

Chambers of
Janis van Meerveld
U.S. Magistrate Judge



UNITED STATES DISTRICT COURT
Eastern District of Louisiana
500 Poydras Street
New Orleans, Louisiana 70130

May 14, 2024

Honorable James C. Dever III
Chair, Advisory Committee on Criminal Rules
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Sent by email to: RulesCommittee_Secretary@ao.uscourts.gov

Dear Judge Dever:

I write to you on behalf of the Magistrate Judges Advisory Group (MJAG) on which I serve as chair. On May 10, 2024, the Advisory Group voted unanimously to approve a package proposing changes to Fed. R. Crim. P. 40. The package, attached for your committee's consideration, would clarify and update procedures that apply when a previously released defendant is arrested in one district under a warrant issued in another district.

At its March 2023 meeting the MJAG began its discussions of Rule 40. Magistrate Judge David Horan (N.D. Tex.), wrote to the Advisory Group seeking feedback on a proposal to modify Fed. R. Crim. P. 40. The Advisory Group quickly discovered that a similar proposal from Magistrate Judge Patty Barksdale (M.D. Fla.) was circulating in the 11th Circuit, and that practices related to Rule 40 varied across the country. Magistrate Judge Joseph Volpe, the prior MJAG chair, asked Judge Barksdale to lead a group of judges to develop a proposal to address the concerns with Rule 40.

The resulting MJAG Rule 40 proposal identifies seven points of confusion involving procedures and substantive rights, such as the application of related rules, informing a defendant of an alleged violation, providing a defendant with notice of their right to counsel, applicable detention standards, and modification of detention orders. Advisory group judges also provided fiscal year 2023 statistics on the number of matters that involve Rule 40 in their districts.

The MJAG proposal would extract procedural provisions of Rule 40 to create a new Rule 5.2, "Revoking or Modifying Pretrial Release," that would model the structure of Fed. R.

Crim. P. 32.1, “Revoking or Modifying Probation or Supervised Release.” The new rule 5.2 would include seven specific provisions, including ones that ensure the defendant is informed of the alleged violation of pretrial release, has a reasonable opportunity to consult with counsel, and one to allow virtual revocation proceedings with the defendant’s consent.

The Rule 40 proposal was developed by a group of judges who worked diligently to produce an excellent document with the input of MJAG judges from across the country. The Advisory Group unanimously supports these changes to Rule 40 and we hope your committee will agree and act favorably.

Thank you for your consideration of this proposal.

Sincerely,


Janis van Meerveld
Chair, Magistrate Judges Advisory Group

Enclosure

cc: Michael Harvey
Joseph T. Phillips

Suggested Amendments

Rule 40, Federal Rules of Criminal Procedure

Contents

- I. Overview 1
- II. Rule 40..... 2
- III. History..... 2
- IV. Issues 3
- V. Previous Discussion 7
- VI. Frequency 7
- VII. Laws to Consider 9
- VIII. Select Cases..... 10
- IX. Suggestions..... 12

Attachment: Previous versions of Rule 40

TITLE VIII. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

Rule 40. 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.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 30, 1979, eff. Aug. 1, 1979; Pub. L. 96–42, §1(2), July 31, 1979, 93 Stat. 326; Apr. 28, 1982, eff. Aug. 1, 1982; Pub. L. 98–473, title II, §§ 209(c), 215(d), Oct. 12, 1984, 98 Stat. 1986, 2016, eff. Oct. 12, 1984, and Nov. 1, 1987; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 26, 2011, eff. Dec. 1, 2011.)

I. Overview

Rule 40 is confusing in at least seven ways. As a result, procedures vary from district to district and division to division. With little guidance, magistrate judges must determine the hearings to which a defendant is entitled and create resulting procedures. To promote clarity and uniformity, the Magistrate Judge Advisory Group requests consideration of revisions to Rule 40.

II. Rule 40

Rule 40 governs procedures that apply when a person is arrested in one district (“arresting district”) under a warrant issued in another district (“issuing district”) under three circumstances:

1. The issuing district issued the warrant for a criminal defendant's arrest based on a petition or motion alleging the defendant violated a condition of pretrial release.
2. The issuing district issued the warrant for a criminal defendant's arrest because the defendant failed to appear in court or at the designated place of incarceration as required by a condition of pretrial, pre-sentencing, or post-sentencing release.
3. The issuing district issued the warrant because a person failed to appear in court or elsewhere as required by a subpoena.

III. History

Rule 40 used to contain procedures for two additional circumstances:

1. The issuing district issued the warrant for a criminal defendant's arrest based on a charge in a complaint, information, or indictment.

2. The issuing district issued the warrant for a criminal defendant's arrest based on a petition alleging the defendant violated a probation or supervised release condition.

See Attachment (previous versions of Rule 40).

Procedures for those two circumstances were moved to Rule 5 (“Initial Appearance”) and Rule 32.1 (“Revoking or Modifying Probation or Supervised Release”) without substantive changes for the other circumstances.

IV. Issues

Rule 40 is confusing in at least seven ways.

1. **Which parts of Rule 5(c)(3) apply?** Rule 40(b) states the judge in the arresting district “must proceed under Rule 5(c)(3) as applicable.” Rule 5 governs initial appearances under a warrant or summons based on a criminal charge in a complaint, information, or indictment. Rule 5(c)(3) has five subsections. Which subsections apply is unclear.
 - a. **Informing the defendant of Rule 20.** Rule 5(c)(3)(A) states the judge in the arresting district “must inform the defendant about the provisions of Rule 20.” Rule 20 governs transferring a prosecution for a plea and sentencing “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.” This subsection does not apply under the second circumstance, where the order to appear is entered after a plea or sentencing. This subsection does not apply under the third circumstance because that circumstance addresses a person who has failed to appear as required by a subpoena. Does this

subsection apply under the first circumstance, where the defendant is alleged to have violated a condition of pretrial release?

- b. **Issuing a warrant.** Rule 5(c)(3)(B) states that “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.” This subsection does not apply because Rule 40 applies only when an arrest is made under a warrant.
- c. **Conducting a preliminary hearing.** Rule 5(c)(3)(C) states “the magistrate judge must conduct a preliminary hearing if required by Rule 5.1.” Rule 5.1 requires a preliminary hearing if “a defendant is charged with an offense other than a petty offense” unless the defendant waives the hearing, the defendant is indicted, the government files an information, or the defendant is charged with a misdemeanor and consents to trial before a magistrate judge. Rule 5.1 has a 21-day deadline for a defendant who is not detained. Does this subsection apply?
- d. **Conducting an identity hearing.** Rule 5(c)(3)(D) requires a magistrate judge to “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.” Does this subsection apply if the

defendant is being supervised in the arresting district (and whose identity therefore is known)?

- e. **Transferring papers to the issuing district.** Rule 5(c)(3)(E) states “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.” This section applies.
2. **Why is “adjacent district” excluded as an option?** Rule 40(a) states that 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.” Rule 5(c)(2) addressing an initial appearance on a complaint, information, or indictment, and Rule 32.1(a)(1)(B) addressing an initial appearance on an alleged violation of a condition of probation or supervised release permit taking a defendant without unnecessary delay before a magistrate judge in the arresting district or “an adjacent district if the appearance can occur more promptly there,” or, for Rule 5(c)(2), an adjacent district if the offense was allegedly committed there and the initial appearance will occur on the day of the arrest.” Why does Rule 40 exclude an “adjacent district”?
 3. **Why is informing the defendant of the alleged violation excluded?** Rule 32.1(a)(3), addressing an initial appearance on an alleged violation of a condition of probation or supervised release, requires the judge to inform the defendant about the alleged violation. Why does Rule 40 exclude this requirement?
 4. **Why is informing the defendant about the right to consult counsel excluded? How does the previous appointment of counsel in the issuing district affect the right?** Rule 32.1(a)(3), addressing an initial appearance on an alleged violation of a condition of probation or supervised release, requires the judge

to inform the defendant about the right to retain counsel or request an appointment of counsel. Why does Rule 40 exclude a similar requirement? How does the fact that the defendant already has counsel in the issuing district affect any right to counsel for any proceedings in the arresting district?

5. **What detention standard applies?** 18 U.S.C. § 3148 provides, “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) ..., 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.” What standard does the arresting district use to determine whether a defendant should be detained for transportation back to the issuing district (which can be lengthy) or should be released and ordered to appear in the issuing district?

6. **Under what circumstances would a judge in the arresting district modify a detention order?** Rule 40 permits the judge in the arresting district to modify a detention order. Under what circumstances would a defendant be arrested under a warrant

for violating a detention order, which assumes the defendant is detained? Does this provision refer to an order establishing a date to report to a designated facility? Does this provision refer to an order by the issuing court directing the defendant's detention upon arrest under the warrant by the issuing court (an outdated practice)?

7. **Does a magistrate judge in the issuing district have the authority to modify a detention order by a magistrate judge in the arresting district?** At least two courts have held no. *See U.S. v. Manley*, 659 F. Supp. 3d 15 (D.D.C. 2023); *U.S. v. Patterson*, No. 13-137, 2013 WL 5375438 (E.D. La. Sept. 24, 2013). Some magistrate judges in issuing districts modify orders entered by magistrate judges in arresting districts, including sua sponte to conform language to local bail practice and special conditions preferred by the issuing district's pretrial officers.

V. Previous Discussion

The Advisory Committee on Criminal Rules considered amending Rule 40 in May 2019 based on a suggestion in December 2018 ([18-CR-G](#)). See discussions beginning on page 169 of the [May 2019 agenda book](#) and page 169 of the [May 2019 meeting minutes](#).

The committee acknowledged Rule 40 is confusing but declined to pursue an amendment. Based on membership understanding, informal surveys, or both, the committee believed the circumstances occur infrequently. The discussion ended with this comment: “[E]very Rules committee could identify an example of a rule that could be clarified. But there is a cost to amending rules too often, and we do get complaints when they are amended too often. So unless there is a real need on the ground to solve a problem, it is best for the committees not to try to achieve every clarification that they could in the rules.” Minutes at p. 7.

VI. Frequency

It is unclear how often the first circumstance occurs (the issuing district issued the warrant for a defendant's arrest based on a petition alleging the defendant violated a condition of pretrial release). Empirically, the first circumstance occurs with some frequency in some districts. Here are FY 2023 figures for a few districts.

Eastern District Arkansas

- Total defendants with alleged violations submitted through petitions: 265
- Of 265, total defendants for whom pretrial requested warrants: 61 (23%)
- Of 61, total arrests occurring outside the district: 8 (13%)

Middle District of Florida

- Total defendants with alleged violations submitted through petitions: 114
- Of 114, total defendants for whom pretrial requested warrants: 52 (46%)
- Of 52, total arrests occurring outside the district: 6 (12%)

District of Kansas

- Total defendants with alleged violations submitted through petitions: 45
- Of 45, total defendants for whom pretrial requested warrants: 33 (73%)
- Of 33, total arrests occurring outside the district: 3 (9%)

Eastern District of Louisiana

- Total defendants with alleged violations submitted through petitions: 18
- Of 18, total defendants for whom pretrial requested warrants: 16 (89%)
- Of 16, total arrests occurring outside the district: 1 (6%)

Southern District of New York

- Total defendants with alleged violations submitted through petitions: 200
- Of 200, total defendants for whom pretrial requested warrants: 10 (5%)
- Of 10, total arrests occurring outside the district: 4 (40%)

Western District of Oklahoma

- Total defendants with alleged violations submitted through petitions: 150
- Of 150, total defendants for whom pretrial requested warrants: 50 (33%)
- Of 50, total arrests occurring outside the district: 9 (18%)

District of Oregon

- Total defendants with alleged violations submitted through petitions: 204
- Of 204, total defendants for whom pretrial requested warrants: 107 (52%)
- Of 107, total arrests occurring outside the district: 6 (6%)

Northern District of West Virginia

- Total defendants with alleged violations submitted through petitions: 121
- Of 121, total defendants for whom pretrial requested warrants: 59 (49%)
- Of 59, total arrests occurring outside the district: 18 (31%)

Western District Washington

- 8 defendants charged in other districts were seen in Seattle in FY2023

VII. Laws to Consider

18 U.S.C. § 3141	Release and detention authority generally
18 U.S.C. § 3142	Release or detention of a defendant pending trial
18 U.S.C. § 3143	Release or detention of a defendant pending sentencing or appeal
18 U.S.C. § 3144	Release or detention of a material witness
18 U.S.C. § 3145	Review and appeal of a detention order
18 U.S.C. § 3148	Sanctions for a violation of release conditions
18 U.S.C. § 3149	Surrender of an offender by a surety
18 U.S.C. § 3156	Definitions (for 18 U.S.C. §§ 3141–3150)
Fed. R. Crim. P. 4	Arrest Warrant or Summons on a Complaint
Fed. R. Crim. P. 4.1	Complaint, Warrant, Or Summons by Telephone or Other Reliable ... Means
Fed. R. Crim. P. 5	Initial Appearance
Fed. R. Crim. P. 9	Arrest Warrant or Summons on an Indictment or Information
Fed. R. Crim. P. 17	Subpoena
Fed. R. Crim. P. 32	Sentencing and Judgment
Fed. R. Crim. P. 32.1	Revoking or Modifying Probation or Supervised Release
Fed. R. Crim. P. 42	Criminal Contempt

Fed. R. Crim. P. 43	Defendant's Presence
Fed. R. Crim. P. 44	Right to and Appointment of Counsel
Fed. R. Crim. P. 46	Release from Custody; Supervising Detention
Fed. R. Crim. P. 50	Prompt Disposition
Fed. R. Crim. P. 59	Matters Before a Magistrate Judge
Fed. R. Civ. P. 45	Subpoena

VIII. Select Cases

Review of Issuing District's Order

U.S. v. Manley, 659 F. Supp. 3d 15 (D.D.C. 2023) (holding a magistrate judge in the issuing district lacks authority to reopen a detention hearing conducted by a magistrate judge in the arresting district)

U.S. v. Patterson, No. 13-137, 2013 WL 5375438 (E.D. La. Sept. 24, 2013) (holding a magistrate judge in the issuing district lacks authority to reopen a detention hearing conducted by a magistrate judge in the arresting district)

U.S. v. Godines-Lupian, 816 F. Supp. 2d 126 (D.P.R. 2011) (holding the district judge in the issuing district is the appropriate judge to review a release or detention order by a magistrate judge in the arresting district; staying the release order pending transportation to the issuing district within five days)

Authority to Conduct Detention Hearing in Arresting District; Standards Unspecified or Reversion to Standards in 18 U.S.C. § 3142

U.S. v. Thomas, No. 23-30099, 2023 WL 2523502 (E.D. Mich. Mar. 14, 2023) (rejecting the government's position that the magistrate judge in the arresting district had no authority to hold a detention hearing considering that the magistrate judge in the issuing district had entered an order revoking bond pending the defendant's return to the issuing district; applying standards in 18 U.S.C. § 3142)

U.S. v. Lank, No. 3:23-mj-339 (N.D. Fla. Nov. 21, 2023) (holding a defendant has a right to a detention hearing in the arresting district and determining standards to apply if the defendant is awaiting sentencing)

U.S. v. Alonzo, No. 3:22-MJ-1077-BN, 2022 WL 17182076 (N.D. Tex. Nov. 23, 2022) (holding the standards in 18 U.S.C. §§ 3142 and 3144 apply during a detention hearing by the magistrate judge in the arresting district)

U.S. v. Fellows, No. 1:21-MJ-0314 (DJS), 2021 WL 3025741 (N.D.N.Y. June 23, 2021) (holding a defendant has a right to a detention hearing in the arresting district; standards unspecified)

U.S. v. Savader, 944 F. Supp. 2d 209 (E.D.N.Y. 2013) (discussing the history of Rule 40; holding a defendant is entitled to a detention hearing in the arresting district; observing deference must be given to detention determinations in the issuing district but observing the arresting district may be in a strong position to make findings on the defendant's ties to the community; applying the standards in 18 U.S.C. § 3142)

U.S. v. Murphy, No. 1:11-mj-615-KPF, 2011 WL 5023534 (S.D. Ind. Oct. 19, 2011) (holding the issuing district is the more appropriate district to have a detention hearing than the arresting district)

Government's Motion for Transportation to the Issuing District as a Modification of the Issuing District's Release Order; Standards Unspecified

U.S. v. Turner, No. 1:02-CR-699, 2023 WL 2401581 (W.D.N.C. Mar. 8, 2023) (declining to conduct a preliminary hearing in the arresting district as "more appropriately reserved for the court in the charging district" and considering the government's motion for detention during transportation to the issuing district a motion for a temporary modification of the release order; standards unspecified)

U.S. v. Szczerbiak, No. 1:21 MJ 28 WCM, 2021 WL 1784341 (W.D.N.C. May 5, 2021) (observing the parties did not believe detention during transportation to the issuing district would be a temporary modification of the release order; noting "authorities clearly supporting that view have not been located immediately," and holding to the extent placing the defendant in

custody for transportation is a change, the change is warranted; standards unspecified)

Rule 40 Inapplicable Where Person is Arrested on Warrant for Civil Contempt

Civ. Contempt Proc. Pending in United States Dist. Ct., W. Dist. of Texas (Austin Div.) v. Schmidt, No. 1:20-CV-00273-RP, 2020 WL 2777495 (S.D. Fla. May 29, 2020) (ruling Rule 40 does not apply in a civil proceeding where a person is arrested in one district based on a civil-contempt warrant issued in another district)

No Right to Preliminary Hearing in Arresting District

United States v. Jaitly, No. 09-644-M, 2009 WL 3260554 (E.D. Pa. Oct. 8, 2009) (holding a defendant has no right to a preliminary hearing in the arresting district)

IX. Suggestions

The Magistrate Judges Advisory Group suggests considering these amendments to address the first circumstance and any other resulting amendments to address the second and third circumstances.

1. Move the procedures for the first circumstance (the issuing district issued the warrant for the arrest of a defendant based on a petition alleging the defendant violated a condition of pretrial release) from Rule 40, which is under Title VIII “Supplementary and Special Proceedings,” to a new Rule 5.2, which would be under Title II “Preliminary Proceedings.”
2. Title new Rule 5.2, “Revoking or Modifying Pretrial Release,” consistent with Fed. R. Crim. P. 32.1, “Revoking or Modifying Probation or Supervised Release.”
3. Include in new Rule 5.2 seven provisions:

- a. The requirement in current Rule 40(a) (“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 ... (ii) violating conditions of release set in another district”) but modifying the language consistent with Rule 5(c)(2) to say, “A defendant must be taken without unnecessary delay before a magistrate judge if the defendant has been arrested under a warrant issued in another district for violating conditions of pretrial release set in another district.”
- b. A new requirement using language from Rule 5(c)(2) and Rule 32.1(a)(1)(B) that the initial appearance must be (a) in the district of arrest; or (b) in an adjacent district if: (1) the appearance can occur more promptly there; or (2) the warrant was issued there and the initial appearance can occur on the day of arrest.
- c. The procedure in Rule 32.1(a)(3)(A) that “[t]he judge must inform the person of ... the alleged violation of probation or supervised release” but change “probation or supervised release” to “pretrial release”;
- d. The procedure in Rule 5(c)(3)(D) that the judge must transfer the defendant to the district where the offense is pending upon production of the warrant and an identity finding but changing “the district where the offense was allegedly committed” to “the

district in which the defendant's arrest was ordered." *See* 18 U.S.C. § 3148(b) ("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.").

- e. The right in Rule 5(d)(2) that the judge "must allow the defendant reasonable opportunity to consult with counsel." (Note: The defendant will already have counsel in the issuing district but usually not in the arresting district.)
- f. The videoconferencing option in current Rule 5(f) and Rule 40(d), but also enabling the issuing district to virtually conduct the revocation proceeding with the defendant's consent.
- g. A standard for determining whether the defendant should be detained for transport back to the issuing district, perhaps with reference to the 18 U.S.C. § 3142(d) and (g), considering whether the standard is different if the defendant is awaiting sentencing.