

From: Patricia Barksdale [REDACTED]
Date: December 10, 2018 at 5:34:58 PM EST
To: Rebecca Womeldorf [REDACTED]
Subject: Re: Federal Rules of Criminal Procedure

Thank you for your speedy response. In the interest of efficiency, I offer my suggestion to you in this email but will happily provide the suggestion in a more formal manner if you wish.

The suggestion concerns **Federal Rule of Criminal Procedure 40**.

The scenario is this. It comes up from time to time, but not often.

District A places Defendant on pretrial release under conditions.

With District A permission, Defendant moves to District B, and District B agrees to supervise Defendant.

While in District B, Defendant commits alleged violation of release conditions.

Per 18 U.S.C. 3148(b), District A issues warrant for Defendant's arrest.

Based on warrant, Defendant is arrested in District B.

Per Federal Rule of Criminal Procedure 40(a), Defendant is immediately brought to Magistrate Judge in District B.

Section 3148(b) provides,

The attorney for the Government may initiate a proceeding for revocation of an order of release by filing a motion with the district court. A judicial officer may issue a warrant for the arrest of a person charged with violating a condition of release, and the person shall be brought before a judicial officer in the district in which such person's arrest was ordered for a proceeding in accordance with this section. To the extent practicable, a person charged with violating the condition of release that such person not commit a Federal, State, or local crime during the period of release, shall be brought before the judicial officer who ordered the release and whose order is alleged to have been violated. The judicial officer shall enter an order of revocation and detention if, after a hearing, the judicial officer-- (1) finds that there is--(A) probable cause to believe that the person has committed a Federal, State, or local crime while on release; or (B) clear and convincing evidence that the person has violated any other condition of release; and (2) finds that--(A) based on the factors set forth in section 3142(g) of this title, there is no condition or combination of conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the

community; or (B) the person is unlikely to abide by any condition or combination of conditions of release.

Rule 40 provides,

Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District

(a) In General. A person must be taken without unnecessary delay before a magistrate judge in the district of arrest if the person has been arrested under a warrant issued in another district for:

(i) failing to appear as required by the terms of that person's release under 18 U.S.C. §§ 3141-3156 or by a subpoena; or

(ii) violating conditions of release set in another district.

(b) Proceedings. The judge must proceed under Rule 5(c)(3) 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.

(d) Video Conferencing. Video conferencing may be used to conduct an appearance under this rule if the defendant consents.

Rule 5(c)(3) provides,

(c) Place of Initial Appearance; Transfer to Another District.

(3) Procedures in a District Other Than Where the Offense Was Allegedly Committed. If the initial appearance occurs in a district other than where the offense was allegedly committed, the following procedures apply:

(A) the magistrate judge must inform the defendant about the provisions of Rule 20; [*Rule 20 is transfer for plea and sentence; 5(c)(3)(A) would not apply in a Rule 40(b) situation.*]

(B) if the defendant was arrested without a warrant, the district court where the offense was allegedly committed must first issue a warrant before the magistrate judge transfers the defendant to that district; [*Rule 40(b) contemplates a warrant; 5(c)(3)(B) would not apply in a Rule 40(b) situation.*]

(C) the magistrate judge must conduct a preliminary hearing if required by Rule 5.1; [*Rule 5.1 concerns criminal charges, not alleged violations of release conditions; 5(c)(3)(C) would not apply in a Rule 40(b) situation.*]

(D) the magistrate judge must transfer the defendant to the district where the offense was allegedly committed if:

(i) the government produces the warrant, a certified copy of the warrant, or a reliable electronic form of either; and

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

[Because Defendant is being supervised in District B, it would not make sense to have an identity hearing/production of the warrant. See, e.g., Rule 32.1.]

(E) when a defendant is transferred and discharged, the clerk must promptly transmit the papers and any bail to the clerk in the district where the offense was allegedly committed.

Comments:

-The primary witness to the alleged violation will (almost always) be the supervising pretrial officer in District B.

-U.S. Marshal transport from District B to District A can take weeks.

-Is Defendant entitled to an identity hearing/production of the warrant in District B? (Those are required under Rule 32.1 only when the alleged violation did not occur in the district of arrest.)

-Is Defendant entitled to a detention hearing in District B? If so, what standards are used?

-Is Defendant entitled to a preliminary hearing in District B? If so, what standards are used?

-What part of Rule 5(c)(3) applies in a Rule 40 proceeding?

-Section 3148(b) provides Defendant "shall" be brought to District A, but Rule 40(c) seems to indicate District B can deal with the alleged violation.

-Why does Rule 40(c) reference a "detention order"? If District A issued a detention order, Defendant would not be on release and not subject to arrest in District B.

-Rule 32.1 specifies what happens at an initial appearance for an alleged violation of supervised release or probation conditions. Rule 40 does not offer the same specificity for an initial appearance for an alleged violation of pretrial release conditions.

Thank you for your consideration.

Patricia D. Barksdale

