum period — the probation officer must furnish the presentence report to the defendant, the defendant's counsel, and the attorney for the Government. The court may, by local rule or in individual cases, direct~~

~~that the probation officer not disclose the probation officer's recommendation, if any, on the sentence.~~

~~**(B)** Within 14 days after receiving the presentence report, the parties shall communicate in writing to the probation officer, and to each other, any objections to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the presentence report. After receiving objections, the probation officer may meet with the defendant, the defendant's attorney, and the attorney for the Government to discuss those objections. The probation officer may also conduct a further investigation and revise the presentence report as appropriate.~~

~~**(C)** Not later than 7 days before the sentencing hearing, the probation officer must submit the presentence report to the court, together with an addendum setting forth any unresolved objections, the grounds for those objections, and the probation officer's comments on the objections. At the same time, the~~

~~probation officer must furnish the revisions of the presentence report and the addendum to the defendant, the defendant's counsel, and the attorney for the Government.~~

~~**(D)** Except for any unresolved objection under subdivision (b)(6)(B), the court may, at the hearing, accept the presentence report as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.~~

~~**(c) Sentence.**~~

~~**(1) Sentencing Hearing.** At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule on any unresolved objections in the presentence report. The court may, in its discretion, permit the parties to introduce testimony or~~

~~other evidence on the objections. For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons.~~

~~**(2) Production of Statements at Sentencing Hearing.** Rule 26.2(a)-(d) and (f) applies at a sentencing hearing under this rule. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the movant, the court may not consider the affidavit or testimony of the witness whose statement is withheld.~~

~~**(3) Imposition of Sentence.** Before imposing sentence, the court must:~~

~~(A) verify that the defendant and the defendant's counsel have read and discussed the presentence report made available under subdivision (b)(6)(A). If the court has received information excluded from the presentence report under subdivision (b)(5) the court — in lieu of making that information available — must summarize it in writing, if the information will be relied on in determining sentence.~~

~~The court must also give the defendant and the defendant's counsel a reasonable opportunity to comment on that information;~~

~~(B) afford defendant's counsel an opportunity to speak on behalf of the defendant;~~

~~(C) address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence;~~

~~**(D)** afford the attorney for the Government an opportunity to speak equivalent to that of the defendant's counsel to speak to the court;~~

~~**(E)** if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence.~~

~~**(4) In Camera Proceedings.** The court's summary of information under subdivision (c)(3)(A) may be in camera. Upon joint motion by the defendant and the attorney for the Government, the court may hear in camera the statements — made under subdivision (c)(3)(B), (C), (D), and (E) — by the defendant, the defendant's counsel, the victim, or the attorney for the government.~~

~~**(5) Notification of Right to Appeal.** After imposing sentence in a case which has gone to trial on a plea of not~~

~~guilty, the court must advise the defendant of the right to appeal. After imposing sentence in any case, the court must advise the defendant of any right to appeal the sentence, and of the right of the person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court must immediately prepare and file a notice of appeal on behalf of the defendant.~~

~~**(d) Judgment.**~~

~~**(1) In General.** A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk.~~

~~**(2) Criminal Forfeiture.** Forfeiture procedures are governed by Rule 32.1.~~**

~~**(c) Plea Withdrawal.** If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.~~

~~**(f) Definitions.** For purposes of this rule —~~

~~**(1)** "victim" means any individual against whom an offense has been committed for which a sentence is to be imposed, but the right of allocution under subdivision (c)(3)(E) may be exercised instead by —~~

~~**(A)** a parent or legal guardian if the victim is below the age of eighteen years or incompetent; or~~

**The Supreme Court approved amendments in April 2000. The amendments take effect on December 1, 2000, unless Congress takes action otherwise.

~~(B) one or more family members or relatives designated by the court if the victim is deceased or incapacitated;~~

~~if such person or persons are present at the sentencing hearing, regardless of whether the victim is present; and~~

~~(2) "crime of violence or sexual abuse" means a crime that involved the use or attempted or threatened use of physical force against the person or property of another, or a crime under chapter 109A of title 18, United States Code.~~

Rule 32. Sentencing and Judgment

(a) Definitions. The following definitions apply under this rule:

(1) "Victim" means an individual against whom the defendant committed an offense for which the court will impose sentence.

(2) "Crime of violence or sexual abuse" means:

(A) a crime that involves the use, attempted use, or threatened use of physical force against another's person or property; or

(B) a crime under 18 U.S.C. §§ 2241–2248 or §§ 2251-2257.

(b) Time of Sentencing.

(1) ***In General.*** The court must impose sentence without unnecessary delay.

(2) ***Changing Time Limits.*** The court may, for good cause, change any time limits prescribed in Rule 32.

(c) Presentence Investigation.

(1) ***Required Investigation.***

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

(i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or

(ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

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

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

(d) Presentence Report.

(1) ***Contents of the Report.*** The presentence report must contain the following information:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) the kinds of sentences and the sentencing range provided by the Sentencing Commission's guidelines, and the probation officer's explanation of any factors that may suggest a more appropriate sentence within or without an applicable guideline;

(C) a reference to any pertinent Sentencing Commission policy statement;

(D) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

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

(F) when the law permits the court to order restitution, information sufficient for such an order;

(G) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation; and

(H) any other information that the court requires.

(2) ***Exclusions.*** The presentence report must exclude the following:

(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;

(B) any sources of information obtained upon a promise of confidentiality; and

(C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.

(e) Disclosing the Report and Recommendation.

(1) ***Time to Disclose.*** Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) ***Minimum Required Notice.*** The probation officer must give the presentence report to the defendant, the defendant's attorney, and the attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

(3) ***Sentence Recommendation.*** By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

(f) Objecting to the Report.

(1) ***Time to Object.*** Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.

(2) ***Serving Objections.*** An objecting party must provide a copy of its objections to every other party and to the probation officer.

(3) ***Action on Objections.*** After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

(g) **Submitting the Report.** At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

(h) **Sentencing.**

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

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

(B) must give the defendant and the defendant's attorney a written summary of—or summarize in camera—any information excluded from the presentence report under Rule 32(d)(2) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

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

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

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

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

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

(B) must rule on any—

(i) unresolved objection to a material matter in the presentence report; and

(ii) other controverted matter, unless the court determines that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

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

(4) *Opportunity to Speak.*

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

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

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

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

(B) *By a Victim.* Before imposing sentence, the court must address any victim of a crime of violence or sexual abuse who is present at sentencing and permit the victim to speak or submit any information concerning the sentence. Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present:

(i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or

(ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.

(C) *In Camera Proceedings.* Upon a party's motion the court may hear in camera any statement made under Rule 32(h)(4).

(5) ***Notice of Possible Departure from Sentencing Guidelines.*** Before the court may depart from the Guidelines calculation on a ground not identified as a ground for departure either in the presentence report or in a prehearing submission by a party, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specifically identify the ground on which the court is contemplating a departure.

(i) Defendant's Right to Appeal.

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

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

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

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

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

(j) Judgment.

(1) ***In General.*** In the judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence. If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so enter judgment. The judge must sign the judgment, and the clerk must enter it.

(2) ***Criminal Forfeiture.*** Forfeiture procedures are governed by Rule 32.2.

Rule 32
Substantive Change Package
May 10, 2000

COMMITTEE NOTE

The language of Rule 32 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The rule has been completely reorganized to make it easier to follow and apply. For example, the definitions in the rule have been moved to the first sections and the sequencing of the sections generally follows the procedure for presentencing and sentencing procedures.

Under current Rule 32(c)(1), the court is required to "rule on any unresolved objections in the presentence report." The rule does not specify, however, whether that provision should be read literally to mean every objection that might have been made to the report or only on those objections which might in some way actually affect the sentence. Revised Rule 32(h)(3)(i) now explicitly requires that the court must rule on any "unresolved objection to a material matter" in the presentence report, whether or not the court will consider it in imposing an appropriate sentence. This is a change from the current rule. If, on the other hand, the unresolved objection addresses any other controverted matter, the court must either make a finding on the objection or decide that a finding is not required because the matter will not affect sentencing or that the matter will not be considered at all in sentencing. *See* Rule 32(h)(3)(ii). The new language recognizes that even if an unresolved objection may not have any impact on determining a sentence under the Sentencing Guidelines, it often affects other important post-sentencing decisions. For example, the Bureau of Prisons consults the presentence report in deciding, for example, where a defendant will actually serve his or her sentence of confinement. *See A Judicial Guide to the Federal Bureau of Prisons*, 11 (United States Department of Justice, Federal Bureau of Prisons 1995) (noting that "Bureau relies primarily on the Presentence Investigator Report..."). *See also* 18 U.S.C. § 3621 (Bureau of Prisons decides where prisoner will serve sentence); *United States v. Velasquez*, 748 F.2d 972, 974 (5th Cir. 1984) (rule designed to protect against evil that false allegation that defendant was notorious alien smuggler would affect defendant for years to come); *United States v. Brown*, 715 F.2d 387, 389 n.2 (5th Cir. 1983) (sentencing report affects "place of incarceration, chances for parole, and relationships with social service and correctional agencies after release from prison). Thus, the Committee considers a "material" matter to be one that will likely affect the defendant's subsequent treatment, including decisions made by the Bureau of Prisons. To that end, counsel should be prepared to point out to the court those matters that are typically considered by the Bureau of Prisons in designating the place of confinement. For example, the Bureau considers:

"the type of offense, the length of sentence, the defendant's age, the defendant's release residence, the need for medical or other special treatment, and any placement recommendation made by the court."

A Judicial Guide to the Federal Bureau of Prisons, supra, at 11. Thus, even assuming that a unresolved objection to the report's discussion about the need for medical treatment might not affect the sentence, it would be considered under the revised rule to be a material matter and one to be resolved by the court. Further, a question as to whether or not the defendant has a "drug problem" could have an impact on whether the defendant would be eligible for prison drug abuse treatment programs. 18 U.S.C. § 3621(e) (Substance abuse treatment). Accordingly, the Committee would view that as a material matter to be resolved by the court.

Rule 32(h)(4)(B) includes a change permitting a victim of a crime under 18 U.S.C. §§ 2251-57 (child pornography and related offenses) to address the court at sentencing. The Committee considered those victims to be similar to victims of sexual offenses under 18 U.S.C. §§ 2241-48, who already possess that right.

Rule 32(h)(4)(C) includes a change concerning who may request an in camera proceeding. Under current Rule 32(c)(4), the parties must file a joint motion for an in camera proceeding to hear the statements by the defense counsel, the defendant, the attorney for the government, or any victim. Under the revised rule, any party may move that the court hear in camera any statement—by a party or a victim—made under revised Rule 32(h)(4).

Rule 32(h)(5) is a new provision that reflects *Burns v. United States*, 501 U.S. 129, 138-139 (1991). In *Burns*, the Court held that before a sentencing court could depart upward on a ground in the Sentencing Guidelines, not previously identified in the presentence report as a ground for such departure, Rule 32 requires the court to give the parties reasonable notice that it is contemplating such a ruling and to identify the specific ground for the departure. The Court also indicated that because the procedural entitlements in Rule 32 apply equally to both parties, it was appropriate to address the issue of requiring notice whether the sentencing court departs either upward or downward. *Id.* at 135, n.4.

Finally, current Rule 32(e), which addresses the ability of a defendant to withdraw a guilty plea, has been moved to Rule 11(e).

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 32 is one of those rules. This version of Rule 32 includes an amendment that expands the occasions that the sentencing judge would have to rule on unresolved objections to the presentence report. This version requires the judge

to rule on every unresolved "material" matter in the report. Another version of Rule 32, that does not include this provision, is being published simultaneously in a separate pamphlet.

~~**Rule 35. Correction or Reduction of Sentence**~~

~~**(a) Correction of Sentence on Remand.** The court shall correct a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to be unreasonable, upon remand of the case to the court—~~

~~(1) for imposition of a sentence in accord with the findings of the court of appeals; or~~

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

~~**(b) Reduction of Sentence for Substantial Assistance.** If the Government so moves within one year after the sentence is imposed, the court may reduce a sentence to reflect a defendant's subsequent, substantial assistance in investigating or prosecuting another person in accordance~~

~~with the guidelines and policy statements issued by the Sentencing Commission under 28 U.S.C. § 994. The court may consider a government motion to reduce a sentence made one year or more after the sentence is imposed if the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after sentence is imposed. In evaluating whether substantial assistance has been rendered, the court may consider the defendant's pre-sentence assistance. In applying this subdivision, the court may reduce the sentence to a level below that established by statute as a minimum sentence.~~

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

Rule 35. Correcting or Reducing a Sentence

(a) **Correcting Clear Error.** Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

(b) **Reducing a Sentence for Substantial Assistance.**

(1) ***In General.*** Upon the government's motion made within one year of sentencing, the court may reduce a sentence if:

(A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and

(B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.

(2) ***Later Motion.*** The court may consider a government motion to reduce a sentence made one year or more after sentencing if the defendant's substantial assistance involved information not known — or the

usefulness of which could not reasonably have been anticipated — until more than one year after sentencing.

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

(4) ***Below Statutory Minimum.*** When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

Rule 35
Substantive Change Package
May 10, 2000

COMMITTEE NOTE

The language of Rule 35 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The Committee deleted current Rule 35(a) (Correction on Remand). That rule, which currently addresses the issue of the district court's actions following a remand on the issue of sentencing, was added by Congress in 1984. P.L. 98-473. The rule cross-references 18 U.S.C. § 3742, also enacted in 1984, which provides detailed guidance on the various options available to the appellate courts in addressing sentencing errors. In reviewing both provisions, the Committee concluded that Rule 35(a) was no longer needed. First, the statute clearly covers the subject matter and second, it is not necessary to address an issue that would be very clear to a district court following a decision by a court of appeals. The remaining subdivisions have been re-numbered.

Former Rule 35(c), which addressed the authority of the court to correct certain errors in the sentence, is now located in Rule 35(a).

A substantive change has been made in Rule 35(b). Under the current rule, if the government believes that a sentenced defendant has provided substantial assistance in investigating or prosecuting another person, it may move the court to reduce the original sentence; ordinarily, the motion must be filed within one year of sentencing. In 1991, the rule was amended to permit the government to file such motions after more than one year had elapsed if the government could show that the defendant's substantial assistance involved "information or evidence not known by the defendant" until more than one year had elapsed. The current rule, however, did not address the question of whether a motion to reduce a sentence could be filed and granted in those instances when the defendant's substantial assistance involved information *known* to the defendant within one year after sentencing, but no motion was filed because the significance or usefulness of the information was not apparent until after the one year period had elapsed. The courts were split on the issue. *Compare United States v. Morales*, 52 F.3d 7 (1st Cir. 1995) (permitting filing and granting of motion) *with United States v. Orozco*, 160 F.3d 1309 (11th Cir. 1998) (denying relief and citing cases). Although the court in *Orozco* felt constrained to deny relief under Rule 35(b), the court urged an amendment of the rule to:

> address the apparent unforeseen situation presented in this case where a convicted defendant provides information to the government prior to the expiration of the jurisdictional, one-year period from sentence imposition, but that information does

not become useful to the government until more than one year after sentence imposition. *Id.* at 1316, n. 13.

The Committee has amended the rule to make clear that a sentence reduction motion is permitted in those instances identified by the court in *Orozco*. The rule's one-year restriction generally serves the important interests of finality and of creating an incentive for defendants to provide promptly what useful information they might have. Thus, the proposed amendment would not eliminate the one-year requirement as a generally operative element. But where the usefulness of the information is not reasonably apparent until a year or more after sentencing, no sound purpose is served by the current rule's removal of any incentive to provide that information to the government one year or more after the sentence (or if previously provided, for the government to seek to reward the defendant) when its relevance and substantiality become evident.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 35 is one of those rules. This proposed revision of Rule 35 includes an amendment that would authorize a court to hear a motion to reduce a sentence, more than one year after sentence was imposed, when the defendant's substantial assistance involved information known to the defendant within one year after sentencing, but no motion was filed because the significance or usefulness of the information was not apparent until after the one year period had elapsed. Another version of Rule 35, which does not include this amendment, is being published simultaneously in a separate pamphlet.

~~**Rule 41. Search and Seizure**~~

~~**(a) Authority to Issue Warrant.** Upon the request of a federal law enforcement officer or an attorney for the government, a search warrant authorized by this rule may be issued (1) by a federal magistrate judge, or a state court of record within the federal district, for a search of property or for a person within the district and (2) by a federal magistrate judge for a search of property or for a person either within or outside the district if the property or person is within the district when the warrant is sought but might move outside the district before the warrant is executed.~~

~~**(b) Property or Persons Which May be Seized With a Warrant.** A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of the crime, or things otherwise~~

~~criminally possessed; or (3) property designed or intended for use or which has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.~~

~~**(c) Issuance and Contents.**~~

~~**(1) Warrant Upon Affidavit.** A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate judge or state judge and establishing grounds for issuing the warrant. If the federal magistrate judge or state judge is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, that magistrate judge or state judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be~~

~~searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate judge or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision~~

~~in the warrant, and for reasonable cause shown, authorized its execution at times other than daytime. It shall designate a federal magistrate judge to whom it shall be returned.~~

~~**(2) Warrant Upon Oral Testimony.**~~

~~**(A) General Rule.** If the circumstances make it reasonable to dispense, in whole or in part, with a written affidavit, a Federal magistrate judge may issue a warrant based upon sworn testimony communicated by telephone or other appropriate means, including facsimile transmission.~~

~~**(B) Application.** The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate judge. The~~

~~Federal magistrate judge shall enter, verbatim, what is so read to such magistrate judge on a document to be known as the original warrant. The Federal magistrate judge may direct that the warrant be modified.~~

~~(C) **Issuance.** If the Federal magistrate judge is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that the grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate judge shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate judge's name on the duplicate original warrant. The Federal magistrate judge shall immediately sign the original warrant and enter on the face~~

~~of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.~~

~~**(D) Recording and Certification of Testimony.** When a caller informs the Federal magistrate judge that the purpose of the call is to request a warrant, the Federal magistrate judge shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. If a voice recording device is available, the Federal magistrate judge shall record by means of such device all of the call after the caller informs the Federal magistrate~~

~~judge that the purpose of the call is to request a warrant. Otherwise a stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the Federal magistrate judge shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the Federal magistrate judge shall file a signed copy with the court.~~

~~**(E) Contents.** The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.~~

~~**(F) Additional Rule for Execution.** The person who executes the warrant shall enter the exact~~

~~time of execution on the face of the duplicate original warrant.~~

~~**(G) Motion to Suppress Precluded.** Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.~~

~~**(d) Execution and Return with Inventory.** 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 federal magistrate judge shall upon request deliver a copy of the inventory to the person from or from whose premises the property was taken and to the applicant for the warrant.~~

~~**(c) Motion for Return of Property.** A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of~~

~~the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.~~

~~**(f) Motion to Suppress.** A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.~~

~~**(g) Return of Papers to Clerk.** The federal magistrate judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.~~

~~**(h) Scope and Definitions.** This rule does not modify any act, 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 and any other tangible objects. The term "daytime" is used in this rule mean hours from 6:00 a.m. to 10:00 p.m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean an government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.~~

Rule 41. Search and Seizure

(a) Scope and Definitions.

(1) ***Scope.*** This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.

(2) ***Definitions.*** The following definitions apply under this rule:

(A) "Property" includes documents, books, papers, other tangible objects, and information.

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

(C) "Federal law enforcement officer" means a government agent (other than an attorney for the government) who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.

(b) **Authority to Issue a Warrant.** At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge having authority in the district — or if none is reasonably available, a judge of a state court of record in the district — may issue a warrant to search for and seize, or covertly observe on a noncontinuous basis a person or property located within the district; and

(2) a magistrate judge may issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move outside the district before the warrant is executed.

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

(1) evidence of the commission of a crime;

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

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

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

(d) Obtaining a Warrant.

(1) ***Probable Cause.*** After receiving an affidavit or other information, a magistrate judge or a judge of a state court of record must issue the warrant if there is probable cause to search for and seize, or covertly observe, a person or property under Rule 41(c).

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

(A) *Warrant on an Affidavit.* When a federal law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to

appear personally and may examine under oath the affiant and any witness the affiant produces.

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

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

(3) ***Requesting a Warrant by Telephonic or Other Means.***

(A) *In General.* A magistrate judge may issue a warrant based on information communicated by telephone or other appropriate means, including facsimile transmission.

(B) *Recording Testimony.* Upon learning that an applicant is requesting a warrant, a magistrate judge must:

(i) place under oath the applicant and any person on whose testimony the application is based; and

(ii) make a verbatim record of the conversation with a suitable recording device, if available, or by court reporter, or in writing.

(C) *Certifying Testimony.* The magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's

accuracy, and file a copy of the record and the transcription with the clerk. Any written verbatim record must be signed by the magistrate judge and filed with the clerk.

(D) *Suppression Limited.* Absent a finding of bad faith, evidence obtained from a warrant issued under Rule 41(d)(3)(A) is not subject to suppression on the ground that issuing the warrant in that manner was unreasonable under the circumstances.

(e) Issuing the Warrant.

(1) ***In General.*** The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it and deliver a copy to the district clerk.

(2) ***Contents of the Warrant.*** The warrant must identify the person or property to be searched or covertly

observed, identify any person or property to be seized, and designate the magistrate judge to whom the warrant must be returned. The warrant must command the officer to:

(A) execute the warrant within a specified time no longer than 10 days;

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

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

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

(A) *Preparing a Proposed Duplicate Original Warrant.* The applicant must prepare a "proposed duplicate original warrant" and must

read or otherwise transmit the contents of that document verbatim to the magistrate judge.

(B) *Preparing an Original Warrant.* The magistrate judge must enter the contents of the proposed duplicate original warrant into an original warrant.

(C) *Modifications.* The magistrate judge may direct the applicant to modify the proposed duplicate original warrant. In that case, the judge must also modify the original warrant.

(D) *Signing the Original Warrant and the Duplicate Original Warrant.* Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact time when it is issued, and direct the applicant to sign the judge's name on the duplicate original warrant.

(f) Executing and Returning the Warrant.

(1) ***Notation of Time.*** The officer executing the warrant must enter on the face of the warrant the exact date and time it is executed.

(2) ***Inventory.*** An officer executing the warrant must also prepare and verify an inventory of any property seized and must do so in the presence of:

(A) another officer, and

(B) the person from whom, or from whose premises, the property was taken, if present; or

(C) if either of these persons is not present, at least one other credible person.

(3) ***Receipt.*** The officer executing the warrant must:

(A) give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or

(B) leave a copy of the warrant and receipt at the place where the officer took the property.

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

(5) ***Covert Observation of a Person or Property.*** If the warrant authorizes a covert observation of a person or property, the government must within 7 days deliver a copy to the person whose property was searched or observed. Upon the government's motion, the court may on one or more occasions for good cause extend the time to deliver the warrant for a reasonable period.

(g) Motion to Return Property. A person aggrieved

by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

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

(i) Forwarding Papers to the Clerk. The magistrate judge to whom the warrant is returned must attach to the warrant a copy of the return, inventory, and all other related papers

and must deliver them to the clerk in the district where the property was seized.

Rule 41
Substantive Change Package
May 10, 2000

COMMITTEE NOTE

The language of Rule 41 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 41 has been completely reorganized to make it easier to read and apply its key provisions. Additionally, several substantive changes have been made.

First, revised Rule 41 now explicitly includes procedural guidance for conducting covert entries and observations. Federal law enforcement officers have obtained warrants, based upon probable cause, to make a covert search—not for the purpose of seizing property but instead to observe and record information. Those observations may assist officers in confirming information already in the possession of law enforcement officials and in turn may assist in deciding whether, and by what means, to pursue further investigation. For example, agents may seek a warrant to enter the office of suspected conspirators to determine the layout of the office for purposes of seeking additional warrants to establish surveillance points or to determine the number and identity of the participants.

Currently, Rule 41(a) recognizes the possibility that a search may occur of property without any subsequent seizure taking place. But the remainder of the rule addresses only traditional searches where the objective is the seizure of tangible property. Nonetheless, the courts have approved the authority of law enforcement agencies to search for and seize intangible evidence or information. *See, e.g.*, *Silverman v. United States*, 365 U.S. 505 (1961) (conversations overheard by microphone touching heating duct); *Berger v. New York*, 388 U.S. 41 (1967) (wiretap of conversations); *United States v. Knotts*, 460 U.S. 276 (1983) (beeper); *United States v. Karo*, 468 U.S. 705 (1984) (beeper); *United States v. Biasucci*, 786 F.2d 504 (2d Cir.), *cert. denied*, 479 U.S. 827 (1986) (visual information gathered by video camera); *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984) (television surveillance of safe house); *United States v. Taborda*, 635 F.2d 131 (2d Cir. 1980) (warrant required to view private area through telescope).

Although the foregoing cases involved Fourth Amendment intrusions because they involved monitoring activities within the defendant's zone of reasonable expectation of privacy, they did not explicitly address the authority of agents to make covert entries. There is authority for the view, however, that both the Constitution and Rule 41 are broad enough to authorize a "surreptitious entry" warrant—for the purpose of observing tangible and intangible evidence. *United States v. Villegas*, 899 F.2d 1334, 1336 (2d Cir. 1990), *citing*

Dalia v. United States, 441 U.S. 238 (1979) and *Katz v. United States*, 389 U.S. 347 (1967); *United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986), *citing United States v. New York Telephone Co.*, 434 U.S. 159, 169 (1977) (Rule 41 is not limited to tangible items). *See also United States v. Freitas*, 856 F.2d 1425 (9th Cir. 1988) (on remand, court held that good faith exception to exclusionary rule applied; officers had reasonably relied on search warrant, based on probable cause, to surreptitiously search for information; failure to provide notice under Rule 41(d) was technical error). *See also United States v. Villegas*, *supra*, 899 F.2d at 1334-35 (2d Cir. 1990) (approving search warrant for "sneak and peek" entry of defendant's buildings; court noted that Rule 41 does not define the extent of court's power to issue search warrant). In some respects, the covert entry search for a noncontinous observation is less intrusive than other types of conventional intrusions. As the court in *United States v. Villegas* observed:

> [A covert entry search] is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. It is less intrusive than a wiretap or video camera surveillance because the [covert entry] physical search is of relatively short duration,...and produces information as of a given moment, whereas the electronic surveillance is ongoing and indiscriminate, gathering in any activities within its mechanical focus. Thus, several of the limitations on wiretap or electronic surveillance, such as duration and minimization, would be superfluous in the context [of a covert entry search].

The Committee agrees that Rule 41 does not define the limits of the Fourth Amendment, and is cognizant that the Supreme Court has upheld the validity of covert entries with delayed notification, *see, e.g., Dalia v. United States*, 441 U.S. 238, 247-248 (1979) ("The Fourth Amendment does not prohibit per se covert entry performed for the purposes of installing otherwise legal electronic bugging equipment"); *United States v. Donovan*, 429 U.S. 428, 429 n. 19 (1977). The Committee also considered the argument that it would be premature to amend Rule 41 in order to codify the views of only two circuits that have expressly addressed the type of covert search addressed in the amendment, and that it would be better to await further caselaw developments. Nonetheless, the Committee believed that on balance, it would be beneficial to address the procedures (in particular the notice provisions) for covert entry searches in the Rule itself. Accordingly, revised Rule 41(b) recognizes the authority of officers to seek a warrant for the purpose of covertly observing—on a noncontinous basis—a person or property. These types of intrusions are to be distinguished from other continuous monitoring or observations that would be governed by statutory provisions or caselaw. *See* Title III, Omnibus Crime Control and Safe Streets Act of 1968, *as amended* by Title I of the 1968 Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2520; *United States v. Biasucci*, *supra* (use of video camera); *United States v. Torres*, *supra* (television surveillance).

Under revised Rule 41(e)(2), the warrant must describe the person or property to be covertly observed.

Revised Rule 41(f)(5) explicitly requires that if a covert entry search warrant has been issued, the government must provide notice to the person whose property was searched within 7 days of the execution. The time for providing notice may be extended for good cause for a reasonable time, on one or more occasions. This notice requirement parallels the notice requirement for the traditional search but makes allowance for the fact that the functions of covert entry searches would be frustrated by prior or contemporaneous notice of the entry. *See, e.g., United States Villegas, supra; United States v. Freitas, supra.*.

The second substantive change is in revised Rule 41(b)(1). That provision requires law enforcement personnel to first attempt to obtain a warrant from a federal judicial officer. If none is reasonably available, they may seek a warrant from a state judge. This preference parallels similar requirements in Rules 3, 4, and Rule 5. The Committee understands that this change may have a dramatic impact in some districts, which experience a heavy criminal caseload and rely routinely on state judges for assistance. That practice seems to be the exception rather than the general rule, however. On balance, it is important to state a clear preference that in the normal situation federal judicial authorities should be involved in pretrial processing of federal prosecutions. The amendment is not intended to create any new ground for contesting the validity of a search warrant or seeking to suppress evidence on the ground that it was issued by the "wrong" judge.

Finally, two minor changes have been made to Rule 41(e), which governs the procedures for issuing warrants under the rule. First, Rule 41(e)(1) requires that after issuing a warrant, the magistrate judge or state judicial officer must deliver a copy of the warrant to the district clerk. Further, under Rule 41(e)(3), the warrant must designate the magistrate judge to whom the warrant must be returned. The Committee believed that these changes would provide for more efficient processing of warrants, particularly in those instances where a state court judge has issued the warrant.

REPORTERS' NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 41 is one of those rules. This version of Rule 41 includes a significant amendment concerning the authority of a court to approve search warrants for covert entries for the purpose of making observations. Another version of Rule 41, which does not include this provision, is being published simultaneously in a separate pamphlet.

~~Rule 43. Presence of the Defendant~~

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

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

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

~~**(2)** in a noncapital case, is voluntarily absent at the imposition of sentence, or~~

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

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

~~(1) when represented by counsel and the defendant is an organization, as defined in 18 U.S.C. § 18;~~

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

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

~~(4) when the proceeding involves a reduction or correction of sentence under Rule 35(b) or (c) or 18 U.S.C. § 3582(c).~~

Rule 43. Defendant's Presence

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

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

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

(3) sentencing.

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

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

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

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

(4) ***Sentence Correction.*** The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).

(c) Waiving Continued Presence.

(1) ***In General.*** A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

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

(B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or

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

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

Committee Notes
Rule 43
May 10, 2000

COMMITTEE NOTE

The language of Rule 43 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The first substantive change is reflected in Rule 43(a), which recognizes several exceptions to the requirement that a defendant must be present in court for all proceedings. In addition to referring to exceptions that might exist in Rule 43 itself, the amendment recognizes that a defendant need not be present when the court has permitted video teleconferencing procedures under Rules 5 and 10 or when the defendant has waived the right to be present for the arraignment under Rule 10. Second, by inserting the word "initial" before "arraignment, " revised Rule 43(a)(1) reflects the view that a defendant need not be present for subsequent arraignments based upon a superseding indictment.

The Rule has been reorganized to make it easier to read and apply; revised Rule 43(b) is former Rule 43(c).

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 43 is one of those rules. This version of Rule 43 recognizes substantive amendments to Rules 5, 5.1. and 10, which in turn permit video teleconferencing of proceedings, where the defendant would not be personally present in the courtroom. Another version of Rule 43, which includes only style changes is being published simultaneously in a separate pamphlet.

APPENDIX C

HABEAS CORPUS RULES

Rule 1. Scope of Rules

(a) Applicable to cases involving custody pursuant to a judgment of a state court. These rules govern the procedure in the United States district courts on applications under 28 U.S.C. § 2254 or § 2241:

(1) by a person in custody pursuant to a judgment of a state court, for a determination that such custody is in violation of the Constitution, laws, or treaties of the United States; and

(2) by a person in custody pursuant to a judgment of either a state or a federal court, who makes application for a determination that custody to which he may be subject in the future under a judgment of a state court will be in violation of the Constitution, laws, or treaties of the United States.

COMMITTEE NOTE

Rule 1(a) has been amended to make it clear that if a request for habeas corpus relief is filed under 28 U.S.C. § 2241, these rules are applicable. The Committee believes that applying these rules to those proceedings will promote uniformity and consistency in processing applications for habeas corpus review, whether the application is filed under § 2254 or § 2241.

Rule 2. Petition

* * * * *

(e) Return of insufficient petition. If a petition ~~received by~~ filed with the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the petitioner, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the petition.

COMMITTEE NOTE

Rule 2(e) has been amended to conform it to language in Federal Rule of Civil Procedure 5(e). No change in practice is intended by the amendment.

Rule 3. Filing Petition

* * * * *

(b) Filing and service. ~~Upon receipt of the petition and the filing fee, or an order granting leave to the petitioner to proceed in forma pauperis, and having ascertained that the petition appears on its face to comply with rules 2 and 3, the~~ The clerk of the district court shall file the petition and enter it on the docket in his office. The filing of the petition shall not require the respondent to answer the petition or otherwise move with respect to it unless so ordered by the court.

COMMITTEE NOTE

The first portion of Rule 3(b) has been deleted because it conflicts with the requirement in Federal Rule of Civil Procedure 5(e) that the clerk file the papers. The amendment also conforms to current practice; the clerk files the petition and refers it to the court for its consideration of any defects in the petition.

Rule 6. Discovery

(a) Leave of court required. A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a petitioner who qualifies for the appointment of

counsel under 18 U.S.C. ~~§ 3006A(g)~~ § 3006A.

* * * * *

COMMITTEE NOTE

The amendment to Rule 6(a) reflects amendments to 18 U.S.C. § 3006A.

Rule 8. Evidentiary Hearing

* * * * *

(b) Function of the magistrate judge.

(1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate judge may conduct hearings, including evidentiary hearings, on the petition, and submit to a judge of the court proposed findings of fact and recommendations for disposition.

(2) The magistrate judge shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate judge.

COMMITTEE NOTE

The amendment reflects the change in name of magistrates to United States Magistrate Judges.

Rule 9. Delayed or Successive Petitions

* * * * *

(b) Successive petitions. ~~A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.~~ Before a second or successive petition is presented to the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the petition.

COMMITTEE NOTE

Rule 9(b) has been amended to reflect the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 which amended 28 U.S.C. § 2244. That new provision places limitations on the ability of a petitioner to file successive applications for habeas corpus relief. Section 2244(b) explicitly states that a second or successive petition must be first presented to the appropriate court of appeals for an order that authorizes the district court to consider the application.dismissed if it was presented in an earlier petition. The amendment to Rule 9(b) is intended to reflect that statutory provision.

Rule 10. Powers of ~~Magistrates~~ Magistrate Judges

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate judge pursuant to 28 U.S.C. § 636.

COMMITTEE NOTE

Rule 10 has been amended to reflect the change in the title of United States Magistrates to United States Magistrate Judges.

Advisory Committee on Criminal Rules
Rules Governing § 2255 Proceedings
May 1, 2000

Rule 1. Scope of Rules

These rules govern the procedure in the district court on a motion under 28 U.S.C. § 2255 or § 2241:

(1) by a person in custody pursuant to a judgment of that court for a determination that the judgment was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack; and

(2) by a person in custody pursuant to a judgment of a state or other federal court and subject to future custody under a judgment of the district court for a determination that such future custody will be in violation of the Constitution or laws of the United States, or that the district court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.

COMMITTEE NOTE

Rule 1 has been amended to make it clear that if a request for habeas corpus relief is filed under 28 U.S.C. § 2241, these rules are applicable. The Committee believes that applying these rules to those proceedings will promote uniformity and consistency in processing applications for habeas corpus review, whether the application is filed under § 2255 or § 2241. For a discussion on the possible relationship between those two provisions, *see Wofford v. Scott*, 177 F.3d 1236 (11th Cir. 1999).

Rule 2. Motion

* * * * *

(b) Form of Motion. The motion shall be in substantially the form annexed to these rules, except that any district court may by local rule require that motions filed with it shall be in a form prescribed by the local rule. Blank motions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the ~~petitioner~~ movant.

(d) Return of insufficient motion. If a motion ~~received by~~ filed with the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the movant, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the motion.

COMMITTEE NOTE

The amendment to Rule 2(b)—changing the word "petitioner" to "movant"—is intended to make the terminology internally consistent throughout the rule.

Rule 2(d) has been amended to conform it to language in Federal Rule of Civil Procedure 5(e). No change in practice is intended by the amendment.

Rule 3. Filing Motion

* * * * *

(b) Filing and service. ~~Upon receipt of the motion and having ascertained~~

~~that it appears on its face to comply with rules 2 and 3, the~~ The clerk of the district court shall file the motion and enter it on the docket in his office in the criminal action in which was entered the judgment to which it is directed. He shall thereupon deliver or serve a copy of the motion together with a notice of its filing on the United States Attorney of the district in which the judgment under attack was entered. The filing of the motion shall not require said United States Attorney to answer the motion or otherwise move with respect to it unless so ordered by the court.

COMMITTEE NOTE

The first portion of Rule 3(b) has been deleted because it conflicts with the requirement in Federal Rule of Civil Procedure 5(e) that the clerk file the papers. The amendment also conforms to current practice; the clerk files the petition and refers it to the court for its consideration of any defects in the petition.

Rule 8. Evidentiary Hearing

* * * * *

(b) Function of the magistrate judge.

(1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate judge may conduct hearings, including evidentiary hearings, on the motion, and submit to a judge of the court proposed findings and recommendations for disposition.

(2) The magistrate judge shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate judge.

(c) Appointment of counsel; time for hearing. If an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under 18 U.S.C. ~~§ 3006A(g)~~ § 3006A and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. § 3006A at any stage of the proceeding if the interest of justice so requires.

* * * * *

COMMITTEE NOTE

The amendments to Rule 8 address two issues. First the term "magistrate" has been changed to "magistrate judge" to reflect the change in name of magistrates to United States Magistrate Judges. Second, the amendment to Rule 8(c) reflects amendments to 18 U.S.C. § 3006A.

Rule 9. Delayed or Successive Motions

* * * * *

(b) Successive motions. ~~A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.~~ Before a second or successive motion is presented to the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the motion.

* * * * *.

COMMITTEE NOTE

Rule 9(b) has been amended to reflect the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 which amended 28 U.S.C. 2244. That new provision places limitations on the ability of a petitioner or movant to file successive applications for habeas corpus relief. Section 2244(b) explicitly states that a second or successive petition must be first presented to the appropriate court of appeals for an order that authorizes the district court to consider the application.dismissed if it was presented in an earlier petition. The amendment to Rule 9(b) is intended to reflect that statutory provision.

Rule 10. Powers of ~~Magistrates~~ Magistrate Judges

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate judge pursuant to 28 U.S.C. § 636.

COMMITTEE NOTE

Rule 10 has been amended to reflect the change in the title of United States Magistrates to United States Magistrate Judges.

APPENDIX D

PROPOSED RULE 12.4

Rule 12.4. Disclosure Statement

(a) Who Must File.

(1) Nongovernmental corporate party. Any nongovernmental corporate party to a proceeding in a district court must file a statement that:

(A) identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation, and

(B) discloses any additional information that may be required by the Judicial Conference of the United States.

(2) Organizational Victim. If an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1).

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

(1) file the Rule 12.4(a) statement upon its first appearance, pleading, petition, motion, response, or other request addressed to the court, and

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

COMMITTEE NOTE

Rule 12.4 is a new rule modeled after Federal Rule of Appellate Procedure 26.1 and parallels similar provisions being proposed in new Federal Rule of Civil Procedure 7.1. The purpose of the rule is to assist judges in determining whether they must recuse themselves because of a "financial interest in the subject matter in controversy." Code of Judicial Conduct, Canon 3C(1)(c)(1972). It does not, however, deal with other circumstances that might lead to disqualification for other reasons.

Under Rule 12.4(a)(1), any nongovernmental corporate party must file a statement that indicates whether it has any parent corporation that owns 10% or more of its stock or indicates that there is no such corporation. In addition, the rule requires that party to disclose any other information that may be required by the Judicial Conference. Although the term "nongovernmental corporate party" will almost always involve organizational defendants, it might also cover any third party that asserts an interest in property to be forfeited under new Rule 32.2.

Rule 12.4(a)(2) requires an attorney for the government to file a statement that lists any organizational victims to the alleged criminal activity; the pupose of this disclosure is to alert the court to the fact that a possible ground for disqualification might exist. Further, if the organizational victim is a corporation, the statement must include the same information required of any nongovernmental corporate party.

Although the disclosures required by Rule 12.4 may seem limited, they are calculated to reach the majority of circumstances that are likely to call for disqualification on the basis of information that a judge may not know or recollect. Framing a rule that calls for

more detailed disclosure is problematic and will inevitably require more information than is necessary for purposes of automatic recusal. Unnecessary disclosure of volumes of information may create the risk that a judge will overlook the one bit of information that might require disqualification, and may also create the risk that courts will experience unnecessary disqualifications rather than attempt to unravel a potentially difficult question.

The same concerns about overbreadth are potentially present by in any local rules that might address this topic. Rule 12.4 does not address the promulgation of any local rules that might address the same issue, or supplement the requirements of the rule. However, the authority granted to the Judicial Conference to require additional disclosures provides authority to preempt any local rules on the same topic.

The rule does not cover disclosure of all financial information that could be relevant to a judge's decision whether to recuse himself or herself from a case. The Committee believes that with the various disclosure practices in the federal courts and with the development of technology, more comprehensive disclosure may be desirable and feasible. The Committee further believes that the Judicial Conference is in the best position to develop any additional requirements and to adjust those requirements as technological and other developments warrant. Accordingly, Rule 12.4(a)(1)(B) authorizes the Judicial Conference to promulgate more detailed financial disclosure requirements for criminal cases.

Rule 12.4(b)(1) indicates that the time for filing a financial disclosure statement is at the point when the parties first have formal contact with the court on criminal proceeding. In some instances, that might be as early as the initial appearance.

Finally, Rule 12.4(b)(2) requires the parties to file supplemental statements with the court if there are any changes in the information required in the statement.

APPENDIX E

MINUTES OF COMMITTEE MEETINGS
JANUARY 2000 & APRIL 2000

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

January 10-11, 2000
Orlando, Florida

The Advisory Committee on the Federal Rules of Criminal Procedure met at Orlando, Florida on January 10 and 11, 2000. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Davis, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, January 10, 2000. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair
Hon. David D. Dowd, Jr.
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. Tommy E. Miller
Hon. Daniel E. Wathen
Prof. Kate Stith
Robert C. Josefsberg, Esq.
Darryl W. Jackson, Esq.
Lucien B. Campbell, Esq.
Mr. Laird Kirkpatrick, designate of the Asst. Attorney General for the Criminal Division, Department of Justice
Professor David A. Schlueter, Reporter

Also present at the meeting were: Mr. Roger Pauley of the Department of Justice; Mr. Peter McCabe of the Administrative Office of the United States Courts, Mr. John Rabiej and Mr. Mark Shapiro from the Rules Committee Support Office of the Administrative Office of the United States Courts; and Mr. Joseph Spaniol, consultant to the Standing Committee.

Judge Davis, the Chair, welcomed the attendees and reported on the Standing Committee's actions on the proposed amendments to Rules 1 to 31. He noted that the Committee's reaction had generally been positive and that it had approved the rules for publication and comment, subject to some minor editing issues. He added that some members had recommended careful consideration of whether to include any controversial

issues, such as the proposal to change the number of peremptory challenges, in the package to be published.

II. PROPOSED AMENDMENTS TO RULES 1 TO 31

Judge Davis indicated that the primary purpose of the meeting would be to review the proposed style changes to Rules 32 to 60. Any additional changes to Rules 1 to 31 would be referred initially to the respective subcommittees for their consideration. The proposed schedule, he said, would be to hold subcommittee meetings before the scheduled April meeting of the full committee, and then use that meeting to finalize the proposed changes to all of the Rules.

The Committee discussed briefly the question of whether to pursue any substantive amendments to Rule 24(b) concerning the number of peremptory challenges. Judge Miller moved that the current number of peremptory challenges in felony cases (6 for the defense and 10 for the prosecution) be retained and that any discussion regarding equalization of the number be deferred until the October meeting. Mr. Campbell seconded the motion, which carried by a unanimous vote.

III. PROPOSED AMENDMENTS TO RULES 32-40

Judge Dowd, the chair of Subcommittee B, informed the Committee that the Subcommittee had reviewed the proposed style changes to Rules 32 through 40.

A. Rule 32. Sentencing and Judgment.

Judge Dowd explained that Mr. Campbell had proposed a re-organization to the Rule to make it easier to follow and apply. Mr. Campbell added that although there were no major substantive changes in his draft proposal, the sequencing of the provisions had changed and noted, for example, that the definitions in the rule had been moved to the first sections.

The Committee turned first to Rule 32(e)(1), which addresses the issue of disclosure of the Presentence Report and Recommendation. Following discussion, the Committee voted unanimously to approve the proposed language. The Committee discussed the time requirements set out in Rule 32 for completing the various stages of presentencing and sentencing and ultimately decided to retain the language in Rule 32(b) that requires the court to impose a sentence "without unnecessary delay."

Mr. Pauley raised the question of whether any reference should be made in Rule 32 to sentences imposed by the court under Rule 42 for a contempt. He noted that currently both of those rules are silent, for example, on the issue of whether a presentence report would have to be prepared, or whether the person found in contempt would be entitled to any of the

other provisions in Rule 32. Following discussion, there was no consensus that the issue should be explicitly addressed in the Rule.

Mr. Pauley and other members of the Committee raised the question whether Rule 32(h)(3)(A) should be retained. Some members believed that the provision, which requires the court to rule on all unresolved objections to the presentence report, placed an unnecessary burden on the court. Although the Committee ultimately voted 8-1 to delete the provision, it also concluded that additional research would be appropriate. Mr. Campbell and Professor Stith will examine this issue further, in particular the question of whether the Rule should attempt to distinguish between ruling on an objection and making a finding.

In discussing Rule 32(h)(4)(ii) (addressing the defendant), the Committee again discussed the issue of whether the Rule should explicitly exempt contempt proceedings from its coverage. The Committee decided not to address Rule 42 contempt proceedings in this particular provision. The Committee also discussed the topic of in camera hearings addressed in Rule 32(h)(4)(C) and determined that it would be appropriate to research further the issue of whether such hearings should be on a joint motion by the parties or perhaps even by a victim.

B. Rule 32.1. Revoking or Modifying Probation or Supervised Release.

Judge Dowd introduced the proposed revisions to Rule 32.1, noting that the Subcommittee had discussed the issue of whether a proceeding under this Rule should be conducted by a magistrate judge or a district judge. He also noted that the revised rule contained new language in (a)(1)(D) to the effect that the defendant bears the burden of showing that he or she will not flee or pose a danger; that language, however, is not a substantive change and will make no change in practice. The Committee also focused on Rule 32.1(b)(1) (dealing with modification of conditions) and concluded that that provision did not make any change in practice or substance. Following additional discussion, the chair asked Judge Miller, Professor Stith and Mr. Campbell to review Rule 32.1 and determine, inter alia, whether any cross-reference should be made to Rule 40.

C. Rule 32.2. Criminal Forfeiture.

In light of the fact that Rule 32.2 had not yet been approved by the Supreme Court, it would be advisable to wait with any additional changes to the Rule. Mr. Spaniol indicated that he would pass along some additional minor style suggestions to Mr. Rabiej for possible inclusion in the next draft of the rule.

D. Rule 33. New Trial.

Judge Dowd noted that only minor style changes had been made to Rule 33. The Committee agreed with the changes.

E. Rule 34. Arrest of Judgment.

The Committee first addressed the issue of whether to change the title of this rule, noting that the term "arrest in judgment" should be replaced with the style subcommittee's suggested language, "Vacating a Verdict or Finding of Guilty on Jurisdictional Grounds." That point, the Committee concluded, should be addressed in the Committee Note. There was some question on whether the rule should address findings following a nolo contendere plea and whether the rule was intended to focus on vacating a conviction or arresting a judgment and whether they are one in the same. Following additional discussion, the Committee concluded that additional work was required on this rule.

F. Rule 35. Correcting or Reducing a Sentence.

The Committee's discussion focused on two primary areas. First, the Committee engaged in a lengthy discussion regarding the need or utility of Rule 35(a), which currently addresses the issue of the district court's responsibilities following a remand on the issue of sentencing. Initially the discussion focused on Rule 35(a)(1); ultimately the Committee voted 8 to 2 to delete that specific provision. The prevailing view was that that provision was unnecessary. Additional discussion focused on the remainder of Rule 35(a). The discussion focused on the issue of whether it was necessary to even address an issue that should be very clear to a district court following a decision by a Court of Appeals on the issue of whether the sentence was correct. The Committee voted 6-4 to delete Rule 32(a) in its entirety and to re-number the remaining subdivisions.

The second issue for discussion focused on new language in Rule 32(b) to the effect that the government may file a late motion to reduce a sentence if it demonstrates that the defendant had presented information, the usefulness of which could not reasonably be known until more than one year following sentencing. This point, which is a substantive change, reflects the decision of *United States v. Orozco*, ___ F.3d ____ will be reflected in the Committee Note.

G. Rule 36 Stay of Execution.

The Committee agreed with the Style Subcommittee's recommended style changes to Rule 36. No substantive changes are intended.

H. Rule 38. Stay of Execution.

Following discussion of the proposed draft of Rule 38, the Committee decided to remove the reference to Appellate Rule 9(b). The Committee believed that the reference was unnecessary and its deletion was not intended to be substantive in nature. A question was raised about Rule 38(e)(2)(D) and whether the term "surety bond" could be substituted for the term "performance bond." Following additional discussion, the Committee decided to research the issue further.

I. Rule 40. Transfer to Another District.

Mr. Pauley recommended that the Committee consider the issue of explicitly addressing in Rule 40, and in other rules, the issue of whether authorities should be permitted to cross district lines in taking a defendant before a magistrate. He noted that the language in Rules 5 and 5.1 did not address the point. He believed that it would be advisable to consider the point with a view toward including something in the rules. He also raised the question of whether Rule 40 should be incorporated into Rules 5 and 5.1

The Committee discussed the issue and a consensus emerged that Rule 40 should be so incorporated into Rules 5, 5.1, and possibly Rule 32.1. Judge Davis asked Judge Miller and Mr. Pauley to confer on proposing changes to those rules.

IV. PROPOSED AMENDMENTS TO RULES 41 TO 60

A. Rule 41. Search and Seizure.

Mr. Pauley and the Reporter explained the changes to Rule 41, noting that the rule had been completely reorganized to more clearly reflect its key provisions. Mr. Pauley pointed out that the redrafted rule was the result of a subcommittee's work and that it includes a reference to "covert" searches, e.g., where officers seek a warrant to examine or monitor activities in a covert manner.

The Committee engaged in an extensive discussion regarding a proposed change in Rule 41(b) that states a clear preference for seeking a warrant from a magistrate judge. This would be a change in practice from the current rule that states no preference. Judge Roll noted that in his district, where there is an extremely heavy caseload, law enforcement officials often request warrants from state judicial officers and urged the Committee to carefully consider the change and the possibility that it might lead to unintended consequences of creating an unnecessary appellate issue. Following additional discussion, the Committee decided to retain the preference and asked the Reporter to include language in the Committee Note that would make it clear the change was not intended to create any new ground for contesting the validity of a search warrant.

B. Rule 42. Criminal Contempt.

The Committee discussed the issue of whether to include a specific provision in Rule 42 for the appointment of a prosecutor where a person has been charged with contempt. Mr. Pauley pointed out that the proposed language in Rule 42(a)(2) mirrored language in *Klayminic v. United States ex rel Vuitton*, 481 U.S. 787 (1987). In that case, he pointed out, the Court had indicated that ordinarily the court should request that an attorney for the government prosecute the contempt; only if that request is denied, should the court appoint a private prosecutor. Following additional discussion the Committee agreed with the general concept but suggested that the language be reworked.

Some members suggested that there might be an ambiguity in Rule 42(b) in using the word "court" and "judge" in the same sentence. However, a consensus emerged that in the context of the provision, no ambiguity existed.

Mr. Pauley raised the issue of whether there should be a specific reference in Rule 42 to the fact that the formal sentencing proceedings in Rule 32 do not apply to contempt procedures. The Committee agreed tentatively to include a reference in Rule 42(b) to the effect that notwithstanding Rule 32, the court may summarily punish a person found in contempt in the presence of the judge.

Several members questioned the meaning of the provision at the end of Rule 42(b) that the contempt order must be "entered on the record." The Committee agreed that the better phrase might be "filed with the clerk."

C. Rule 43. Presence of the Defendant.

In discussing the proposed style changes to Rule 43, several committee members raised the question of whether some mention should be made in the Rule of the defendant's presence at an arraignment following a superceding indictment. The Committee ultimately decided to change the language in Rule 43(a) to make it clear that the rule applies to "initial" arraignments and to include some discussion of the issue in the Committee Note. The Committee also indicated that the Note should make it clear that the language in Rule 43(b) referring to the fact that the defendant "need not be present..." is designed to reflect the view that the defendant does not have a right to be present under the specified instances.

D. Rule 44. Right to and Assignment of Counsel.

The Committee briefly discussed the proposed style changes to Rule 44 and made several minor modifications, including changing several reference to the assignment of counsel; the Committee believed that the word "appointment" was more appropriate. The Committee also agreed with deletion of the word "promptly" from current Rule 44(c)

regarding the timing of the judge's inquiry into the issue of joint representation. Now, the Rule simply requires that the inquiry be made; the Committee anticipates no change in practice.

E. Rule 45. Computing and Extending Time.

The Committee generally agreed with the proposed style changes but some members questioned whether the reference in Rule 45(a)(4)(C) to "Presidents' Day" was still appropriate. Other members noted that that term had been used in the recent restyling of the appellate rules, although the statute uses the term "Washington's Birthday." It was also pointed out to the Committee that current Rule 45(d), which governs the timing of written motions and affidavits, has been moved to Rule 47.

F. Rule 46. Release from Custody.

During the discussion of the changes to Rule 46, several members raised the question of whether the district court may grant release of a defendant once notice of an appeal has been filed and whether any more specific guidance should be provided in the Rule itself. Currently, Rule 46(c) simply cross-references 18 U.S.C. § 3143(a). Following additional discussion regarding the exoneration of obligors and sureties in Rule 46(g), the Committee decided that more research was required into the question of whether a court must exonerate a surety who deposits cash in the amount of the bond or produces the defendant. The Committee also suggested that more research was required into the question of whether there is any further need for the government to provide bi-weekly reports on defendants who are in pretrial detention. The Committee discussed whether Rule 46(h) should be changed to reflect that the attorney for the government is not required to list each defendant, and the reason for that defendant's continued confinement. Mr. Pauley and Judge Miller had indicated that in their view that provision was not needed; however, the Committee was of the view that more research was required. Finally, the Committee agreed that the Subcommittee should attempt to clarify the language in Rule 46(i).

G. Rule 47. Motions and Supporting Affidavits.

The Committee agreed that the word "orally" should be deleted from the rule. First, that term should not act as a limitation of those who are not able to speak orally and second, a court may wish to entertain motions through electronic means. Deletion of the term also comports with a similar change in Rule 26, regarding the taking of testimony during trial. In place of that word, the Committee decided to substitute the broader phrase "by other means."

Several members raised the question of whether Rule 47(b), regarding affidavits, might be better placed in Rule 12. Another option mentioned was the possibility of cross-referencing Rule 47 in Rule 12. This matter will be studied further.

H. Rule 48. Dismissal.

During the discussion of the proposed changes to Rule 48, it was pointed out to the Committee that the phrase, "leave of the court," in Rule 48(a) was apparently inserted by the Supreme Court when it reviewed the rule during an earlier process, although it might not be apparent from the face of the rule why that language was necessary. Mr. Pauley indicated that it would be appropriate to change the word "government" in that same subdivision, to "attorney for the government." He also noted that there might be a question of whether Rule 48(b) was still necessary. That provision, he stated, preceded the Speedy Trial Act, and to his knowledge, there has been no case where the court dismissed the case under Rule 48(b), which otherwise met the requirements of the Act. Some members pointed out the Act would not necessarily cover pre-arrest delays, and thus Rule 48(b) had some utility. After further discussion, the Committee decided to conduct further research on the issue. Judge Davis asked Mr. Campbell and Mr. Josefsberg to consider whether to retain Rule 48(b).

I. Rule 49. Serving and Filing of Papers.

The Committee briefly discussed the proposed style changes to Rule 49 and agreed with those changes.

J. Rule 50. Calendars; Prompt Disposition.

The Committee discussed the need for the first sentence in Rule 50(a) and agreed that that sentence simply states a truism and was no longer necessary.

Mr. Rabiej and Mr. Shapiro had pointed out to the Committee that Rule 50(b) simply mirrored 18 U.S.C. § 3165. They noted that the provision had been added in 1971 under an accelerated amendment procedure to meet congressional concerns about deadlines in criminal cases. Although there was apparently some discussion in 1975 regarding deletion of the rule (after enactment of the Speedy Trial Act), no action was taken. The Committee agreed that the provision seemed out of place and served no purpose. With the deletion of this provision, the Committee agreed that the Rule should be retitled, "Prompt Disposition" and that some additional thought should be given to deleting Rule 50 entirely.

K. Rule 51. Preserving Claimed Error.

The Committee provided additional style changes to those recommended by the Style Subcommittee and added a sentence at the end of the Rule, clarifying that any rulings regarding evidence would be governed by Federal Rule of Evidence 103. That sentence was added because of concerns about the Supercession Clause and the belief that an argument might have been made that Congressional approval of this rule would supercede that Rule of Evidence.

L. Rule 52. Harmless and Plain Error.

During its discussion of the proposed style changes to Rule 52, the Committee agreed that use of the word "noticed" in the current rule was an anachronism. In its place, the Committee inserted the word "considered."

M. Rule 53. Courtroom Photographing and Broadcasting Prohibited.

The Committee briefly discussed the proposed changes to Rule 53 and agreed that the word "radio" could be deleted without changing the scope of the rule. The Committee also noted that the Note should discuss the narrow exceptions to this rule, i.e. Rules 5 and 10 regarding video teleconferencing of certain proceedings.

N. Rule 54. Application and Exception.

The Reporter indicated that the provisions of Rule 54 had been moved to Rule 1 or deleted from the Rules altogether.

O. Rule 55. Records.

The Committee made only minor changes to the recommended version of Rule 55.

P. Rule 56. When Court Is Open.

The Committee briefly discussed the proposed style changes to the Rule and concluded that no additional changes were necessary. Based upon the earlier discussion at Rule 45(a) (regarding use of the term "Presidents' Day) the Committee agreed to use that term in Rule 56 as well.

Q. Rule 57. District Court Rules.

The Committee reviewed the proposed style changes and in Rule 57(a)(1) substituted the words "federal statute" for the words, "Acts of Congress."

R. Rule 58. Misdemeanors and Petty Offenses.

The Committee changed the title of the rule to "Petty Offenses and Other Misdemeanors." In Rule 58(c)(2)(B) (regarding waiver of venue), the Committee changed to rule to require that the "district clerk," instead of the magistrate judge, to inform the original district clerk of the defendant's waiver of venue. During the discussion of that change the Committee voted 8 to 0 to use the term "district clerk" throughout the rules, rather than "clerk of the district court."

And in Rule 58(g)(1) and (g)(2)(A), the Committee deleted the word "decision." In the Committee's view deletion of that term does not amount to a substantive change.

In addition to several other minor style changes, the Committee discussed whether initial appearances and detention hearings should be addressed in this rule, or cross-referenced in other rules. The Committee referred those issues back to the Subcommittee.

S. Rule 59. Effective Date.

No changes were made to the proposed style changes in Rule 59.

T. Rule 60. Title.

The Reporter noted that Rule 60 has been deleted from the rules.

V. DESIGNATION OF TIME AND LOCATION OF NEXT MEETINGS

Judge Davis reminded the Committee that its next regularly scheduled meeting would be held in New York City on April 25 and 26, 2000. Mr. Rabiej announced that after consulting with the chairs of the subcommittees, that Subcommittee A will meet in Washington, D.C. on Tuesday, February 29, 2000. Subcommittee B will meet in Washington , D.C. on March 9, 2000.

Respectfully submitted,

David A. Schlueter
Reporter, Criminal Rules Committee

MINUTES [DRAFT]
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

April 25-26, 2000
New York City, New York

The Advisory Committee on the Federal Rules of Criminal Procedure met at New York City, New York on April 25 and 26, 2000. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Davis, Chair of the Committee, called the meeting to order at 8:30 a.m. on Tuesday April 25, 2000. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair
Hon. Edward E. Carnes
Hon. David D. Dowd, Jr.
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. Paul L. Friedman
Hon. Tommy E. Miller
Hon. Daniel E. Wathen
Prof. Kate Stith
Robert C. Josefsberg, Esq.
Darryl W. Jackson, Esq.
Lucien B. Campbell, Esq.
Mr. Laird Kirkpatrick, designate of the Asst. Attorney General for the Criminal Division, Department of Justice
Prof. David A. Schlueter, Reporter

Also present at the meeting were: Hon. Anthony J. Scirica, Chair of the Standing Committee, Hon. A. Wallace Tashima, member of the Standing Committee and liaison to the Criminal Rules Committee; Mr. Roger Pauley of the Department of Justice; Mr. Peter McCabe of the Administrative Office of the United States Courts, Mr. John Rabiej and Mr. Mark Shapiro from the Rules Committee Support Office of the Administrative Office of the United States Courts; Professor Joseph Kimble and Mr. Joseph Spaniol, consultants to the Standing Committee, Hon. James Parker, former member of the Standing Committee and past-chair of that Committee's Subcommittee on Style, Ms. Lynn Rzonca, briefing attorney for Judge Scirica, and Ms. Laurel Hooper, of the Federal Judicial Center.

Judge Davis, the Chair, welcomed the attendees and noted the presence and assistance of Judges Parker and Tashima, and the new consultant on style to the Standing Committee, Professor Joe Kimble.

II. APPROVAL OF MINUTES

Mr. Jackson moved that the minutes of the Committee's special style meeting in Orlando, Florida in January 2000, be approved. The motion was seconded by Justice Wathen and carried by a unanimous vote.

III. STATUS OF PENDING AMENDMENTS BEFORE THE SUPREME COURT

Mr. Rabiej informed the Committee that the Supreme Court had approved the amendments to Rules 6, 7, 11, 24(c), 32.2, and 54 on April 17, 2000 and had forwarded them to Congress. Barring any additional action by Congress, those changes will go into effect on December 1, 2000.

IV. REPORT ON STATUS OF RESTYING PROJECT: PROPOSED PUBLICATION OF TWO PACKAGES OF RULES

Judge Scirica informed the Committee that he and Professor Cocquillette had met with the Chief Justice and provided a status report on the criminal rules restyling project. Judge Davis added that as a result of discussions between Judge Scirica, Professor Coquillette, Mr. Rabiej, and the Reporter, that it was decided that it would be best to publish the proposed rules changes in two packages. That process was further explained by the Reporter who informed the Committee that the first package would be referred to as the "Style" package and would consist of all of the criminal rules. That package would include changes in style and any other changes resulting from conforming the rules to practice or clarifying ambiguous provisions in the existing rules. He added that a "Reporter's Note" would accompany a number of the rules that would be published separately in a second package. The second package for publication, he continued, would be referred to as the "Substantive" package. He noted that that package would consist of approximately 10 rules that included substantive amendments that had been under consideration by the Committee apart from the restyling project. It could also include, he stated, any rules that involved major or controversial changes. The secondary purpose of this package would be to draw the public's attention to those rules containing significant changes in current practice.

Mr. Pauley questioned whether certain rules, such as the proposed amendment to Rule 35 would have to be included in the substantive package. The Reporter responded that that particular rule had been included because the amendment to that rule had been under consideration for some time, before the restyling project began. Again, each of the rules in the substantive package would be a restyled version of the rule and would be accompanied

by a Committee Note and Reporter's Note that would explain that two versions of the rule were being published separately but simultaneously.

Mr. Rabiej added that a letter of explanation would be included in the publication packages to set out the purposes for duplicate sets of rules.

Judge Dowd moved that the Committee approve the format of using two separate packages for publication, with the understanding that a rule might be added, or removed, from the substantive package. The motion was seconded by Judge Miller and carried by a unanimous vote.

V. UNRESOLVED OR NEW ISSUES IN RULES 1-60*

Judge Davis indicated that the priority for the meeting would be to review any unresolved, or new, issues that remained in Rules 1 to 60, following the subcommittee meetings in February and March.

A. Rule 5. Initial Appearance.

Mr. Pauley pointed out that the restyled Rule 5 included a gap for extraterritorial jurisdiction. The revised rule sets out where officers are to take defendants who have been arrested within a district and outside a district. But the rule does not address what is to happen if a defendant is arrested outside the United States. Judge Miller added that in his district the courts handle a number of initial appearances involving arrests occurring outside the United States. Following additional discussion, Mr. Pauley moved that Rule 5(a)(1)(B) be amended. Judge Miller seconded the motion, which carried by a unanimous vote.

B. Rule 5.1. Preliminary Hearing in a Felony Case.

Mr. Pauley also pointed out that two sentences in Rule 5.1(e) were out of place. Following some discussion, Mr. Campbell moved that the rule be amended. Judge Carnes seconded the motion which carried by a unanimous vote.

C. Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition.

Several committee members noted that in restyling Rule 12.2 a reference to mental examinations had been inadvertently omitted from the revised rule. The Reporter later informed the Committee that Mr. Pauley, Mr. Campbell and the Reporter had drafted some

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* The discussion concerning the rules follows their numerical order rather than the order they were discussed at the meeting.

appropriate language--for both the restyled version of Rule 12.2 and the "substantive" version of Rule 12.2.

D. Rule 26.

Judge Carnes reported that in reviewing the proposed changes to new Rule 26(b)(3), which provides for remote transmission of live testimony, the Subcommittee had initially referred to unavailability provisions in Federal Rule of Evidence 804(a)(1) to (4) in an attempt to avoid a possible conflict with Rule 804(a)(5)'s requirement that a proponent must first show a reasonable attempt to obtain a witness's actual presence in court before offering prior testimony under Rule 804(b)(1). He noted however that for purposes of Rule 26, the only reasonable grounds for unavailability are those listed in Rule 804(a)(4) and (5). The Committee discussed the matter and ultimately agreed to the change, with the recognition that the Evidence Committee might wish to visit the issue.

E. Rule 32. Sentencing and Judgment.

Judge Dowd, the chair of Subcommittee B, informed the Committee that the Subcommittee had addressed the provision in Rule 32(h)(3) concerning whether the sentencing judge must decide all unresolved objections to the presentence report. He noted that on one hand, the Subcommittee recognized that the accuracy of the presentence report was often of assistance to the Bureau of Prisons in deciding administrative disposition of a defendant in the prison system. On the other hand, he noted, the Subcommittee was concerned that requiring a judge to rule on every unresolved objection could be time consuming and inefficient if in fact the factor in question was not material to a sentencing decision. Finally, he stated that Mr. Pauley had suggested an amendment to the rule that would address the problem.

Mr. Campbell added that his research indicated that the Bureau of Prisons depends on the presentence reports in making certain administrative decisions. He noted that the report might actually affect the length of the sentence to be served. Judge Friedman stated that the rule may not go far enough and that perhaps the rule should set out what constitutes "material" information in the report. Judge Carnes observed that trial judges should not be called upon to do the work of the Bureau of Prisons; the role of the trial judge is to determine the sentence. Mr. Pauley stated that the rule, which seemingly requires the judge to resolve all objections, even if they will not affect the sentence, does not reflect current practice in all courts. He explained that in his view, a material matter in a presentence report would be where the defendant has admitted drug addiction in hopes that he or she would be eligible for certain rehabilitation programs while in prison. In that instance, it would be important for the judge to resolve any disputes about whether the defendant in fact was addicted to drugs.

Following additional discussion, Judge Dowd ultimately moved that the Committee adopt Mr. Pauley's suggested change to Rule 32(h)(3), which would require the sentencing judge to decide unresolved objections to material matters. Judge Roll seconded the motion, which carried by a vote of 6 to 4. Members of the Committee suggested that the Note indicate the purpose of the change and that counsel should be prepared to take a greater role in insuring that the Bureau of Prisons was presented with accurate information.

Several members suggested that in light of the substantive change to Rule 32, it should be included in the "substantive" package of amendments. The Committee ultimately voted to do so.

F. Rule 32.1. Revoking or Modifying Probation or Supervised Release.

Judge Dowd noted that he had identified a potential problem in the wording of Rule 32.1 and the accompanying note, that might be read to preclude magistrate judges from preparing reports and recommendations on whether to revoke or modify probation or supervised release. Mr. Campbell responded that he had done some additional research on the issue and proposed language for both the rule and the note to address the issued raised by Judge Dowd. The Committee agreed to the changes suggested by Mr. Campbell.

Mr. Pauley expressed concern about language in Rule 32.1(b)(2)(C) that might be interpreted to provide an absolute right to a person to examine adverse witnesses in connection with a revocation hearing. Following additional discussion, Mr. Pauley moved, and Judge Miller seconded, a motion to make minor changes in the language of the rule that reflects that the right to cross-examination exists unless the court determines that the interests of justice do not require the witness to appear at the hearing. The Committee approved the amendment by a vote of 9 to 0 with 1 abstention.

G. Rule 38. Stay of Execution.

Judge Dowd noted that at the Committee's meeting in Orlando, a question was raised about Rule 38(e)(2)(D) and whether the term "surety bond" could be substituted for the term "performance bond." He indicated that after further consideration he recommended that the reference to "bond" in the restyled version be retained, and so moved. His motion was seconded by Judge Roll. The motion carried by a unanimous vote.

I. Rule 41. Search and Seizure.

Professor Stith informed the Committee of Subcommittee A's proposed revision of Rule 41, in particular the reference in the definitions section, Rule 41(a)(2) to "intangibles." The Committee discussed the issue and concluded that the term was difficult to define; in its place the Committee agreed to substitute the word "information." She also noted that there had been a great deal of discussion about Rule 41(b)(1), which would provide for issuing

warrants for covert entries. Mr. Pauley indicated that the courts have already approved such entries and that the rule could be amended to indicate that such entries are non-continuous, as opposed to entries approved under Title III, which may involve continuous monitoring. Following some additional discussion, Professor Stith moved that the section be amended to note explicitly that these types of intrusions are non-continuous. Judge Friedman seconded the motion, which carried by a vote of 9 to 2 with 1 abstention.

Professor Stith also noted that the subcommittee had discussed the question of whether to include the covert entry provision in the published amendments. Mr. Pauley reiterated that the courts have already approved these intrusions so that the rule is not really creating a new type of fourth amendment intrusion. He added that it would be important that the rule address this investigative technique and establish procedural mechanisms for its implementation.

Judge Friedman responded that this issue was one for Congress to address and that only two circuits have addressed the question of covert searches. In particular he was concerned about the open-ended nature of these intrusions, noting that under proposed Rule 41(f)(5), the government could obtain multiple 30-day extensions of time in which to inform the property owner that a covert entry has occurred. Following additional discussion, the Committee agreed by a vote of 11 to 1 to modify that language to reflect that the court could grant a "reasonable" extension of time to deliver the warrant. By the same margin of approval, additional amendments were made to the rule.

Judge Wathen raised the question of whether even the amended version of Rule 41 should be published for comment. Several members indicated a concern that the amendment was not really procedural in nature and that until there was more caselaw on the subject, the issue of covert searches should not be included in the rule. Judge Wathen moved that the substantive amendments regarding covert searches be removed from the rule. The motion was seconded by Judge Dowd; it failed by a vote of 6 to 7, with Judge Davis casting the tie-breaking vote.

J. Rule 46. Release from Custody; Supervising Detention.

Judge Carnes informed the Committee that Subcommittee A had discussed the language in Rule 46(i), dealing with forfeiture of property if a defendant fails to appear. He noted that the subcommittee had concluded that the language in that provision had been included by Congress and the subcommittee was initially reluctant to change the language. However, he recommended "restyled" language that would retain the essence of the provision and make it clearer that a court may dispose of a charged offense by ordering forfeiture under 18 U.S.C. § 3146(b), if a fine in the amount of the property's value would be an appropriate sentence. Judge Dowd moved that the suggested language be adopted and Judge Bucklew seconded the motion. The motion carried by a unanimous vote.

K. Rule 48. Dismissal.

Judge Dowd indicated that at the Committee's Orlando meeting, a question had been raised about whether to retain Rule 48(b), which permits a court to dismiss an indictment for delays. It had been pointed out at that meeting that the rule had preceded enactment of the Speedy Trial Act and that there was a risk that re-promulgating the rule might be viewed as an attempt to supersede that Act. The Subcommittee had considered an amendment offered by Mr. Pauley but had ultimately decided not to change the rule because it believed that Rule 48(b) still had utility apart from the Speedy Trial Act. Following some additional discussion the Committee decided to retain Rule 48(b) and suggested some modifications to the accompanying Note that would simply reflect that the Committee had considered the relationship between the Speedy Trial Act and Rule 48 and that it intended to make no change in that relationship.

L. Rule 49. Serving and Filing of Papers.

The Reporter informed the Committee that the Civil Rules Committee had published for comment an amendment to Civil Rule 77 concerning electronic service of a court's orders or judgments. He noted that Criminal Rule 49 currently cross-references the civil rules regarding service of papers and recommended that similar language be adopted regarding notice of a court order in Rule 49(c). Following discussion Judge Miller moved that Rule 49(c) be so amended. Mr. Campbell seconded the motion, which carried by a unanimous vote.

VI. VIDEO TELECONFERENCING—RULES 5 & 10

Judge Roll reported that in his circuit there was a great deal of interest in being able to use teleconferencing for initial appearances and arraignments. He also noted, however, that there was also a feeling that if those procedures were dependent upon obtaining the defendant's consent that they would not be used. Following additional discussion, the Committee voted by a margin of 10 to 2 to publish alternate versions of Rule 5—one that would require the defendant to consent to video teleconferencing and one that would not. The Committee also voted by a margin of 11 to 1 to publish similar alternate versions of Rule 10.

VII. ADDITIONAL STYLE CHANGES TO RULES 1 - 60

Judge Davis indicated that additional suggested style changes had been submitted by several parties and that they would be submitted to the Standing Committee's Style Subcommittee, which would be conducting a review of the rules during the public comment period. Any minor, purely mechanical, corrections or changes could be incorporated into the two packages to be sent to the Standing Committee. The Reporter added that if time

permitted, any changes or corrections could be considered at the Committee's Fall 2000 meeting, while the rules were still out for public comment.

VIII. FINANCIAL DISCLOSURE RULES

Judge Scirica provided some background information on proposed financial disclosure rules. He indicated that the Judicial Conference was very interested in the topic and that each of the rules committees would hopefully agree on some standard language for their particular rules to be published in August 2000. He noted that there had been considerable discussion about whether these proposed rules were even procedural in nature; some were of the view that this is really a matter of professional ethics and not the rules process. In response, others had noted that the Appellate Rules already included a disclosure provision, that Congress apparently expected the Judicial Conference to address the issue, and finally, the Code of Conduct Committee had requested assistance from the rules committees. Judge Scirica also stated that there had been a good deal of debate over just what should be disclosed. A review of the district and appellate courts had indicated a wide variety of approaches to the problem. For now, he said, there appeared to be a consensus to address the topic in a more limited fashion in the rules themselves but to include a cross-reference to the fact that the Judicial Conference might develop a standard form that could be used; that form in turn might require information beyond the basic financial disclosure envisioned at this time.

Judge Davis indicated that he and the Reporter had discussed the issue and that the Reporter, using Appellate Rule 26.1, had drafted a new Rule 12.4 that would parallel that Rule. The Reporter added that eventually the Reporters of the various rules committees would probably work further to standardize the language.

Following additional discussion regarding disclosure of information concerning organizational victims, the Committee approved the draft.

IX. APPROVAL OF HABEAS RULES FOR PUBLICATION

The Reporter presented copies of proposed amendments and committee notes to the Habeas Corpus Rules (Rules Governing § 2254 and § 2255 Proceedings) to the Committee for its consideration. He noted that the Committee had already approved the substance of the changes at the Fall 1998 and Fall 1999 meetings. Judge Carnes and Judge Miller briefly addressed the purpose of the amendments. Judge Friedman questioned the proposed language in Rules 2 and 3 that would change the current practice of receiving and reviewing habeas actions. In his experience, one judge reviews all of the habeas actions that are received and then decides whether they should actually be filed. Other judges noted that the amendment conforms to Civil Rule 5(e) that indicates that the clerk is to file the papers and then refers them to the court for a determination of whether there are any defects in the papers.

Judge Miller moved that the rules be approved and forwarded with a recommendation that they be published for comment. Mr. Pauley seconded the motion, which carried by a unanimous vote.

X. APPROVAL OF PUBLICATION OF LOCAL RULES ON INTERNET

Mr. Rabiej asked the Committee to consider a proposal to publish all of the local rules on the internet. He noted that some concerns had been raised that publication might lead to unnecessary cross-analysis of some of the rules. Following brief discussion, Judge Dowd moved that the Committee approve publication of the local rules on the internet. Judge Miller seconded the motion, which carried unanimously.

XI. APPROVAL OF RULES 1 - 60 FOR SUBMISSION TO STANDING COMMITTEE FOR PUBLICATION

Judge Miller moved that the Committee forward restyled Rules 1 through 60 the Standing Committee for publication and comment. Judge Wathen seconded the motion which carried by a unanimous vote. Judge Davis thanked the Committee members for all of their dedicated efforts in the restyling project.

XII. DESIGNATION OF TIME AND LOCATION OF NEXT MEETINGS

Judge Davis recommended that the Committee hold its Fall 2000 meeting in San Diego. The tentative dates for that meeting are October 23 to 24.

Respectfully submitted,

David A. Schlueter
Reporter, Criminal Rules Committee