ADVISORY COMMITTEE
ON
CRIMINAL RULES

Washington, D.C.

Subcommittee A	Subcommittee B
March 8-9, 2001	March 22-23, 2001

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MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Changes to Style and Substantive Packages**

DATE: **February 19, 2001**

I. In General

The official comment period for the proposed style and substantive changes has passed and the Committee has received a number of comments and proposed changes to the rules—both from the public and from members of the committee. This memo summarizes those proposed changes and identifies matters that should be addressed by the two subcommittees at their March 2001 meetings.

This memo provides a rule by rule summary of any proposed changes and my recommendations, if any, on whether the changes should be made, either to the style package version of the rule (TAB B) or the substantive package of the rule (TAB C).

II. Subcommittee Assignments (TAB A)

For each rule addressed in this memo, I have identified the Subcommittee and Committee member responsible for the rule. Those designations are based upon reassignments made by Judge Carnes and Judge Roll and reflected in Mr. Rabiej's memo of November 29, 2000. Please note that a number of the rules have been "reassigned." The Subcommittees' responsibility for the various rules is unchanged. (E.g., Subcommittee A: Rules 1-9, 23-31, and 41-60; Subcommittee B: Rules 10-22 and 32-40).

The November 29th memo indicating the new assignments is located at TAB A.

III. Suggested Style Changes—Style Subcommittee (TAB B)

Following the Committee's meeting in San Diego in October, Professor Kimble and Mr. Spaniol reviewed the style package again. They have updated their suggestions into one master copy of the style package. That revised draft is located at TAB B (dated 2-12-01). They have not provided a "style" review of the substantive package.

Although they have added to the list of suggested changes, they have also decided to withdraw some of their earlier suggestions, based upon our discussions in San Diego. This memo also addresses those proposed style changes.

In most areas I have recommended that the suggested style change be made. In other areas, however, I have provided a brief note on why I believe the style change

should be rejected. For example, in some of the changes, the Committee had previously discussed adoption or rejection of particular language. Where I am able to recall that discussion, I have attempted to note it in the recommendations. In others, I simply recommend rejection of the proposed change (with no particular reason given) because I believe the current language is appropriate.

IV. Suggested Style Changes From the Public (TAB F)

To date the Committee has received approximately 80 comments from the public. Most of those are located at TAB E and are concerned with the substantive package amendments, e.g. video teleconferencing. Those comments are organized by Rule. In addition, the Administrative Office has sorted out those public comments that appeared to focus only on the style package. I have summarized those comments as well and they are located at TAB F.

V. Possible Global Style Changes

In their proposed changes submitted to the Committee last Fall, the Style Subcommittee suggested that the Committee make several global style changes. Several of those suggestions were discussed at the Committee's San Diego meeting. In addition, this memo notes several other possible global changes that were not addressed at the last meeting:

- *Numbering.* The Committee had decided on a method for using Arabic numerals for any number less than 10 (ten) unless the number was "1." It seemed awkward to write the number 1 in those instances. The Style Subcommittee has proposed a different system. I recommend that we continue the system adopted by the Committee.

- *Internal Cross-referencing.* The Committee should probably address the question of whether to specifically identify any cross-references to other provisions within each rule, or whether to simply to refer to "this rule." As the project progressed, we were not always consistent on that point. The Committee decided to address this issue on a rule-by-rule basis.

- *Attorney vs. Counsel.* The Style Subcommittee has recommended that we use the word "attorney" rather than "counsel." The Committee decided to address this suggestion on a rule-by-rule basis. In addition, Mr. Pauley urged the subcommittees to be sensitive to using the term "an attorney for the government" rather than "the attorney for the government." Please note that in their most recent version, the Style Subcommittee did not renew their suggestion to standardize the use of those terms.

- *Titles of Rules and Subdivisions.* The Style Subcommittee recommended a number of additions and changes to the titles of subdivisions and paragraphs;

in particular they note the preference for using the "ing" form of the word. The Committee agreed to address those proposed changes on a rule-by-rule basis.

- *Designating Deleted Rules.* A number of rules have deleted over the years, including several as a result of the restyling effort. At one point during the project the Committee decided to keep the rule numbers in place and indicate in brackets that the rule has been abrogated. The Style Subcommittee has recommended that the word "reserved" be used instead. The Committee decided to use the terms "deleted" or "transferred" to more accurately indicate the disposition of the rules. In this memo I suggest that for those rules that were rescinded or abrogated a number of years ago, it might be appropriate to refer to those rules as being "reserved."

- *Use of the Terms "Unable" and "Cannot."* In a number of rules the Style Subcommittee has recommended that the word "cannot" be substituted for the word "unable." In the current rules both terms are used. Although this issue is not critical the Committee may wish to decide whether "cannot" and "unable" are always synonymous for purposes of these rules. In one dictionary, the word "cannot" is defined as "not able." But the word "unable" is defined in that same source as "Not able; incapable; unqualified; incompetent; inefficient." I take these definitions to say that the term "unable" may be viewed as more encompassing. This issue was not discussed in San Diego.

- *"Law Enforcement Officer."* The current rules do not hyphenate this term and my sense is that neither do the cases or commentators. The style subcommittee has recommended that the term by hyphenated. I recommend that the term not be hyphenated. I do not recall this issue being addressed at San Diego.

VI. Suggested Substantive Changes (TABS D & E)

This memo also addresses a number of substantive changes that have been suggested by either the public comments (TAB E) or by members of the Committee. In particular, Mr. Pauley and Judge Miller have prepared several memos suggesting corrections or changes in the text of the rules. Some of those changes may be considered to be substantive in nature. Those memos are located at TAB D.

The memos at TAB D are suggestions from Committee Members and are arranged in chronological order:

- Memo from Mr. Pauley to Mr. Goldberg, Oct 24, 2000, re Rule 32.1

- Memo from Mr. Pauley to Subcommittee B Members, Oct. 25, 2000 re Rule 35(b)(2).
- Memo from Mr. Pauley to Judge Carnes, et al, Oct. 27, 2000, re S. 768.
- Memo from Judge Miller to Judge Davis, Dec. 7, 2000 re Fed. Courts Improvement Act.
- Memo from Mr. Pauley to Judge Davis, et. al, Dec. 13, 2000, re Judge Miller's Memo.
- Letter from Judge Davis to Mr. Pauley, Jan. 8, 2001, re Rule 32.
- Memo from Mr. Pauley to Judge Davis, et. al, Jan. 24, 2001, re Proposed Amendments
- Memo from Mr. Pauley to Criminal Rules Committee, Feb. 5, 2001, re Rule 52.
- Memo from Judge Miller to Judge Davis, Feb. 7, 2001, re Fed. Courts Improvement Act. (Includes Jan 30, 2001 memo from Mr. Pauley)
- Letter from Judge Davis to Judge Cauthron, Feb. 12, 2001, re Video Teleconferencing Amendments (Rules 5, 10, and 43).
- Memo from Prof. Schlueter to Committee, Feb. 16, 2001, re Rule 32.1.

The materials at TAB E are summaries of the public comments on each rule. In this memo I have attempted to cross reference any comments from the public that might be considered either substantive or style comments.

VII. Rule-by-Rule Analysis

Rule 1. Scope; Definitions
Subcommittee A (Carnes)

Style Recommendations: Adopt all suggested style changes.

Other Recommendations: Mr. Pauley has recommended (TAB D) that Rule 1(a)(5) be amended by adding another subdivision (F) that would read as follows:

> "(F) a proceeding against a witness in a foreign country under 28 U.S.C. § 1784."

This change was discussed and approved at the last Committee meeting.

Rule 2. Interpretation
Subcommittee A (Carnes)

Style Recommendations: None

Other Recommendations: None

Rule 3. The Complaint
Subcommittee A (Bucklew)

Style Recommendations: None

Other Recommendations: None

Rule 4. Arrest Warrant or Summons on a Complaint
Subcommittee A (Bucklew)

Style Recommendations: Accept suggested changes in Rule 4(b) and (c). (Note: the style subcommittee has withdrawn it suggested changes to Rule 4(a))

Rule 4(b)(2). As I recall, the Committee specifically selected the words "is to be" rather than "must" to avoid awkward language—in one of the first meetings on the project, I believe. Similar language was used in Rule 9, *infra*.

Other Recommendations: In his January 24, 2001 memo (TAB D), Mr. Pauley recommends that Rule 4(c)(2) be amended to reflect the recently enacted Military Extraterritorial Jurisdiction Act (Pub. L. No. 106-523, 114 Stat. 2488). That act now recognizes that arrest warrants may be executed outside the United States. His memo includes the following redraft of that section:

(2) Territorial Limits.

(A) Within the Jurisdiction of the United States. Except as provided in this rule, a warrant may be executed, or a summons served, only within the jurisdiction of the United States.

(B) Outside the Jurisdiction of the United States. A warrant may be executed, or a summons served, outside the jurisdiction of the United States if a statute authorizes an arrest in such place.

Judge Zimmerman (CR-015) suggests that the Committee consider amending Rule 4 to clarify the judge's ability to issue warrants via fax.

Ms. Bench (CR-004)(Style) proposes a number of style changes to Rule 4. See TAB F.

Rule 5. Initial Appearance
Subcommittee A (Miller)

Style Recommendations: Accept all recommended changes in Rule 5(a), (b).

Re Rule 5(c): Some study should be done on whether to accept the proposed changes in 5(c). The proposed changes raise questions about use of the term "magistrate" and "judge" interchangeably in the rule. As I recall we used the general rule that the first reference in the rule should be to "magistrate judge" and all later references would be to "judge." Also, the Committee might wish to discuss whether in Rule 5(c)(2)(F) the reference should be to "court" or to the "clerk."

Rule 5(d). I recommend that we retain the term "counsel" in this rule. Although the terms counsel and attorney are interchangeable, we normally speak of the "right to counsel."

Other Recommendations: Rule 5(a)(1)(B). Mr. Pauley recommends in his January 24th memo (TAB D) that Rule 5(a)(1)(B) be amended to reflect the recently enacted Military Extraterritorial Jurisdiction Act (Pub. L. No. 106-523, 114 Stat. 2488). He recommends that the following language be added at the beginning of that subdivision: "Except as otherwise provided by statute,..." He notes that if the amendment is not made, an argument could be made that the rule would supercede the Act.

Mr. Spaniol (CR-0010)(Style) suggests clarify Rule 5(a)(1)(B) by adding the words "without a warrant." See TAB F.

Ms. Bench (CR-004)(Style) provides some suggested changes to Rule 5. See TAB F.

Mr. Brzosowski, (CR-045) a student of Judge Miller, recommends that the Committee amend Rule 5 to provide an explicit remedy for failure to follow the rule. See TAB F.

Mr. Horsley (CR-003)(Style) recommends a change to Rule 5. See TAB F.

Rule 5.1. Preliminary Hearing in a Felony Case
Subcommittee A (Miller)

Style Recommendations: Accept recommended changes and attempt to conform language in Rule 5.1(g), (h) with similar provisions in other rules.

Other Recommendations: None.

Rule 6. The Grand Jury
Subcommittee A (Stith)

Style Recommendations: Rule 6(a), (b). Accept proposed changes.

Rule 6(c). Conform this rule with other rules noted regarding use of the word "district."

In Rule 6(e)(3)(B), the Committee needs to discuss whether cross-references in the rules should refer generically to "this rule" or to the specific subsection, etc.

Rule 6(e)(3)(F). Accept proposed change.

Rule 6(f)-(i). Accept proposed changes.

Other Recommendations: Rule 6(e)(3)(A). Mr. Pauley has recommended in his January 24th memo (TAB D) that a new subdivision (iii) be added that would provide an exception for disclosures authorized under 18 U.S.C. § 3322 (authorizing disclosures for civil forfeiture and civil banking laws, etc.). The new provision would read:

"(iii) a person authorized by 18 U.S.C. § 3322."

Ms. Stegman (CR-020) recommends making the rule gender neutral. See TAB E.

Judge Ashmanskas (CR-002)(Style) offers some changes to Rule 6. See TAB F.

Judge Doumar (CR-009)(Style) offers suggested changes to Rule 6. See TAB F.

Rule 7. The Indictment and the Information
Subcommittee A (Stith)

Style Recommendations: Accept proposed change.

Other Recommendations: In his January 24, 2001 memo, Mr. Pauley recommends that the introductory language of Rule 7(a)(1) be amended to include an exception for criminal contempt proceedings. The new provision (underlined) would read:

"An offense <u>(other than criminal contempt)</u> must be prosecuted by an indictment..."

Judge Doumar (CR-009)(Style) offers suggested changes to Rule 7. See TAB F.

Rule 8. Joinder of Offenses or Defendants
Subcommittee A (Friedman)

Style Recommendations: Accept proposed punctuation changes

Committee should decide what to do with Arabic numbers, etc. It had already decided to use Arabic numbers for any

number less than 10 (ten) unless it was awkward to do so. I recommend retaining that practice.

Other Recommendations: None.

Rule 9. Warrant or Summons Upon Indictment or Information
Subcommittee A (Friedman)

Style Recommendations: Rule 9(a). These changes should conform to whatever changes are made to Rule 4, *supra*, regarding use of term "court."

Rule 9(b). As I recall, the Committee specifically selected the words "is to be" rather than "must" to avoid awkward language—in one of the first meetings on the project, I believe. Similar language was used in Rule 4(b)(2).

Other Recommendations: None.

Rule 10. Arraignment
Subcommittee B (Campbell)

Style Recommendations: Accept proposed change

Other Recommendations: Mr. Pauley recommends that Rule 10(b) be amended by adding the words "good cause." (See TAB D, Memo of January 24, 2001). He suggests that in the alternative perhaps something might be said in the Note. This may be a substantive change that will require some discussion.

Rule 11. Pleas
Subcommittee B (Campbell)

Style Recommendations: Rule 11(a). Accept proposed change.

Rule 11(b). Accept proposed change.

Rule 11(c)(1)-(4). Accept proposed changes.

Rule 11(c)(5). Reject proposed changes. I am not sure that the proposed reorganization clarifies the provision.

Rule 11(d), (e). Accept proposed changes. Consider whether to change word "plea" to "sentence" or "judgment." The current rule (Rule 32(e)) uses the word plea.

Rule 11(f). Reject proposed changes. The Committee decided not to restyle this subdivision because it tracked Federal Rule of Evidence 410, which was drafted by Congress. Although the current language, "such a statement," is not the mark of clarity, the courts seem to have settled on what it means. I recommend leaving this section as we found it. Another option would be to delete this section and replace it with something like: "The admissibility of pleas, plea discussions, and related statements is governed by Federal Rule of Evidence 410."

Other Recommendations:

The Committee Note should probably reference deletion of requirement that the judge ask the defendant whether he or she has talked to the government about a plea bargain.

Mr. Spaniol (CR-001)(Style) recommends clarification in Rule 11 regarding setting aside guilty pleas. See TAB F.

Judge Doumar (CR-009)(Style) provides a number of suggested changes to Rule 11. See TAB F.

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections
Subcommittee B (Roll)

Style Recommendations:

Rule 12(a). Accept change

Rule 12(b). Accept changes. But it is not clear whether changing the term "during the proceeding" is the same as "while the case is pending." Also, the Committee should review the interchangeable use of term "objection" and "motion to suppress" in the rule.

Rule 12(e). Reference should be to Rule 12(b)(2) (motions to be made before trial).

Rule 12(f)-(g). Accept changes.

Rule 12(h). I am not sure that hyphenating "law enforcement officer" is necessary. If the Committee decides to do so, it will need to check all of the other references in the rules. Currently, the term is not hyphenated in the rules and most courts do not do so.

Other Recommendations: None.

Rule 12.1. Notice of Alibi Defense
Subcommittee B (Roll)

Style Recommendations: Rule 12.1(a). Accept changes

Rule 12.1(b). Accept change in (1) and change "notice" to disclosure." Retain cross-references to other sections of Rule 12.1.

Rule 12.1(c)-(f). Accept changes.

Other Recommendations: Judge Doumar (CR-009)(Style) offers a suggested change to Rule 12.1. See TAB F.

Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition.
Subcommittee B (Roll)

Style Recommendations: Rule 12.2(a). Accept proposed change of adding word "so." Reject deletion of m-dash. Committee decided at one point to use m-dashes for emphasis. It is not clear to me that we must either use all m-dashes or comments throughout the rules whenever we use the words "good cause.".

Rule 12.2(b). Accept changes, except make no change to last sentence regarding "good cause"

Rule 12.2(d)-(e). Accept changes.

Other Recommendations: Judge Doumar (CR-009)(Style) offers a suggested change to Rule 12.2. See TAB F.

Rule 12.3.Notice of Public Authority Defense
Subcommittee B (Roll)

Style Recommendations: Rule 12.3(a). Accept changes. Reference needs to be to "an" attorney for the government. The reference to (a)(1) should probably be (a)(3) (referring to the government's response).

Rule 12.3(b). This should be conformed to 12.1(c) regarding duty to disclose--i.e. does defense counsel have duty?

Rule 12.3(e). Accept changes.

Other Recommendations: Judge Doumar (CR-009)(Style) offers a suggested change to Rule 12.3. See TAB F.

Rule 12.4. Disclosure Statement (New Rule)
Subcommittee B (Roll)

Style Recommendations: None

Other Recommendations: None.

Rule 13. Joint Trial of Separate Cases
Subcommittee B (Roll)

Style Recommendations: None

Other Recommendations: None

Rule 14. Relief from Prejudicial Joinder
Subcommittee B (Roll)

Style Recommendations: Accept recommended changes.

Other Recommendations: None

Rule 15. Depositions
Subcommittee B (Campbell)

Style Recommendations: Rule 15(a). Check insertion of word "unprivileged." Appears to modify preceding list when intent was probably to expand the list of producible materials, assuming that they were not privileged. See the Subcommittee's note at the bottom of page 70 of the style package

Rule 15(b)-(h). Accept changes.

Other Recommendations: None.

Rule 16. Discovery and Inspection
Subcommittee B (Campbell)

Style Recommendations: Accept changes.

Rule 16(d)(2). Note reference to Rule 16 instead of "this rule." Conforming global changes may be necessary as noted, *supra*.

Other Recommendations: Judge Doumar (CR-009)(Style) offers a suggested change to Rule 16. See TAB F.

Rule 17. Subpoena
Subcommittee B (Pauley)

Style Recommendations: Rule 17(c). Accept recommended changes.

Rule 17(f). Reject suggested change to title. If title is changed then title for subsection (1) should be changed to "Issuance of Subpoena."

Rule 17(h). Accept change.

Other Recommendations: Rule 17(g). Mr. Pauley recommends in his January 24th

memo (TAB D) that Rule 17(g) should distinguish between contempt authority for magistrates and that for district judges. Judge Miller agrees with the suggestion. Mr. Pauley has suggested the following language:

> "The court (other than a magistrate judge) may hold in contempt a witness ho, without adequate excuse, disobeys a subpoena issued by a court in that district. A magistrate judge may hold in contempt a witness who without adequate excuse, disobeys a subpoena issued by that magistrate judge as provided [by statute][in 28 U.S.C. § 636(e)]."

Judge Miller recommends citing the particular statutory provision and I concur in that recommendation.

Judge Doumar (CR-009)(Style) offers a suggested change to Rule 17. See TAB F.

Rule 17.1. Pretrial Conference
Subcommittee B (Pauley)

Style Recommendations: Accept change

Other Recommendations: None

Rule 18. Place of Prosecution and Trial
Subcommittee B (Pauley)

Style Recommendations: Accept change.

Other Recommendations: None.

Rule 19. Rescinded or Reserved.
Subcommittee B (Pauley)

Style Recommendations: The Committee should decide what designation this rule should receive. It was rescinded years ago and shows up in books as being "rescinded." At this point it is probably

all right to refer to it as "reserved." Using the word rescinded might give the reader the incorrect impression that it was rescinded by the style project amendments.

Other Recommendations: None

Rule 20. Transfer for Plea and Sentence
Subcommittee B (Pauley)

Style Recommendations: Rule 20(c). Note cross-reference to specific rule number; Committee should address whether to maintain these specific cross-references or simply refer to "this rule."

Rule 20(d). Accept change.

Other Recommendations: None.

Rule 21. Transfer for Trial
Subcommittee B (Pauley)

Style Recommendations: Rule 21(a), (b). Accept changes.

Rule 21(c). Accept changes (Committee may wish to leave the title for this subdivision as it is and change the one for 20(b) and 20(d)(2).

Other Recommendations: None.

Rule 22. Time to File Motion to Transfer [Transferred]
Subcommittee B (Pauley)

Style Recommendations: This rule was deleted in the style project and should probably carry the designation of "transferred" and explained in the Committee Note.

Other Recommendations: None

Rule 23. Jury or Nonjury Trial
Subcommittee A (Carnes)

Style Recommendations: None

Other Recommendations: None

Rule 24. Trial Jurors
Subcommittee A (Miller)

Style Recommendations: Rule 24(c)(1). Does "cannot" equate to "unable" for purposes of this rule? See Style Subcommittee's reference to other rules using the word "cannot." In Rules 21(a) and 31, the current rule already uses the term "cannot." In Rule 25 the current rule uses the word "unable" and the provisions in Rule 32.1, the provisions, relating to assistance of counsel, are new to the Rule.

Rule 24(c)(3)-(4). Accept changes.

Other Recommendations: Mr. Pauley has recommended (TAB D, Jan. 24th memo) that the Committee consider amending 24(b)(3) to clarify whether the provision applies to petty offenses. Given the sensitivity to any amendments to the issue of peremptory challenges, I recommend that the question be deferred--unless there is a substantial need to address that issue now.

Judge Doumar (CR-009)(Style) offers suggested changes to Rule 24, including a suggestion to revise the number of peremptory challenges. See TAB F.

Rule 25. Judge's Disability
Subcommittee A (Friedman)

Style Recommendations: Accept changes

Other Recommendations: None.

Rule 26. Taking Testimony
Subcommittee A (Friedman)

Style Recommendations: Accept changes.

Other Recommendations: The style version of Rule 26 includes the word "orally," which is technically a substantive change. Depending on what happens to the major substantive change to this rule (regarding remote transmission of live testimony), the Committee Note should be amended to reflect at least that change.

Mr. Keane (CR-045), a student of Judge Miller, recommends that the rule be expanded to include more specific criteria when remote transmission may be used. See TAB F.

Mr. Ries (CR-045), a student of Judge Miller, provides an alternate version of Rule 26. See TAB F.

Rule 26.1. Foreign Law Determination
Subcommittee A (Friedman)

Style Recommendations: Accept change

Other Recommendations: None

Rule 26.2. Producing a Witness's Statement
Subcommittee A (Friedman)

Style Recommendations: Rule 26.2(a). Reject suggestion to refer to attorney for the government as "the" attorney. Accept other changes.

Rule 26.2(e). Reject proposed changes; there is a difference between producing and delivering an object.

Other Recommendations: Mr. Allen (CR-005)(Style) points out several grammatical and typographical problems with Rule 26.2. See TAB F.

Rule 26.3. Mistrial
Subcommittee A (Friedman)

Style Recommendations: None

Other Recommendations: None

Rule 27. Proof of Official Record
Subcommittee A (Friedman)

Style Recommendations: None

Other Recommendations: None

Rule 28. Interpreters.
Subcommittee A (Friedman)

Style Recommendations: None

Other Recommendations: None

Rule 29. Motions for Judgment of Acquittal
Subcommittee A (Bucklew)

Style Recommendations: Accept changes. Note: the Style Subcommittee has recommended changing "fixes" to "sets" throughout the rules. At one point, at least one of the subcommittees had an extended discussion about selecting the word "fix" as opposed to some other term. The word "fix" is used in some of the current rules. See, e.g., 29(c). Either should work.

Other Recommendations: None.

Rule 29.1. Closing Argument
Subcommittee A (Bucklew)

Style Recommendations: None

Other Recommendations: None

Rule 30. Jury Instructions
Subcommittee A (Stith)

Style Recommendations: None: Note that the Style Subcommittee has withdrawn a previously suggested style change in 30(d).

Other Recommendations: The Committee Note needs to be corrected. The reference to a similar provision in the Civil Rule is incorrect. That rule has not yet been amended to change the time for submitting instructions.

Rule 31. Jury Verdict
Subcommittee A (Pauley)

Style Recommendations: Accept change. See the Subcommittee's suggestion of alternate language on page 107 of the style package.

Other Recommendations: Rule 31(a). Mr. Pauley recommends that the word "federal" be inserted before the word "judge." (TAB D, Memo of Jan. 24, 2001). He notes that the addition is necessary to avoid the remote problem of a verdict being delivered to a state judge.

Rule 32. Sentencing and Judgment
Subcommittee B
(Roll—Rule 32(a)-(c)(2))
(Stith—Rule 32(c)(3) to end)

Style Recommendations: Rule 32(a)-(f).Accept changes

Rule 32(g). Reject proposed change; there may be multiple grounds for objections.

Rule 32(h)(2). Reject proposed changes; "disobeys" sounds awkward. "fails to comply with" might be better.

Rule 32(h)(4). Accept the recommended changes.

Rule 32(h)(5). Accept recommendations.

Rule 32(i). Question: are "cannot" and "unable" synonymous for purposes of this rule? See Rule 24(c)(1), supra.

Rule 32(j). Reject change and retain the word "enter." That is the term currently used in the rule.

Other Recommendations:

Rule 32(h)(1)(B). In his January 24th memo (TAB D), Mr. Pauley recommends that Rule 32(h)(1)(B) be amended to include a requirement that the judge provide the excluded information to the government as well as to the defendant. This might be viewed as a "substantive" change in the rule that was not published for comment. If the current rule is not preventing the government attorney for seeing the information, the amendment may not be critical enough to explain why the change is being added after the comment period has closed.

Rule 32(h)(4)(C). Mr. Pauley also recommends adding a "good cause" requirement in the provision addressing in camera sessions. Presumably, the published version of the rule grants enough leeway to the sentencing judge to decide whether to grant the motion.

Mr. Crane (CR-001) suggests that the term "material" be defined in the rule itself. See TAB F.

Rule 32.1. Revoking or Modifying Probation or Supervised Release.
Subcommittee B (Stith)

Style Recommendations:

Rule 32.1(a) Accept recommendations.

Rule 32.1(b)(1). Committee needs to decide whether to use reference to "counsel" or "attorney" or both.

Rule 32.1(b)(2). Reject changes.

Rule 32(c)(1). Need to address issue of whether to use term "attorney" or "counsel" as noted *supra*.

Rule 32(e). Conform rule to other similar provisions but reject suggestion to insert word "disobeys" because it sounds awkward.

Other Recommendations:

Rule 32.1(a)(3). Mr. Pauley recommends in his January 24th memo (TAB D) that Rule 32.1(a)(3) be deleted. He references a memo he sent to Mr. Goldberg (Oct 24, 2000). That memo is also located at TAB D. I have prepared a short memo with attachments responding to his points in the October memo. See TAB D. That material, I believe, generally supports the Committee's decision to include rights warnings in the 32.1 proceedings. Briefly, similar rights warnings are currently given in Rule 5 proceedings and apparently in grand jury proceedings—to both witnesses and targets. Second, for all of the discussion about the need for a "real and appreciable" risk of self-incrimination, there are very few cases holding that a particular suspect or defendant did not face a risk of incriminating himself. Third, drawing on the *Miranda* analogy, facing a trial judge in a revocation proceeding seems more akin to custodial interrogation than talking to a probation officer on the street (where no warnings are required). I recommend that the rights warnings provision remain in the rule.

Rule 32.2. Criminal Forfeiture
(No subcommittee assigned)

Style Recommendations:

(Note; Considering the recent approval of this rule, the Committee had decided not to make any significant style changes to this rule, considering that it is pending before Congress. As the rule progressed through the process, only minor style changes have been made. The following recommendations are offered in the event the Committee decides to do further restyling of this rule).

Rule 32.2(b). Reject suggested change in title; otherwise accept changes. If change is necessary, order of title can be

changed to read, "Post-Verdict Hearing; Entering a Preliminary Order of Forfeiture." Accept other changes in subdivision.

Rule 32.2(c)(1), (2), and (3). Accept changes.

Rule 32.2(c)(4). Better for title to read "Ancillary Proceeding Not Part of Sentencing." I believe the Committee originally opted for shorter title given the length of the provision.

Rule 32.2(d). Accept change.

Rule 32.2(e)(3). Accept change.

Other Recommendations: None.

Rule 33. New Trial
Subcommittee B (Pauley)

Style Recommendations: Rule 33(b)(2). I am not sure why the word "as" is necessary.

Other Recommendations: None.

Rule 34. Arresting Judgment
Subcommittee B (Pauley)

Style Recommendations: Rule 34(a)(1). Accept change.

Rule 34(b). Reject deletion of words "a verdict or finding of guilty. Conform the language here (time as the court may set, etc. with similar language in Rule 33(b)(2).

Other Recommendations: None.

Rule 35. Correcting or Reducing Sentence.
Subcommittee B (Pauley)

Style Recommendations: Accept changes.

Other Recommendations: See Mr. Pauley's memo (Oct. 25, 2000) concerning alternative language for Rule 35(b)(2) at TAB D.

Judge Becker (CR-028) offers another version of Rule 35(b). See TAB F.

Rule 36. Clerical Mistakes.
Subcommittee B (Miller)

Style Recommendations: None.

Other Recommendations: None.

Rule 37. [Reserved]
Subcommittee B (Miller)

Style Recommendations: This rule was abrogated in 1968. Thus, it should be probably labeled as "reserved."

Other Recommendations: None

Rule 38. Staying a Sentence or a Disability
Subcommittee B (Miller)

Style Recommendations: Rule 38(b)(2). Reject changes; current titles in (1) and (2) are parallel.

Rule 38(c). Consider changing word "proper" to "appropriate." The Style Subcommittee notes use of the word "appropriate in 38(e). But the current rule uses both terms. They appear to be synonymous here.

Other Recommendations: None.

Rule 39. [Reserved]
Subcommittee B (Miller)

Style Recommendations: Because this rule was abrogated in 1968, it should probably be listed as "reserved".

Other Recommendations: None.

Rule 40. Arrest for Failing to Appear in Another District
Subcommittee B (Miller)

Style Recommendations: Rule 40(a). Accept change.

Other Recommendations: None.

Rule 41. Search and Seizure
Subcommittee A (Bucklew)

Style Recommendations: Rule 41(a)(2). Reject change to hyphenated term, "law enforcement officer. Accept other changes. The word "of" after enforcement should also be deleted.

Rule 41(b). reject any reference to "covertly" observe--that is covered in substantive amendments package. Reference in (e)(2) in style package (page 149) should also be removed—pending a decision on whether to forward the substantive amendments in Rule 41.

Rule 41(c). Accept recommended change.

Rule 41(e)(2). Delete reference to covert searches.

Rule 41(f)(1), (2). These provisions need to be checked. The Committee struggled with using just the right language for the inventory section. The Style Subcommittee has suggested yet another version. That provision, and the Committee's current language, includes what may be a new requirement that does not appear in the current Rule 41(d)—that the officer executing the warrant be the one

who prepares the inventory. The current rule simply indicates that the inventory shall be made in the presence of the "applicant" for the warrant, etc. If this is an intentional change, then we should probably add something to the Committee Note, alerting the readers.

Rule 41(i). This provision needs to be checked. It is not clear what the word "copy"` modifies.

Other Recommendations:

Rule 41(d)(3)(B)(ii). In his memo of January 24th (TAB D), Mr. Pauley recommends that the words "or cause to be made" after the words "to make." He explains that this addition will cover those situations where the magistrate's recording device fails and the AUSA is asked to make the recording of the conversation..

Judge Murrian (CR-018) recommends a change to Rule 41(e)(1) regarding the return of the warrant to the clerk. See TAB F.

Mr. Nakano (CR-045), a student of Judge Miller, suggests the Rule 41 include a requirement that covert searches may be approved only on a showing of necessity.

Rule 42. Criminal Contempt
Subcommittee A (Bucklew)

Style Recommendations:

Accept change in Rule 42(a)(2). Note that the Style Subcommittee withdrew other more comprehensive suggested changes that were presented to the Committee in October.

Other Recommendations:

Rule 42(b). Mr. Pauley has recommended (TAB D, January 24, 2001) that new language be substituted for the published version, in order to clarify the authority of magistrate judges to hold contempt proceedings—per the recent Federal Courts Improvement Act. He recommends the following language:

> "Notwithstanding any other provision of these rules—(1) the court (other than a magistrate judge) may summarily punish a person.... and (2) a magistrate judge may summarily punish a person as

provided in [the applicable statute][28 U.S.C. § 636(e).]"

Judge Miller agrees with the proposed change. Memo of Feb. 7, 2001 (TAB D).

Rule 43. Defendant's Presence
Subcommittee A (Bucklew)

Style Recommendations: Accept changes. Conform to whatever practice the Committee decides on cross-referencing other provisions in the same rule.

Other Recommendations: None.

Rule 44. Right to and Appointment of Counsel
Subcommittee A (Friedman)

Style Recommendations: Rule 44(a). The Committee needs to decide whether "cannot" and "unable" are always synonymous for purposes of these rules. Both terms are used in the current rules and style subcommittee has recommended in this rule, and in others, that the word "cannot" be substituted for "unable." In one dictionary, the word "cannot" is defined as "not able." But the word "unable" is defined as "Not able; incapable; unqualified; incompetent; inefficient." I take these definitions to say that the term "unable" may be viewed as more encompassing.

Please note that the style subcommittee has not included its earlier recommendation to change the word "counsel" to "attorney" in this rule.

Rule 45. Computing and Extending Time
Subcommittee A (Friedman)

Style Recommendations: Rule 45(a). Reject change—leave in "a."

Rule 45(b). Accept change.

Rule 45(c). Accept change.

Other Recommendations: Change designation to "Washington's Birthday" in Rule 45(a)(4)(C) per discussion at October Committee meeting.

Rule 46. Release from Custody; Supervising Detention
Subcommittee A (Carnes)

Style Recommendations: Rule 46(f). Accept changes.

Rule 46(h). Reject changes. The original rule used the plural form, which connotes court supervision over the whole group as opposed to individual control or supervision.

Question: Should the reference in Rule 46(h)(1) to "the attorney for the government" be "an attorney for the government?"

Rule 46(i). Accept change.

Rule 46(j). Reject change in heading. In the other rules (e.g. Rules 5, 32.1), the title "Producing Statements" is used without otherwise referring to the type of hearing or proceeding referred to.

Other Recommendations: None.

Rule 47. Motions and Supporting Affidavits
Subcommittee A (Carnes)

Style Recommendations: Accept punctuation changes.

Other Recommendations: None.

Rule 48. Dismissal
Subcommittee A (Carnes)

Style Recommendations: Accept change.

Other Recommendations: None.

Rule 49. Serving and Filing Papers
Subcommittee A (Carnes)

Style Recommendations: Accept changes.

Other Recommendations: None.

Rule 50. Prompt Disposition.
Subcommittee A (Pauley)

Style Recommendations: None.

Other Recommendations: None.

Rule 51. Preserving Claimed Error.
Subcommittee A (Pauley)

Style Recommendations: None.

Other Recommendations: None.

Rule 52. Harmless and Plain Error
Subcommittee A (Pauley)

Style Recommendations: None.

Other Recommendations: Rule 52(b). In a memo dated February 5, 2001 (TAB D), Mr. Pauley recommends that the Committee clarify an ambiguity in the wording "A plain error or defect..." He points out that the Supreme Court has concluded that that wording should be read more simply as meaning "error." As he notes, the Court has indicated that the use of the disjunctive is misleading. Thus, he recommends that the

words "or defect" be deleted from the rule. He recommends that no changes be made to Rule 52(a).

Rule 53. Courtroom Photographing and Broadcasting Prohibited
Subcommittee A (Pauley)

Style Recommendations: None.

Other Recommendations: Judge Ashmanskas (CR-002)(Style) recommends that Rule 53 be revised. See TAB F.

Mr. Johnson (CR-045), a student of Judge Miller, has drafted an alternate version of Rule 53 that includes a list of factors to be considered by the court in deciding whether to permit electronic coverage. See TAB F.

Rule 54. [Transferred]
Subcommittee A (Pauley)

Style Recommendations: This rule was transferred to Rule 1 and should carry the designation of "transferred" rather than "reserved."

Other Recommendations: None.

Rule 55. Records
Subcommittee A (Friedman)

Style Recommendations: None.

Other Recommendations: None.

Rule 56. When Court is Open
Subcommittee A (Friedman)

Style Recommendations: None.

Other Recommendations: None.

Rule 57. District Court Rules
Subcommittee A (Friedman)

Recommendation: Rule 57(a). Accept proposed changes.

Rule 57(c). Accept proposed change. At this point I would not omit reference to "under this rule." There has been considerable discussion over the years—especially at the Standing Committee level—about the importance of this rule and its counterparts in the other rules of procedure vis a vis the authority of district judges to make local rules. This provision arguably distinguishes between local rules, adopted under this rule, and other rules or procedures adopted by local courts.

Rule 58. Petty Offenses and Other Misdemeanors
Subcommittee A (Miller)

Style Recommendations: Accept changes. Rule 58(b).

Other Recommendations: Rule 58(b)(2)(E)(i) and (b)(3)(A) and (B). Judge Miller has suggested in his memo of December 7, 2000 (TAB D), that Rule 58 be amended to reflect recent statutory changes. His recommended language is attached to that memo.

Rule 59. [Deleted]
Subcommittee A (Miller)

Style Recommendations: This rule is being deleted as being unnecessary—thus the reference to "deleted."

Other Recommendations: The Committee Note should be changed to reflect that the rule has been "deleted."

Rule 60. [Deleted]
Subcommittee A (Miller)

Style Recommendations: This rule is being deleted as being unnecessary—thus the

reference to "deleted."

Other Recommendations: None.

Rules Governing § 2254 and § 2255 Proceedings
(Subcommittees A and B)

Style Recommendations: None

Other Recommendations:

Mr. Krog (CR-010) recommends that Rule 9 prohibit successive petitions unless they have been approved by an appellate court. He also suggests that the rules more clearly explain the application of the Rules of Civil Procedure. See Tab E.

Mr. Kengery (CR-021) recommends that the word "petition in the Committee Note for Rule 3 of the Rules Governing § 2255 Proceedings be changed to "motion" for consistency.

Judge Walter (CR-032) recommends that Rule 6 of the Rules be made gender neutral. See TAB E.

A

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November 29, 2000

MEMORANDUM TO SUBCOMMITTEES "A" AND "B"

SUBJECT: *Subcommittee Assignments*

During the style project, each subcommittee member was asked to pay particular attention to specific assigned rules, in addition to reviewing all other rules under consideration. The departure of several committee members, whose terms have expired, has left several rules unassigned. Judges Carnes and Roll have reviewed all earlier assignments and reallocated some of the assigned rules to level the assignments and fill the vacuum left by the departing committee members.

The chart below lists the rules assigned to each member who will be responsible for focusing on any public comments or changes that have been proposed by the style subcommittee with respect to them. Subcommittee "A" will meet on March 8-9, 2001, and Subcommittee "B" will meet on March 29-30, 2001, to review the public comments and the style subcommittee's suggestions. To date, we have only received a handful of public comments.

COMMITTEE MEMBER	ASSIGNED RULES
Judge Carnes	1-2, 23, and 46-49
Judge Roll	12-14, 32(a)-(c)(2)
Judge Bucklew	3-4, 29-29.1, and 41-43
Judge Miller	5-5.1, 24, 36-40, and 58-60
Judge Friedman	8-9, 25-28, 44-45, and 55-57
Professor Stith	6-7, 30, and 32(c)(3)-32.1
Pauley, Esquire	17-22, 31, 33-35, and 50-54
Campbell, Esquire	10-11 and 15-16

Please note that Rule 32.2 has not been assigned because the subcommittee determined that no changes were necessary since the rule has just taken effect. Please contact me if you have any questions regarding these assignments.

John K. Rabiej

cc: Honorable Anthony J. Scirica
Honorable W. Eugene Davis
Professor David A. Schlueter

B

NEW WORKING VERSION
2-12-01

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.

VIOLATING COLLECTING

(AT LEAST CHANGE THIS ONE.)

(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.

(CHANGE to "AND," AS IN (1)(C) AND 10(A) ?)

"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.

(OR you NEED A COMMA AFTER "Columbia.")

(WE'RE TRYING to follow the guideline to draft IN THE SINGULAR?)

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)(2). 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 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 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.

Must

(Why have two different ways of imposing a duty? Note that 4(b)(1) uses "must," and the two provisions are parallel.)

(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 a 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~~ the 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 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). A similar amendment was made to Rule 41 in 1972. In the intervening years, however, 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 summonses. 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 an 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. WITHOUT A WARRANT?

(FOR CONSISTENCY WITH 4(c)(2), WHICH SAYS A WARRANT MAY BE EXECUTED ONLY WITHIN THE UNITED STATES.)

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.

(Rule 5 itself is called "Initial Appearance.")

Place of

	(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.

(BELOW, THIS BECOMES "the PROSECUTION IS PENDING." SAME THING, I TAKE IT.)

(WHY HERE AND NOT IN (B), (D) & (E)? COMPARE 41(d)(3), WHICH REPEATS "MAGISTRATE judge" THROUGHOUT.)

IF REQUIRED BY?

?

(NOT MENTIONED IN PREVIOUS SENTENCE)

CLERK? (1(b)(5) defines "COURT" AS A federAL judge.)

(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***~~ Consulting ***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 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 case law reflecting that the right to an initial appearance applies not only when a person is arrested within the United States but also when 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, 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 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). Electing a ~~Election of~~ District ~~Electing Venue?~~
	(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.

(PARENS)

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. MAY NOT ✓ (COMPARE 6(b)(2) and 11(e).)
(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. ANY

RECORDING the PROCEEDINGS
(COMPARE 6(e)(1), 11(g), AND OTHERS THROUGHOUT.)

(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.

Producing a

Not Producing a

(Not limited to (a).)

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. 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 41 in 1972 and to Rule 4 in 1974. In the original Committee Note, 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 court reporter 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.

("DISTRICT" ONLY NEEDED TO DISTINGUISH DISTRICT AND APPELLATE CLERKS WHEN THERE MAY BE CONFUSION.
THE TERM "DISTRICT CLERK" IS NOT USED IN 20(d)(2), 32(i)(2), 32(j)(1), 45(a)(3), 49(c), OR 58(g)(2)(A) OR (B). THE TERM IS USED IN 46(f)(3)(B) & (C). RECOMMEND WE OMIT "DISTRICT" HERE AND IN 46(f)(3)(B) & (C)?)

(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 the 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. But 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.~~

(IN 5(h)(1) "This Rule" REFERS TO ALL OF RULE 5. HERE, IT REFERS ONLY TO THIS SUBPART (B).)

(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.

judicial?

((To confirm that we're still talking about 6(e)(3)(D)(i).)

(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.	(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 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.	Discharging the Grand Jury (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. Excusing a Juror (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.
(Compare 45(4).)	Defined (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 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 of the grand jury 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 the Department of Defense Relating to the Investigation and Prosecution of Certain Crimes; 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 Congress added the provision 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 (1988).

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 case law, 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.

the ?

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

(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.

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 in May 2000, and pending review by Congress under 28 U.S.C. § 2074(a).]

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.

(DOES this modify "SAME ACT OR TRANSACTION"? If so, COMMAS BEFORE "OR" AND AFTER "TRANSACTIONS.")

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~~ must 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.

(4(a) says "judge".)

A court may issue (judge?) (same as 4(a).)

(Should this be "The clerk must deliver"? Compare the original Rule.)

(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 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 AN	**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 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) **Considering and Accepting 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;

The government's Right to use

(Not parallel with others. It's an independent clause.)

(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.	(c) 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. The plea agreement? (See II(c)(4) and (c)(5).)	(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.

Agreed-to

(i) THE COURT MAY NOT FOLLOW THE PLEA AGREEMENT;
(ii) THE DEFENDANT MAY WITHDRAW THE PLEA; AND
(iii) IF THE PLEA IS NOT WITHDRAWN, THE COURT MAY, ETC.

(THE "IN OPEN COURT" STUFF FROM (B) APPLIES TO (C) AS WELL, DOESN'T IT? FOR THE ADVICE IN (C), CAN THE COURT GO IN CAMERA WITHOUT SHOWING GOOD CAUSE? DON'T THE SAME REQUIREMENTS APPLY TO (B) & (C)?)

(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~~ the plea ~~of guilty or a plea of nolo contendere~~, for any or no REASON reason; or (2) after the court accepts ~~a~~ the 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 a 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.

(THIS IN THE LEAD-IN.)

JUDGMENT OR SENTENCE?
(MR. SPANIOL NOTES THAT (1) AN APPELLATE COURT DEALS IN JUDGMENTS AND SENTENCES, NOT PLEAS, AND (2) 28 U.S.C. § 2255 MENTIONS SETTING ASIDE "THE SENTENCE" OR "THE JUDGMENT.")

See page following for clean revision

(1) In General

(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.	(2) Exceptions. A statement described in Rule 11(f)(1)(C) or (D)
(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.

(New sentence in the middle of a listed item. Do we do that anywhere else?)

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 the 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 11(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements

(1) In General. Except as 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 participated in the plea discussions:

(A) a plea of guilty that was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement about either of those two pleas that was made during plea proceedings; or

(D) any statement made during plea discussions with an attorney for the government that do not result in a guilty plea or that result in a guilty plea later withdrawn.

(2) Exceptions. A statement described in Rule 11(f)(1)(C) ← ? or (D) is admissible

(A) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, and the statement should in fairness be considered together with the other statement; or

(B) IN A CRIMINAL PROCEEDING FOR PERJURY OR FALSE STATEMENT IF THE DEFENDANT MADE THE STATEMENT UNDER OATH, ON THE RECORD, AND IN THE PRESENCE OF THE DEFENDANT'S ATTORNEY.

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~~ notify 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~~ object (or "suppress it") 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.	

(Compare 6(e)(1), 11(g).)

Recording the Proceedings

(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. (Is this Right?)
(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. (instituting)
(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 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 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 (A) the specific places where the defendant claims to have been at the time of the alleged offense; and (B) 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: (A) 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 (B) 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 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 Rules 12.1(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 an 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 an 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 an 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. (COMPARE 12.1(F).)

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 an 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~~ The 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~~ the 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. (WE'RE NOT CONSISTENT ABOUT THIS.)
(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. (NOT IN 12.1(c).)	**(b) Continuing Duty to Disclose.** Both ~~an~~ the 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.

INTENT

(Compare 12.1(F).)

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.

(Compare 12.1(F) and 12.2(e).)

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 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) **Defendant's 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 defendant's statements that the government intends to use as evidence.

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.

(See 45(b)(1)(B) and 57(a)(2).)

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 because of the 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.~~ unprivileged **(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.

(What does this modify?
- If it applies only to the last item: "any designated book, paper, document, record, recording or data or any other designated material that is not privileged."
- If it applies to all the items: "Any designated material that is not privileged, including any book, paper, document, record, recording, or data."

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~~ BEING WARNED by 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 of the DEPOSITION TRANSCRIPT

(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~~ Manner of Taking.** 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: TAKEN AND (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.** By Agreement The parties may by agreement take and use a deposition with the court's consent.

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 government requested the deposition, 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: (FIRST TIME WE'VE GONE TO 5 LEVELS. INSTEAD, MAYBE "if ——, ." AND 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~~ PREPARING 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~~ INVESTIGATING or ~~prosecution of~~ PROSECUTING 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.

(BREAK THE LINK TO "If."

(LOOKS AS IF IT MIGHT Modify "Buildings" OR PLACES." MAKE IT "buildings, PLACES, OR TANGIBLE OBJECTS."

(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. (WE ARE NOT CONSISTENT about this.)	(2) ***Failure to Comply.*** If a party fails to comply with ~~Rule 16~~ This rule, 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 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 Rule 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) In General 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) Quashing or Modifying the Subpoena On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

(We usually have headings at the (1), (2), (3) level.)

(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 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 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.

WHERE **COMMITTEE NOTE**
(SEE 6(e)(3)(E) & OTHERS.)

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.~~ [RESERVED]	**Rule 19. [~~Rescinded.~~]** RESERVED

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.

("This Rule" seems to refer to the Rule more generally — not a specific subpart. I guess either work here.)

(Sometimes we say "this Rule." Not sure I see the distinction.)

(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.

(COMPARE 20(b).)

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 new 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 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.~~] RESERVED

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 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.

(COMPARE (c)(4) BELOW.)

(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. (WE USE "CANNOT" IN 21(a), 25(a)(1) & (b), 31(b)(2) & (3), AND 32.1(a)(3)(B) & (b)(1)(B)(i))	**(c) Alternate Jurors.** (1) ***In General.*** The court may impanel up to ~~6~~ SIX alternate jurors to replace any jurors who ~~are unable to~~ CANNOT 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.
(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. THESE ADDITIONAL CHALLENGES	(3) ***~~Retention of~~ Retaining 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 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. (See 17(c))	**(b) After a Verdict or Finding of Guilty.** (1) IN GENERAL. 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) GRANTING A NEW TRIAL. 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 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.

EVERY

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.

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.

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 only style changes. Another version of Rule 26, which includes an amendment that would authorize a court to receive testimony from a remote location, is being published simultaneously in a separate pamphlet.

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 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.

(PLAIN ERROR ☺) — WITNESS'S

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. THEIR	**(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. ✓ THE
(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. ✓ THE

(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(e) (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 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 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 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 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.

(BREAKS THE LINK TO "If.")

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 a 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 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 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*, 527 U.S. 373, 388 (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~~ ON 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~~ ON 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~~ ON those counts. The government may retry any defendant on any count ~~as to~~ ON 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]

(THERE IS NO ANTECEDENT FOR THIS, EXCEPT IMPLICITLY. AN ALTERNATIVE: "... THE COURT MAY DECLARE A MISTRIAL ON THOSE COUNTS ON WHICH THE JURY HAS NOT AGREED. THE GOVERNMENT MAY RETRY ANY DEFENDANT ON THOSE COUNTS.")

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

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~~ This Rule.

(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. disobeys

(FOR CONSISTENCY WITH 26.2(e) AND OTHER RULES CITED IN 26.2(g).)

(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~~ CANNOT 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 32.2. [3]	**(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.

(SEE RULES cited at 23(c)(1).)

ORDER?

(MR. SPANIOL NOTES THAT A JUDGE "ISSUES" OR "APPROVES" AN ORDER OR A JUDGMENT.)

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

(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.	

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.

Revised Rule 32(a) contains definitions that currently appear in Rule 32(f). One substantive change was made in Rule 32(a)(2). The Committee expanded the definition of victims of crimes of violence or sexual abuse to include victims of child pornography under 18 U.S.C. §§ 2251-2257 (child pornography and related offenses). The Committee considered those victims to be similar to victims of sexual offenses under 18 U.S.C. §§ 2241-2248, who already possess that right.

Under current Rule 32(c)(1), the court is required to "rule on any unresolved objections to 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.

Revised Rule 32(h)(4)(B) provides for the right of certain victims to address the court during sentencing. As noted, *supra*, revised Rule 32(a)(2) expands the definition of victims in Rule 32(a)(2) to include victims of crimes under 18 U.S.C. §§ 2251-57 (child pornography and related offenses). Thus, they too will now be permitted to address the court.

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.

(COMPARE (b)(1)(a))

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 probable 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 a Statement.** Rule 26.2(a)–(d) and (f) applies at a hearing under this rule. If a party ~~does not comply with~~ a Rule 26.2~~(a)~~ order to produce a witness's statement, the court ~~cannot~~ consider that witness's testimony. MUST NOT disobeys (FOR CONSISTENCY WITH 26.2(e) AND OTHER RULES CITED IN 26.2(g).)

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 led 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 hearings. 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 (1972); *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).	**(b) Entering a 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.

a

REGARDING

THE GOVERNMENT SEEKS?

judgment of guilty? ←
(TO COVER A judge's
IN A NONjury TRIAL?)

(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.	(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 56 (Compare 38(g).)

(THE "if" CLAUSE IS RESTRICTIVE, OR ESSENTIAL, AS IN (c)(1)(B).)

(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. (WHY?) (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 the 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.

(OTHERWISE, IT'S SAME AS MAIN HEADING — THE (c) HEADING.)

(NOT PART OF SENTENCING)

(AN)

(NOT SUPPOSED TO READ "CONVICTION OF FORFEITURE," IS IT?)

(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).

(STILL SEEMS REDUNDANT WITH (e)(1).)

(COMPARE 23(a).)

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.

ALTERNATIVE:

"(2) THIRD-PARTY CLAIM: IF A THIRD PARTY FILES A PETITION CLAIMING AN INTEREST IN THE PROPERTY, THE COURT MUST CONDUCT AN ANCILLARY PROCEEDING UNDER RULE 32.2(c)."

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. (IT IS NOT IDIOMATIC TO SAY "SUCH FURTHER TIME THE COURT ACTS." COMPARE 34(b).)	**(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 as the court sets during the 7-day period.

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 a 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 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 after 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 more than one year after sentencing if the defendant's substantial assistance involved: (A) information not known to the defendant until more than one year after sentencing; or (B) information ~~provided by~~ the defendant to the government within one year of sentencing, but ~~which~~ did not become useful to the government 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 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 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. [4] 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.

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

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~~ The 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. The person (otherwise, gap between subject and verb.)
(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 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 in 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.

(BRYAN would CRINGE. WE have hyphenated PHRASAL ADJECTIVES THROUGHOUT.)

ENFORCING

✓ (PER Prof. Schlueter: DELETE "OR COVERTLY OBSERVE" IN (e)(2).) , OR COVERTLY OBSERVE,? (SEE (e)(2).) OR BE MOVED? (PROPERTY CAN'T MOVE ITSELF?)	**(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.

MUST

(PER PROF SCHLUETER)

(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.

(Compare (F)(1).)

(See page following for clean rewrite of (f)(2).)

(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.*** Noting the The officer executing the warrant must enter on ~~the~~ face ~~of the warrant~~ it the exact date and time it is executed. (2) ***Inventory.*** ~~An~~ The 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 whom 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. (As above.)

(Compare (e)(3)(D).)

(No good to combine in a list.)

The officer must prepare and verify the inventory

(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 any 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.	(What does "copy of" Modify? If just first two items: "A copy of the return and of the inventory, along with all other related papers, and must, etc." If all three items: "A copy of the return, of the inventory, and of all other related papers and must, etc.")

Rule 41(f)(2)

INVENTORY. THE OFFICER EXECUTING THE WARRANT MUST ALSO PREPARE AND VERIFY AN INVENTORY OF ANY PROPERTY SEIZED. THE OFFICER MUST DO SO IN THE PRESENCE OF ANOTHER OFFICER AND THE PERSON FROM WHOM, OR FROM WHOSE PREMISES, THE PROPERTY WAS TAKEN. IF EITHER ONE IS NOT PRESENT, THE OFFICER MUST PREPARE AND VERIFY THE INVENTORY IN THE PRESENCE OF AT LEAST ONE OTHER CREDIBLE PERSON.

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.

Current Rule 41(c)(1), 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 1972, apparently to reflect emerging federal case law. *See* Advisory Committee Note to 1972 Amendments to Rule 41 (citing cases). Similar language was added to Rule 4 in 1974. In the intervening years, however, 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.

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~~ this 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 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).

(OTHERWISE, "INCLUDE" SEEMS TO MODIFY OTHER TWO ITEMS.)

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). (NOT REFERRING TO WHOLE RULE.)	(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.
(OR OMIT "UNDER RULE 43(c)(1)")	(2) ***Waiver's Effect.*** If the defendant waives the right to be present under ~~this rule~~ RULE 43(c)(1), the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

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.

(See Rules cited at 23(c)(1).)

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 CANNOT ~~is unable to~~ obtain ~~c~~ounsel 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 may be 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 ~~c~~ounsel, 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 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 "retained or assigned" 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.** 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, 3 days are added to the period if service occurs in the manner provided under ~~Rule~~ 5(b)(2)(B), (C), or (D) ~~of the~~ Federal Rules of Civil Procedure.

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.

The additional three days provided by Rule 45(c) is extended to the means of service authorized by the new paragraph (D) added to Rule 5(b) of the Federal Rules of Civil Procedure, including — with the consent of the person served — service by electronic means. The means of service authorized in civil actions apply to criminal cases under Rule 49 (b).

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.

(AGAIN, THE "IF" CLAUSE IS ESSENTIAL TO MEANING.)

(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. (I'd SAY "MAY WHOLLY OR PARTIALLY SET ASIDE.")	**(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. (IT'S LIKE "FOR GOOD CAUSE" — AN INTERRUPTIVE ADVERBIAL PHRASE IN THE MIDDLE OF THE VERB PHRASE. IN (C), MIGHT BETTER MOVE IT TO THE BEGINNING OF THE SENTENCE.)	(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).

(NOT SMOOTH.)

(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. (Why plural? Against our guidelines.)	**(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(d), if a fine in the amount of the property's value would be an appropriate sentence for the charged offense. Detention Hearing;
(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. Not Producing (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.

(Same as others cited in 26.2(g).)

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(h) 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(d) 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 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(b), 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. 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 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 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 1112, 1116 (7th Cir. 1981) (suggesting that Rule 48(b) could provide alternate basis in an extreme case to dismiss an indictment, 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 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 proposed changes in the Federal Rules of Civil Procedure that 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 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 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 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 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 to Rule 26 that would permit remote transmission of live testimony. Those amendments would thus impact on Rule 53.

Rule 54. Application and Exception	Rule 54. (Reserved)[5]
(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.	

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

(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.

(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 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 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 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).

(See 17(c).)

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. (Compare 45(b)(1)(B).)	**(a) In General.** Creating Local Rules (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. Limit on Enforcing (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 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.

(They have been lowercase throughout. E.g. 12.2(e) 12.3(d) & (e).

Could omit "under this Rule.")

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 any 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. (COMPARE 11(a)(1).) (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~~ a CASE 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.	(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) **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.	(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.

Recording the Proceedings

(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 or 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 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 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~~
These rules may be known and cited as the Federal Rules of Criminal Procedure.	~~[Abrogated.]~~

COMMITTEE NOTE

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

C

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~~

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

~~magistrate judge shall proceed in accordance with the applicable subdivisions of 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 a 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.

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 violating probation or supervised release, or for failing to appear in another district, Rules 32.1 or 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 judge in that district. If no magistrate judge 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 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), derived from current Rule 5(c), has been retitled to more clearly reflect the subject of that subdivision and 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(f), 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 require 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(f), 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 require 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.

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. 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 hearing. *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.

31 **[ALTERNATIVE VERSION]**

32 (c) **Video Teleconferencing.** Video teleconferencing may

33 be used to arraign a defendant.

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. 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(f) 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. 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 the 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 an 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 an 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.

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 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.

(1) A party must file the Rule 12.4(a) statement upon its first appearance, pleading, petition, motion, response, or other request addressed to the court, and

(2) must 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 purpose 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 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 disclosure statement is at the point when the parties first have formal contact with the court in a 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.

~~**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.

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 compelling 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) and (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 Rule 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.

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 the 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 an order of 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.~~

~~**(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 counsel 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 to 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 equivalent to that of the defendant's counsel to speak to the court; and~~

~~(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 by 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 a 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 32.2.~~**

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

~~**(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.~~

~~**(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.~~

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.

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)(B)(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)(B)(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, 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 an 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.

Revised Rule 32(h)(4)(B) provides for the right of certain victims to address the court during sentencing. Revised Rule 32(a)(2) expands the definition of victims in Rule 32(a)(2) to include victims of crimes under 18 U.S.C. §§ 2251-57 (child pornography and related offenses). Thus, they too will now be permitted to address the court.

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 a 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 a 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.

(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.

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 crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or 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 the grounds for~~

~~issuing the warrant. If the federal magistrate judge or state judge is satisfied that 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 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 whom 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 Definition.** 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 to mean the 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 any 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.

(4) ***Scope.*** This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.

(5) ***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 who was observed or whose property was 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.

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, supra,* at 1337 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 v. 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.

Current Rule 41(c)(1), 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 1972, apparently to reflect emerging federal case law. *See* Advisory Committee Note to 1972 Amendments to Rule 41 (citing cases). Similar language was added to Rule 4 in 1974 and was included in the promulgation of Rule 5.1 in 1972. In the intervening years, however, 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.

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.

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. 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, initial 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 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.

RULES GOVERNING PROCEEDINGS IN THE UNITED STATES DISTRICT COURT UNDER § 2254 OF TITLE 28, UNITED STATES CODE

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~~ the clerk's 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.

(c) Appointment of counsel; time for hearing. If an evidentiary hearing is required the judge shall appoint counsel for a petitioner 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 case 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 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 obtain an order from the appropriate court

of appeals 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.

RULES GOVERNING PROCEEDINGS IN THE UNITED STATES DISTRICT COURT UNDER § 2255 OF TITLE 28, UNITED STATES CODE

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 the movant 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~~ the clerk's office in the criminal action in which was entered the judgment to which it is directed. ~~He~~ The clerk 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.

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Leave of court required. A party may invoke the processes of discovery available under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure or elsewhere in the usages and principles of law 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 movant who qualifies for appointment of counsel under 18 U.S.C. ~~§ 3006A(g).~~ § 3006A.

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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.

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~~abuse of the procedure governed by these rules.~~ Before a second or successive motion is presented to the district court, the applicant shall obtain an order from the appropriate court of appeals authorizing the district court to consider the motion.

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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.

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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.

D

W. Eugene Davis
U.S. COURT OF APPEALS, FIFTH CIRCUIT
Suite 5200, 800 Lafayette Street
Lafayette, LA 70501

February 12, 2001

Honorable Robin J. Cauthron
Chair, Committee on Defender Services
United States District Court
200 NW 4th Street
Oklahoma City, Oklahoma 73102

Subject: Proposed Amendments to Criminal Rules 5, 10 and 43

Dear Judge Cauthron:

Thank you for your January 30, 2001, letter commenting on the proposed amendments to Rules 5, 10, and 43 of the Federal Rules of Criminal Procedure. A copy of your letter has been sent to each member of the Advisory Committee on Criminal Rules.

The advisory committee meets in Washington, D.C., on April 25-27, 2001. Several witnesses, including representatives from the Public Defenders and the American Bar Association's Section on Criminal Justice, are scheduled to testify on the first day of the meeting. After the hearing, the committee will review and discuss all comments submitted on the proposed amendments. It will transmit its recommendations to the Committee on Rules of Practice and Procedure, chaired by Judge Anthony J. Scirica, which meets on June 7-8, 2001, in Philadelphia, Pennsylvania.

As you are aware the advisory committee has, since October 1992, wrestled with policy implications raised by the use of video conferencing at initial appearance and arraignment proceedings. In October 1993 we published amendments permitting video conferencing in certain proceedings with the defendant's consent. Your predecessor, Judge Diamond, asked us to defer consideration of the proposals pending completion of several ongoing video-conferencing pilot projects, including several projects involving arraignment proceedings. We agreed to wait for the completion of these pilot projects.

Unfortunately, the 1995 Federal Judicial Center pilot projects designed to assess the costs and benefits of video conferencing of arraignment and initial appearance proceedings collapsed because no defendants consented to the procedure. Lawyers and judges eschewed the option for fear of appellate reversal. It is unlikely that another pilot project permitting

video conferencing will succeed unless we authorize the procedure in the rules.

In August 2000, proposed amendments to Criminal Rules 5, 10, and 43 were published for comment. Pamphlets containing the proposals were distributed to each federal judge, and the proposals were posted on the Internet. The committee decided to publish the proposals because of several intervening developments, which are briefly summarized below.

1. The Judicial Conference has been actively promoting the use of video conferencing in various court proceedings. Over 100 federal court sites are now equipped with video conferencing capabilities. In its June 2000 report to the Judicial Conference, the Committee on Court Administration and Case Management noted that "various pretrial, civil and criminal proceedings, sentencings, settlement conferences, witness appearances in trials, arraignments, bankruptcy hearings, and appellate oral arguments are among the types of judicial proceedings in which this technology has been proven beneficial where compelling geographic and logistical conditions exist."

2. The recent explosion of criminal cases in the "border states" continues to place immense pressures on judges to handle huge caseloads. Many of these judges must hold court in courtrooms jammed with prisoners who have been transported long distances for court appearances--many of them perfunctory. These judges make the strong point that adequate security cannot be maintained under these circumstances. Several of these judges have understandably requested that the rules be changed to allow video conferencing of initial appearances and arraignments. They are convinced that these changes would give them substantial relief by: (1) reducing the number of prisoners in the courtroom to a level that permits adequate security; (2) allowing them to handle their caseload more efficiently; (3) improving the lot of the defendants who are now routinely transported over long distances for long periods of time under poor conditions; and (4) reducing the burden and security risks faced by the Marshal Service and their temporary security officers who are constantly shuttling prisoners long distances between jails and courthouses.

3. Many state courts routinely handle arraignment and initial appearance by video conference. In August 1997 the state of California issued a detailed cost/benefit analysis of the use of video conferencing in arraignment proceedings. The report

recommended continued use of video technology. Public defenders were particularly satisfied with the ability to use the machinery to consult with their clients.

4. In 1996, the Judicial Conference expanded the pilot project on video conferencing in prisoner civil rights pretrial proceedings to include many more courts.

We are not unaware that adoption of these proposed rule changes may require more travel by defense counsel. We do believe that much of this travel will be avoided in locations where counsel have secure video conferencing equipment available to communicate with their clients. Because of the potential benefits of the rule change referred to above, particularly the reduced security risks in transporting large numbers of defendants and holding them in large numbers in courtrooms, we believe it prudent to go forward with the proposed rule changes and seek the input of the bench, bar and public.

The advisory committee is sensitive to the fairness of using video conferencing in these pretrial proceedings. All agree that the proposed rule reposes the authority to use video conferencing within the sole discretion of the court, which goes a long way in obviating potential abuse. So, a court that has a strong need to conduct arraignments and initial appearances by video conference can elect to do so and other courts who do not have such a need can follow the existing procedure. Because of this judicial control there is strong support for mandatory use of video conferencing. On the other hand, there is also strong support to retain the defendant's consent, which appears to eliminate many of the fairness concerns. As we continue to work through this debate, the advisory committee is particularly interested in the views of your committee regarding the need to retain the defendant's consent in these proceedings.

I plan to call you next week and discuss this matter with you. I look forward to continuing this dialogue and seeing you at the Judicial Conference session in March.

Sincerely,

W. Eugene Davis

cc: Honorable Anthony J. Scirica
Professor Daniel R. Coquillette

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

January 24, 2001

MEMORANDUM

To: Honorable W. Eugene Davis, Honorable Edward E. Carnes, Honorable John M. Roll, Professor David A. Schlueter, and John Rabiej

From: Roger A. Pauley

Subject: Criminal Rules Amendments I Will Likely Propose At Subcommittee Meetings

The Criminal and Appellate Chiefs in the United States Attorneys Offices are currently studying the published rules and may suggest changes/problems with them. But I thought you might find it useful if I acquainted you with the list (sometimes with a brief explanation) of the minor amendments that my own review of the rules has produced and that I plan to raise at the Subcommittee meetings in March. (The list below is exclusive of any purely stylistic amendments).

1. Rule 1(a)(5). Add a final subdivision (F) restoring the exemption from applicability of the rules for a "proceeding against a witness in a foreign country under 28 U.S.C. § 1784," as per the discussion and vote at the last full Committee meeting.

2. Rule 4(c)(2). Amend the territorial limits provision to allow arrest warrants to be executed outside the jurisdiction of the United States if a statute authorizes an arrest in such place. This change is prompted by the recent enactment of the military extraterritorial jurisdiction statute that permits arrests by DOD personnel of civilian military dependents and contractors for crimes committed overseas, but there are also a number of other statutes that allow for out of country arrests, e.g. 14 U.S.C. 88 (Coast Guard). If federal law authorizes an arrest outside the United States, it makes no sense to require that the arrest be warrantless. Why not authorize execution of a warrant anytime a statute allows an arrest? Thus, (c)(2) would be rewritten as follows:

"(2) Territorial Limits.

(A) Within the Jurisdiction of the United States. Except as provided in this rule, a warrant may be executed, or a summons served, only within the jurisdiction of the United States.

(B) Outside the Jurisdiction of the United States. A warrant may be executed, or a summons served, outside the jurisdiction of the United States if a statute authorizes an arrest in such place." (New proposed matter in bold)

3. Rule 5(a)(1)(B). Add "Except as otherwise provided by statute," at the beginning of this subdivision, which requires that a person arrested outside the United States be taken without unnecessary delay before a magistrate. In order to avoid an argument that the rule would supersede the recently enacted military extraterritorial jurisdiction statute, the quoted exception must be inserted. The statute (new 18 U.S.C. 3264-5) allows an arrestee to opt to remain abroad following arrest and to have any initial appearance conducted by telephone.

4. Rule 6(e)(3)(A). Add a new subdivision (iii) stating "a person authorized by [18 U.S.C. § 3322][statute]". 18 U.S.C. 3322 operates as an exception to Rule 6(e) and authorizes disclosure of 6(e) material to an attorney for the government without a court order for purposes of enforcing civil forfeiture and civil banking laws, and disclosure to banking regulators with a court order on less than the normally required showing of particularized need. In order to preserve this statute from supersession clause challenges, the addition above is needed.

5. Rule 7(a)(1). Amend the introductory language to include an exception for criminal contempt, so that it reads: "An offense **(other than contempt)** must be prosecuted by an indictment", etc. The exception for contempt is consistent with caselaw. E.g., United States v. Eichhorst, 544 F.2d 1383 (7th Cir. 1976). The present rule's failure to recognize the exception creates an apparent conflict with Rule 42, which of course sets out a special procedure for instituting criminal contempt charges. In addition to making the above change (which could also be phrased in terms of a reference to Rule 42), the rule or the Note (here and/or in Rule 42) might wish to further explicate that, while contempt *need not* be charged by indictment, indictment is an alternative means of bringing contempt charges (along with the notice procedures spelled out in Rule 42). See United States v. Williams, 622 F.2d 830 (5th

Cir. 1980).

6. Rule 10(b). Consider adding a "good cause" requirement before allowing a defendant to waive arraignment altogether, in view of the fact that the seriousness and gravity of the charges are usually best conveyed by attendance at the proceeding (whether or not conducted by videoteleconferencing). The rule as published, to be sure, requires judicial consent to a waiver, but no standard for granting or withholding consent is set forth. (Alternatively make clear in the Note that judges should require "good cause" before consenting.)

7. Rule 17(a). Explore whether it is appropriate to have dropped the last sentence in the existing rule stating that a subpoena issued by a magistrate need not be under the court's seal. (Our published version would require that all subpoenas be with seal). Judge Miller is soliciting reaction from his colleagues.

Also consider adding explicit authority of the court to issue a subpoena. Since Rule 614 of the Evidence Rules permits the trial judge to call witnesses, it follows that the judge must have implied authority to issue a subpoena. Why not say so in Rule 17(a)?

8. Rule 17(g). Pursuant to my December 13, 2000, memorandum to Judge Davis and others, amend 17(g) to separate out contempts by magistrate judges, in order to reflect the recent enactment of the Federal Courts Improvements Act of 2000 (FCIA), which created contempt authority for magistrates but at the same time gave rise to several distinctions between magistrates' contempt authority and that of district judges. Judge Miller, though originally disagreeing with this proposal, has advised me he has become persuaded of its merit. Subdivision (g) would thus read:

"The court (other than a magistrate judge) may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a court[1] in that district. A magistrate judge may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by that magistrate judge[2] as

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[1]The word "federal" that appears in the published version before "court" is superfluous.

[2]The FCIA is explicit that a magistrate may punish solely for a violation of that magistrate's subpoena or order. This is contrary to the existing rule, that seemingly allows a judge to

provided by [statute][28 U.S.C. § 636(e)]."

9. Rule 24(b)(3). Consider amending the misdemeanor peremptory challenge provision that gives each side 3 peremptories to clarify its application or lack thereof to petty offenses. Rule 58, of course, says that jury trial is not required for petty offenses. But what if, though not required, a jury is empaneled, with all parties and the court's consent, in a petty offense case? (Does this ever happen?)(Nothing in Rule 23 or 58 precludes a jury trial when one is not mandated). If so, would/should each side be entitled to 3 peremptory challenges?

10. Rule 26. Delete "orally." This was a mistake in the published version that failed to reflect a Committee decision.

11. Rule 31(a). Insert "federal" before "judge." Given our definitions in Rule 1, it is necessary to make this change to assure that a federal verdict may not be delivered to a state judge (though the likelihood of such an event is remote).

12. Rule 32(h)(1)(B).[3] Amend this provision (which requires the court to give the defendant and his attorney a summary of information excluded from the presentence report on which the court will rely in sentencing) to make explicit that the requirement for disclosure also extends to the government. This is consistent with the existing rule, as we understand it, and (according to a random survey conducted at my request by the Department's Executive Office for United States Attorneys) with present practice. Rule 32 requires that the government's opportunity for allocution be "equivalent" to that of the defense. But it couldn't be equivalent if it wasn't based on, and thus could not address, all the information provided to the defense informing the court's sentencing decision.

13. Rule 32(h)(4)(C). Consider adding "and for good cause shown" after "Upon a party's motion." The published version amends this provision to allow a party's allocution to be heard in camera, upon motion of *any* party (rather than, as is now required) a joint motion of the defendant and the government). While the court retains discretion to deny or

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hold a witness in contempt for violating a subpoena issued by *another* judge in the district.

[3]This list does not include any change to the published version as regards the court's requirement to decide disputed matters in the presentence report that do not affect sentencing. That major issue is still under consideration.

grant the motion, it may be preferable to make clear in the rule that the standard for doing so is "good cause."

14. Rule 32.1(a)(3). Pursuant to the discussion at the last full Committee meeting, and my October 24, 2000, follow-up memorandum to Donald Goldberg and others,[4] strike subdivision (D), which would create a new requirement that an alleged probation or supervised release violator be advised at the initial appearance of a right not to make a statement and that any statement made can be sued against him. See Minnesota v. Murphy, 465 U.S. 420 (1984).

15. Rule 35(b)(2). Amend this provision to reflect the Committee's "straw poll" at the last meeting to include both published versions, each of which addressed a slightly different post-sentence cooperation scenario. I was directed to draft an amendment to this effect, and did so in an October 25, 2000, memorandum provided to all Subcommittee B members.[5]

16. Rule 41(d)(3)(B)(ii). Consider adding to this provision relating to telephonic search warrants the phrase "or cause to be made" after "make" in the language requiring the magistrate to make a verbatim record. The suggestion (which comes from AUSAs) is designed to accommodate the situation in which a magistrate's recording equipment fails, but the AUSA at the other end of the line has recording equipment. The magistrate could then instruct the AUSA to record the conversation and immediately deliver it to the magistrate, who could certify its correctness. I had some discussion with Judge Miller about this, and I think he undertook to solicit views from his colleagues, since he had never done a telephonic warrant.

17. Rule 42(b). Consistent with the suggestion regarding Rule 17(g) to separate out magistrates' contempt authority from that of district judges in light of the recent enactment of the Federal Courts Improvements Act of 2000, Rule 42(b), relating to summary contempt power generally, should be amended along similar lines. As per my December 13, 2000, memorandum, I suggest the following revision:

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[4]I would request that this memorandum, a copy of which was sent to John Rabiej, be provided to the Committee members in the agenda materials.

[5]I would request that this memorandum, a copy of which I am appending for convenience's sake, be included in the agenda materials for the full Committee meeting.

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

October 24, 2000

MEMORANDUM

To: Donald J. Goldberg, Esq., et al

From: Roger A. Pauley RAP

Subject: Rule 32.1 Proposed Warnings; Also Whether the Fifth Amendment Privilege in a Domestic Proceeding Requires a Real and Substantial Threat of Incrimination

You will recall that, in the course of considering the proposed expansion of Rule 32.1 to require the giving of a warning that the probationer or supervised releasee facing revocation need say nothing, the Criminal Rules Committee embarked on a somewhat tangential inquiry concerning the general scope of the Fifth Amendment privilege. (This is, of course, not the critical inquiry; the question at issue for the Committee is whether, even if a privilege exists, the person must or should be given a warning of his rights; see Minnesota v. Murphy, 465 U.S. 420 (1984), discussed infra). I asserted that, in order for the privilege to be validly invoked, a real and substantial danger of incrimination must be shown and that, for some kinds of probation or supervised release violations, such as breaches of travel or associational restrictions, no such danger was present even though theoretically such violations might constitute a contempt. Another example involving a hypothetical "dirty urine" sample was also discussed. You responded that, apart from a recent Supreme Court case involving the threat of foreign prosecution[1], you believed that the courts did not look to whether a substantial threat of incrimination existed and recognized the privilege if even a theoretical possibility of prosecution existed. I later promised to research the question and let you know the results.

Having now done so, it seems clear that a valid assertion

[1]The name of the case both of us remembered by content but not title is United States v. Balsys, 524 U.S. 666 (1998).

of the Fifth Amendment privilege in any setting requires a showing of a real and substantial danger of prosecution. E.g., Zicarelli v. New Jersey Investigation Commission, 406 U.S. 472, 478 (1972)("It is well established that the privilege protects against real dangers, not remote and speculative possibilities."). See also, citing additional authorities, 88 Georgetown L. J. 1317, 1433-4n.1813 (2000). The Zicarelli opinion, while involving a foreign prosecution threat, cited as support for the above-quoted proposition several cases involving domestic threats, among them Mason v. United States, 244 U.S. 362 (1917), where the Court found an invocation of the privilege unjustified. In that amusing case, a man who had been seated at a table in the Arctic Billiard Parlors in Nome, Alaska, when six other men were arrested in the premises, refused to answer questions regarding whether cards were being played at his or any other table at the time. But because Alaska law only made it a crime to play cards for money, the Court found the threat of self-incrimination from even an affirmative answer to be too remote to support the privilege. Many other examples of privilege invocations based on the fear of domestic prosecution yet held to be too speculative exist. See, e.g., United States v. Nickens, 955 F.2d 112, 127-8 (1st Cir. 1992).

In the context of probation revocation, the most salient precedent is Minnesota v. Murphy, 465 U.S. 420 (1984), where the Court upheld, against a claim of the Fifth Amendment privilege, the admission in respondent's murder trial of incriminating statements he made to his probation officer absent any warnings. Even though the probation officer "could compel Murphy's attendance and truthful answers" (id. at 431), consciously sought incriminating statements about the incident, and failed to give any Miranda-like warnings, the Court found any Fifth Amendment privilege inapplicable because nothing in State law or otherwise had conveyed a threat to the respondent that, if he had invoked the privilege, his probation would have been revoked. In other words, the Court said that, unlike the inherently coercive situation of custodial interrogation where the privilege applies even though not invoked, the privilege did not automatically apply in the probation interview context. The Court concluded that the general rule that a person questioned about potentially incriminating matters must assert the Fifth Amendment privilege was applicable in this situation.[2]

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[2]It would seem difficult to contend that a probation revocation proceeding before a judicial officer is inherently more coercive than an interview before a probation officer to whom one is obligated by the terms of his release to answer all questions truthfully.

Moreover, the Court noted that it had never held that warnings were required even for grand jury witnesses who are "placed in a setting conducive to truthtelling" and determined similarly that warnings were not required during a probation interview because "the totality of the circumstances is not such as to overbear a probationer's free will." Id. at 431.

Later, after stating that the privilege might well be applicable if a probation officer asked about a prior crime **and** coupled the question with a threat to revoke probation if the person invoked the privilege, the Court made the following interesting observations (along the lines of the point I attempted to make at our meeting)(id at 435n.7):

"The situation would be different if the questions put to a probationer were relevant to his probationary status and posed no realistic threat of incrimination in a separate criminal proceeding. If, for example, a residential restriction were imposed as a condition of probation, it would appear unlikely that a violation of that condition would be a criminal act. Hence, a claim of the Fifth Amendment privilege in response to questions relating to a residential condition could not validly rest on the ground that the answer might be used to incriminate if the probationer was tried for another crime."

In sum, it is clear, based on Minnesota v. Murphy, that the warnings proposed in Rule 32.1 go well beyond current law requirements. Not only is the Fifth Amendment privilege inapplicable to certain types of violations of probation and supervised release that do not constitute independent crimes, but even in the latter category no warnings need be given as a constitutional matter and the individual must himself invoke the privilege. I therefore continue to believe, as stated at the meeting, that the Committee's proposed amendment of Rule 32.1 to add a requirement that probationers and supervised releasees be given a warning that they may remain silent and that anything they say may be used against them is unjustified. The requirement of warnings will inevitably form the basis for a new kind of suppression motion, when the warnings are omitted or imperfectly imparted, that could keep reliable, uncoerced admissions from being considered. The Committee, of course, will decide this matter next April, but since you had expressed an interest (because of other litigation in your office) in the constitutional issue, I thought I should promptly pass on the fruits of my research.

All the best.

CC: Judge Davis, Professor Schlueter, and the members of Subcommittee B (Judges Roll and Miller, Professor Stith, and Lucien Campbell).

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

October 25, 2000

MEMORANDUM

To: Subcommittee B Members (Judges Roll and Miller, Professors Schlueter and Stith, and Lucien Campbell)

From: Roger A. Pauley

Subject: Rule 35(b)(2) Draft

Below is a draft of Rule 35(b)(2) that reflects the Committee's "straw poll" decision at our recent meeting to include both published versions of Rule 35(b)(2), together with my stylistic suggestion to make the introductory language of Rule 35(b)(2) parallel to that of Rule 35(b)(1). Although our Subcomittee meeting is a long way off, I wanted to get this down on paper while my memory is fresh.

"(2) Later Motion. Upon the government's motion made one year or more after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:

(A) information not known to the defendant until one year or more after sentencing;

(B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until one year or more after sentencing; or

(C) information the usefulness of which could not reasonably have been anticipated by the defendant until one year or more after sentencing [and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant] [and which was provided to the government within one year after its usefulness was reasonably apparent to the defendant]."

I would welcome any comments on the draft, including the

bracketed alternatives, and look forward to seeing everyone in D.C. in a few months.[1]

[1]Kate, you left before my invitation was extended and accepted to have the full Committee (and any spouses or companions) over to my house prior to the customary dinner after the first day of the full Committee meeting in April. I hope you (and others) will plan for this and be able to attend.

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

October 27, 2000

MEMORANDUM

To: Honorable Edward E. Carnes (Subcommittee A Chair), Honorable Tommy E. Miller, Professors Kate Stith and David A. Schlueter, and John Rabiej

From: Roger A. Pauley RAP

Subject: S. 768 (extraterritorial military dependents jurisdiction bill)

Yesterday the Senate passed S. 768, the "Military Extraterritorial Jurisdiction Act of 2000," clearing it for the President, who will certainly sign it into law. I have had intermittent communications about this bill (about which I testified before Congress) with many of you, and Judge Cabranes will doubtlessly be pleased that the gap in federal jurisdiction over extraterrritorial crimes by persons accompanying our armed forces, which he recently had occasion to discover and deplore in United States v. Gatlin, 216 F.3d 207 (2d Cir. 2000), has been remedied.

For our Committee's purposes, S. 768 will require a conforming change in Rule 5(a)(1)(B), relating to an initial appearance following arrest outside the United States. The bill contains special procedures that allow arrestees in certain circumstances to remain outside the United States until indictment, and that permit the initial appearance, appointment of counsel, and any detention hearing to be conducted telephonically. Thus, in order to avoid supersession clause problems, I believe our Rule 5(a)(1)(B) needs to be amended so that it begins with the phrase "Except as otherwise provided by statute,". The Note should be augmented by a sentence explaining that this language is needed to preserve the effect of new 18 U.S.C. 3264 and 3265, as enacted by S. 768 (the Public Law number for which should be available in a couple of weeks). I am attaching a copy of the bill for your information (although the attached pages reflect passage of a bill with a different number, H.R. 3380, the House later that day

substituted the text of its bill for that of S. 768 and passed the latter; the Senate acted yesterday to accept the House amendment to S. 768).

with the funding increase suggested by this motion.

In 1995, the budget for the Institution of Museum and Library Services was cut by more than 25 percent. Since then, the IMLS has seen only extremely modest increases in their funding levels. This motion to instruct provides much needed and very affordable relief by directing the conferees to accept a $600,000 increase for this agency, an amount that was responsibly added to this bill by the other body. This Institute of Museum and Library Services oversees America's 8,000 museums, connects schools, libraries and other institutions with many wonderful resources within their walls. With additional funding, IMLS can continue to administer the wonderful programs that connect our youth with history and expose all of us to worlds we have yet to know.

In an era where technology takes center stage in our society, we need new programs more than ever and not to forget to emphasize art, culture, and history. If we give these services nothing more than level funding, we send a message to the younger generation that it is okay to forget your past, it is okay not to have a place where individuals can see evidence of the greatness that came before them. Unless we approve this motion, we are contributing to the slow death of arts and culture in America. We owe our constituents much more than that.

Mr. Speaker, I urge all of my colleagues to vote in favor of the motion to instruct.

Mr. DICKS. Mr. Speaker, I reserve the balance of my time.

Mr. REGULA. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, this motion to instruct is a very small and modest amount for the Institute of Museum and Library Services, and it just requests that we take the Senate level, which was $600,000 above the House level, a good program. I urge adoption of the motion.

Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

Mr. DICKS. Mr. Speaker, I have no further requests for time, I yield back the balance of my time, and I move the previous question on the motion.

The previous question was ordered.

The SPEAKER pro tempore. The question is on the motion to instruct offered by the gentleman from Washington (Mr. DICKS).

The motion was agreed to.

The SPEAKER pro tempore. Without objection the Chair appoints the following conferees: Messrs. REGULA, KOLBE, SKEEN, TAYLOR of North Carolina, NETHERCUTT, WAMP, KINGSTON, PETERSON of Pennsylvania, YOUNG of Florida, DICKS, MURTHA, MORAN of Virginia, CRAMER, HINCHEY, and OBEY.

There was no objection.

ANNOUNCEMENT BY THE SPEAKER PRO TEMPORE

The SPEAKER pro tempore. Pursuant to clause 8 of rule XX, the Chair announces that he will postpone further proceedings today on the remaining motions to suspend the rules on which a recorded vote or the yeas and nays are ordered or on which the vote is objected to under clause 6 of rule XX.

Any record votes on postponed questions will be taken tomorrow.

MILITARY EXTRATERRITORIAL JURISDICTION ACT OF 2000

Mr. CHABOT. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 3380) to amend title 18, United States Code, to establish Federal jurisdiction over offenses committed outside the United States by persons employed by or accompanying the Armed Forces, or by members of the Armed Forces who are released or separated from active duty prior to being identified and prosecuted for the commission of such offenses, and for other purposes, as amended.

The Clerk read as follows:

H.R. 3380

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Military Extraterritorial Jurisdiction Act of 2000".

SEC. 2. FEDERAL JURISDICTION.

(a) CERTAIN CRIMINAL OFFENSES COMMITTED OUTSIDE THE UNITED STATES.—Title 18, United States Code, is amended by inserting after chapter 211 the following new chapter:

"CHAPTER 212—MILITARY EXTRATERRITORIAL JURISDICTION

"Sec.
"3261. Criminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States.
"3262. Arrest and commitment.
"3263. Delivery to authorities of foreign countries.
"3264. Limitation on removal.
"3265. Initial proceedings.
"3266. Regulations.
"3267. Definitions.

"§ 3261. Criminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States

"(a) Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States—

"(1) while employed by or accompanying the Armed Forces outside the United States; or

"(2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice),

shall be punished as provided for that offense.

"(b) No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated.

"(c) Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal.

"(d) No prosecution may be commenced against a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice) under this section unless—

"(1) such member ceases to be subject to such chapter; or

"(2) an indictment or information charges that the member committed the offense with 1 or more other defendants, at least 1 of whom is not subject to such chapter.

"§ 3262. Arrest and commitment

"(a) The Secretary of Defense may designate and authorize any person serving in a law enforcement position in the Department of Defense to arrest, in accordance with applicable international agreements, outside the United States any person described in section 3261(a) if there is probable cause to believe that such person violated section 3261(a).

"(b) Except as provided in sections 3263 and 3264, a person arrested under subsection (a) shall be delivered as soon as practicable to the custody of civilian law enforcement authorities of the United States for removal to the United States for judicial proceedings in relation to conduct referred to in such subsection unless such person has had charges brought against him or her under chapter 47 of title 10 for such conduct.

"§ 3263. Delivery to authorities of foreign countries

"(a) Any person designated and authorized under section 3262(a) may deliver a person described in section 3261(a) to the appropriate authorities of a foreign country in which such person is alleged to have violated section 3261(a) if—

"(1) appropriate authorities of that country request the delivery of the person to such country for trial for such conduct as an offense under the laws of that country; and

"(2) the delivery of such person to that country is authorized by a treaty or other international agreement to which the United States is a party.

"(b) The Secretary of Defense, in consultation with the Secretary of State, shall determine which officials of a foreign country constitute appropriate authorities for purposes of this section.

"§ 3264. Limitation on removal

"(a) Except as provided in subsection (b), and except for a person delivered to authorities of a foreign country under section 3263, a person arrested for or charged with a violation of section 3261(a) shall not be removed—

"(1) to the United States; or

"(2) to any foreign country other than a country in which such person is believed to have violated section 3261(a).

"(b) The limitation in subsection (a) does not apply if—

"(1) a Federal magistrate judge orders the person to be removed to the United States to be present at a detention hearing held pursuant to section 3142(f);

"(2) a Federal magistrate judge orders the detention of the person before trial pursuant to section 3142(e), in which case the person shall be promptly removed to the United States for purposes of such detention;

"(3) the person is entitled to, and does not waive, a preliminary examination under the Federal Rules of Criminal Procedure, in which case the person shall be removed to the United States in time for such examination;

"(4) a Federal magistrate judge otherwise orders the person to be removed to the United States; or

"(5) the Secretary of Defense determines that military necessity requires that the limitations in subsection (a) be waived, in which case the person shall be removed to the nearest United States military installation outside the United States adequate to detain the person and to facilitate the initial appearance described in section 3265(a).

"§ 3265. Initial proceedings

"(a)(1) In the case of any person arrested for or charged with a violation of section 3261(a) who is not delivered to authorities of a foreign country under section 3263, the initial appearance of that person under the Federal Rules of Criminal Procedure—

"(A) shall be conducted by a Federal magistrate judge; and

"(B) may be carried out by telephony or such other means that enables voice communication among the participants, including any counsel representing the person.

"(2) In conducting the initial appearance, the Federal magistrate judge shall also determine whether there is probable cause to believe that an offense under section 3261(a) was committed and that the person committed it.

"(3) If the Federal magistrate judge determines that probable cause exists that the person committed an offense under section 3261(a), and if no motion is made seeking the person's detention before trial, the Federal magistrate judge shall also determine at the initial appearance the conditions of the person's release before trial under chapter 207 of this title.

"(b) In the case of any person described in subsection (a), any detention hearing of that person under section 3142(f)—

"(1) shall be conducted by a Federal magistrate judge; and

"(2) at the request of the person, may be carried out by telephony or such other means that enables voice communication among the participants, including any counsel representing the person.

"(c)(1) If any initial proceeding under this section with respect to any such person is conducted while the person is outside the United States, and the person is entitled to have counsel appointed for purposes of such proceeding, the Federal magistrate judge may appoint as such counsel for purposes of such hearing a qualified military counsel.

"(2) For purposes of this subsection, the term 'qualified military counsel' means a judge advocate made available by the Secretary of Defense for purposes of such proceedings, who—

"(A) is a graduate of an accredited law school or is a member of the bar of a federal court or of the highest court of a State; and

"(B) is certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.

"§ 3266. Regulations

"(a) The Secretary of Defense, after consultation with the Secretary of State and the Attorney General, shall prescribe regulations governing the apprehension, detention, delivery, and removal of persons under this chapter and the facilitation of proceedings under section 3265. Such regulations shall be uniform throughout the Department of Defense.

"(b)(1) The Secretary of Defense, after consultation with the Secretary of State and the Attorney General, shall prescribe regulations requiring that, to the maximum extent practicable, notice shall be provided to any person employed by or accompanying the Armed Forces outside the United States who is not a national of the United States that such person is potentially subject to the criminal jurisdiction of the United States under this chapter.

"(2) A failure to provide notice in accordance with the regulations prescribed under paragraph (1) shall not defeat the jurisdiction of a court of the United States or provide a defense in any judicial proceeding arising under this chapter.

"(c) The regulations prescribed under this section, and any amendments to those regulations, shall not take effect before the date that is 90 days after the date on which the Secretary of Defense submits a report containing those regulations or amendments (as the case may be) to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate.

"§ 3267. Definitions

"As used in this chapter:

"(1) The term 'employed by the Armed Forces outside the United States' means—

"(A) employed as a civilian employee of the Department of Defense (including a nonappropriated fund instrumentality of the Department), as a Department of Defense contractor (including a subcontractor at any tier), or as an employee of a Department of Defense contractor (including a subcontractor at any tier);

"(B) present or residing outside the United States in connection with such employment; and

"(C) not a national of or ordinarily resident in the host nation.

"(2) The term 'accompanying the Armed Forces outside the United States' means—

"(A) a dependent of—

"(i) a member of the Armed Forces;

"(ii) a civilian employee of the Department of Defense (including a nonappropriated fund instrumentality of the Department); or

"(iii) a Department of Defense contractor (including a subcontractor at any tier) or an employee of a Department of Defense contractor (including a subcontractor at any tier);

"(B) residing with such member, civilian employee, contractor, or contractor employee outside the United States; and

"(C) not a national of or ordinarily resident in the host nation.

"(3) The term 'Armed Forces' has the meaning given the term 'armed forces' in section 101(a)(4) of title 10.

"(4) The terms 'Judge Advocate General' and 'judge advocate' have the meanings given such terms in section 801 of title 10.".

(b) CLERICAL AMENDMENT.—The table of chapters for part II of title 18, United States Code, is amended by inserting after the item relating to chapter 211 the following new item:

"213. Military extraterritorial jurisdiction ..... 3261".

The SPEAKER pro tempore. Pursuant to the rule, the gentleman from Ohio (Mr. CHABOT) and the gentleman from Virginia (Mr. SCOTT) each will control 20 minutes.

The Chair recognizes the gentleman from Ohio (Mr. CHABOT).

GENERAL LEAVE

Mr. CHABOT. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days within which to revise and extend their remarks and include extraneous material on H.R. 3380.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Ohio?

There was no objection.

Mr. CHABOT. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, H.R. 3380, the Military Extraterritorial Jurisdiction Act of 1999, was introduced by the gentleman from Georgia (Mr. CHAMBLISS) last year, together with the gentleman from Florida (Mr. MCCOLLUM), who is the chairman of the Subcommittee on Crime.

The bill as it is reported from the Committee on the Judiciary today is the product of close collaboration between the gentleman from Georgia (Mr. CHAMBLISS), the gentleman from Florida (Mr. MCCOLLUM), and the ranking minority member of the Subcommittee on Crime, the gentleman from Virginia (Mr. SCOTT). It also reflects the input of the Departments of Justice and Defense, the American Civil Liberties Union and the National Education Association. I am pleased to represent to the Members that the bill is supported by both the Defense and Justice Departments, as well as the ACLU and the NEA.

H.R. 3380 would amend Federal law to establish Federal criminal jurisdiction over offenses committed outside the United States by persons employed by or accompanying the United States Armed Forces. It would also establish Federal criminal jurisdiction over offenses committed outside the United States by members of the Armed Forces, but who are not tried for those crimes by military authorities and later cease to be the subject of military control. This bill fills the jurisdiction gap in the law that has allowed rapists, child molesters and a variety of other criminals to escape punishment for their crimes. This bill fills that gap and will help to ensure that persons who commit crimes while accompanying our Armed Forces abroad will be punished for their crimes.

Mr. Speaker, I am pleased to support it. The Committee on the Judiciary ordered the bill reported favorably by voice vote late last month.

Mr. Speaker, I am pleased to yield such time as he may consume to the gentleman from Georgia (Mr. CHAMBLISS), the original sponsor of the legislation. I would like to commend the gentleman for his leadership in this effort.

Mr. CHAMBLISS. Mr. Speaker, I thank the gentleman from Ohio for his leadership on this and for his cooperation in bringing this bill to the floor.

Mr. Speaker, I rise in strong support of this bill, which fixes a loophole in the law and is critical to enforcing justice and assisting America's military leaders in maintaining order and discipline among our Armed Forces.

In many cases, when a crime is committed by an American civilian who accompanies our military overseas, they may be subject to prosecution by the foreign government, or subject to provisions of an international agreement which governs how these cases are handled. However, too many times there are instances where American civilians attached to a military unit commit crimes outside the United States but cannot be prosecuted because the foreign governments decline to take any action and U.S. military or civilian law enforcement agencies lack the appropriate authority to prosecute these criminals. As a result, military commanders can only issue minor administrative sanctions as a punishment for

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
SUITE 173
WALTER E. HOFFMAN UNITED STATES COURTHOUSE
600 GRANBY STREET
NORFOLK, VIRGINIA 23510-1915
(757) 222-7007

CHAMBERS OF
TOMMY E. MILLER
UNITED STATES MAGISTRATE JUDGE

FACSIMILE NO.
(757) 222-7027

MEMORANDUM

TO: THE HONORABLE W. EUGENE DAVIS
CHAIR, CRIMINAL RULES ADVISORY COMMITTEE

FROM: TOMMY E. MILLER

RE: CRIMINAL RULES AMENDMENTS REQUIRED BY ENACTMENT OF THE FEDERAL COURTS IMPROVEMENT BILL OF 2000

DATE: DECEMBER 7, 2000

On November 13, 2000, the President signed the Federal Courts Improvement Act of 2000 (Public Law 106-518)(hereafter "Improvement Act"). I have reviewed the bill in its entirety and believe that only modest changes to one of our restyled criminal rules are necessary to comply with the bill. For your convenience, I have attached to this memorandum Sections 202 and 203 of the Improvement Act (Attachment 1). I have also attached Criminal Rules 17(g), 20(d), 42 (Attachment 2), and the pertinent parts of Rule 58 (Attachment 3) for your convenience.

Contempt Provisions

Section 202 of the Improvement Act amends 28 U.S.C. §636(e) to provide for limited contempt authority for United States Magistrate Judges. I have compared the provisions of Section 202 with Rule 42, Criminal Contempt, and have determined that no changes are required to Rule 42 in order to comply with the new statute. It appears that all our hard work creating the definition of "court" in Rule 1(b)(2), "federal judge" in Rule 1(b)(3), and "judge" in Rule 1(b)(4) provides for magistrate judges exercising contempt authority as authorized by the Improvement Act without amending Rule 42.

New 28 U.S.C. § 636(e)(2), Summary Criminal Contempt Authority, specifically references the Federal Rules of Criminal Procedure in setting forth the authority of the magistrate judge. Current Rule 42(a) and restyled Rule 42(b) are the provisions that a magistrate judge would use when exercising summary criminal contempt authority.

New 28 U.S.C. § 636(e)(3), Additional Criminal Contempt Authority in Civil Consent and Misdemeanor Cases, also specifically references the Federal Rules of Criminal Procedure. This reference is to current Rule 42(b) and restyled criminal Rule 42(a), which set forth the procedure a magistrate judge would use when exercising contempt authority in civil consent cases and in misdemeanor cases.

Title 28 U.S.C. § 636(e)(5) limits the penalties a magistrate judge may impose in a criminal contempt case to that of a Class C misdemeanor, 30 days' imprisonment and a fine of $5,000 (and a special assessment of $5.00). This limitation of penalties was specifically enacted to eliminate any constitutional concerns regarding a magistrate judge imprisoning a person for more than six months, as a district judge may do. This penalty provision does not affect the procedure that a magistrate judge must follow in order to impose criminal contempt either under the provisions of current or restyled Rule 42.

Fed. R. Crim. P. 17(g) provides for contempt sanction in the enforcement of subpoenas. I recommend no change to the restyled version of Rule 17(g) because the terms used in the rule cover a magistrate judge conducting a contempt hearing in either a civil or criminal case in which the magistrate judge is authorized to act by law. New 28 U.S.C. § 636(e)(3) provides for the appropriate authority for a magistrate judge to act in most cases where the magistrate judge is presiding over a case in which a contempt issue regarding subpoenas arises under Rule 17(g). If the magistrate judge has authority, the judge may then act. If it is a situation where the magistrate judge does not have the authority to act to enforce the subpoena by contempt sanctions, then the judge may certify the problem to a district judge under new 28 U.S.C. § 636(e)(6).

My only concern with the new contempt provisions is in 28 U.S.C. § 636(e)(7), Appeals of Magistrate Judge Contempt Orders. This section provides for a two-track avenue of appeal from a magistrate judge contempt order. Track one is a direct appeal to the Court of Appeals in cases proceeding under 28 U.S.C. § 636(c) civil consent cases. The other track covers all other cases and requires an appeal to a district judge in both civil and criminal contempt cases. I invite comment from other members of the committee as to whether a subsection 42(c) should be added cross-referencing this statute so those who are convicted under Fed. R. Crim. P. 42(a) or (b) would know the proper avenue of appeal. Alternatively, Rule 58(g)(2) could be amended to set out the avenue of appeal from a magistrate judge's order finding criminal contempt. If we determine that a cross-referencing provision should be added identifying the appeal route from a magistrate judge's finding of criminal contempt, I suggest that it be placed at Rule 42(c) instead of Rule 58. The provisions of Rule 58 directly address the appeals in petty offenses and misdemeanor cases of the run-of-the-mill variety and not the specialized finding of contempt. If the contempt appeal cross-reference were placed in Rule 58, it would be lost; whereas, if it were placed in Rule 42, anyone found guilty of criminal contempt would know the appeal avenue.

Juveniles

Professor Schleuter suggested that I look at Rule 20(d) regarding transfer for plea and sentencing of juveniles to see if Section 203(b) of the Improvement Act required any changes to Rule 20(d). No changes are required. Rule 20(d) relates solely to the consent of a juvenile to have a case transferred from one district to another in order for the juvenile to face trial in the transferee jurisdiction. The amendments to 28 U.S.C. § 636(a), as provided for in Section 203(b) of the Improvement Act, do not affect Rule 20(d) in any way. The new provisions give the power to a magistrate judge to enter a sentence of imprisonment for a petty offense involving juveniles and the power to try and sentence a juvenile in a Class A misdemeanor when the defendant consents. This section has nothing to do with the actual transfer of a

juvenile from one district to another so that the juvenile may enter a plea of guilty. If the juvenile enters a plea of guilty in the transferee jurisdiction to a misdemeanor or petty offense before a United States Magistrate Judge, then the magistrate judge is bound to follow all the procedures dealing with juveniles as if the juvenile had been originally charged in the transferee jurisdiction. I recommend no changes to Rule 20(d).

Petty Offenses

I recommend changes to Fed. R. Crim. P. 58. The changes are at three places and are identical. The change replaces the term "Class B misdemeanor motor vehicle offense, a Class C misdemeanor, or an infraction" with the term "petty offense." These changes are required at Rule 58(b)(2)(E)(i), Rule 58(b)(3)(A) and (B). I have attached the language in the restyled rules with the proposed changes in handwritten form. (Attachment 3).

The changes in Rule 58 are required by Section 203(a) of the Improvement Act, which now permits a magistrate judge to try any petty offense case without consent of the defendant.

I have examined the rest of the Improvement Act and do not see the need for changes to any other rules. Since Roger Pauley has written memos on a number of these rules recently, I am also sending a copy of this memo to him for his information.

cc: Professor David Schleuter
John Rabiej, Chief
Rules Committee Support Office
Roger Pauley, Esq.

adding at the end the following:

"(7) In districts that are not part of a United States trustee region as defined in section 581 of this title, the Judicial Conference of the United States may require the debtor in a case under chapter 11 of title 11 to pay fees equal to those imposed by paragraph (6) of this subsection. Such fees shall be deposited as offsetting receipts to the fund established under section 1931 of this title and shall remain available until expended.".

TITLE II—JUDICIAL PROCESS IMPROVEMENTS

SEC. 201. EXTENSION OF STATUTORY AUTHORITY FOR MAGISTRATE JUDGE POSITIONS TO BE ESTABLISHED IN THE DISTRICT COURTS OF GUAM AND THE NORTHERN MARIANA ISLANDS.

Section 631 of title 28, United States Code, is amended—

(1) by striking the first two sentences of subsection (a) and inserting the following: "The judges of each United States district court and the district courts of the Virgin Islands, Guam, and the Northern Mariana Islands shall appoint United States magistrate judges in such numbers and to serve at such locations within the judicial districts as the Judicial Conference may determine under this chapter. In the case of a magistrate judge appointed by the district court of the Virgin Islands, Guam, or the Northern Mariana Islands, this chapter shall apply as though the court appointing such a magistrate judge were a United States district court."; and

(2) by inserting in the first sentence of paragraph (2) of subsection (b) after "Commonwealth of Puerto Rico," the following: "the Territory of Guam, the Commonwealth of the Northern Mariana Islands,".

SEC. 202. MAGISTRATE JUDGE CONTEMPT AUTHORITY.

Section 636(e) of title 28, United States Code, is amended to read as follows:

"(e) CONTEMPT AUTHORITY.—

"(1) IN GENERAL.—A United States magistrate judge serving under this chapter shall have within the territorial jurisdiction prescribed by the appointment of such magistrate judge the power to exercise contempt authority as set forth in this subsection.

"(2) SUMMARY CRIMINAL CONTEMPT AUTHORITY.—A magistrate judge shall have the power to punish summarily by fine or imprisonment such contempt of the authority of such magistrate judge constituting misbehavior of any person in the magistrate judge's presence so as to obstruct the administration of justice. The order of contempt shall be issued under the Federal Rules of Criminal Procedure.

"(3) ADDITIONAL CRIMINAL CONTEMPT AUTHORITY IN CIVIL CONSENT AND MISDEMEANOR CASES.—In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under

Attachment 1

section 3401 of title 18, the magistrate judge shall have the power to punish, by fine or imprisonment, criminal contempt constituting disobedience or resistance to the magistrate judge's lawful writ, process, order, rule, decree, or command. Disposition of such contempt shall be conducted upon notice and hearing under the Federal Rules of Criminal Procedure.

"(4) CIVIL CONTEMPT AUTHORITY IN CIVIL CONSENT AND MISDEMEANOR CASES.—In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge may exercise the civil contempt authority of the district court. This paragraph shall not be construed to limit the authority of a magistrate judge to order sanctions under any other statute, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure.

"(5) CRIMINAL CONTEMPT PENALTIES.—The sentence imposed by a magistrate judge for any criminal contempt provided for in paragraphs (2) and (3) shall not exceed the penalties for a Class C misdemeanor as set forth in sections 3581(b)(8) and 3571(b)(6) of title 18.

"(6) CERTIFICATION OF OTHER CONTEMPTS TO THE DISTRICT COURT.—Upon the commission of any such act—

"(A) in any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, or in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, that may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection, or

"(B) in any other case or proceeding under subsection (a) or (b) of this section, or any other statute, where—

"(i) the act committed in the magistrate judge's presence may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection,

"(ii) the act that constitutes a criminal contempt occurs outside the presence of the magistrate judge, or

"(iii) the act constitutes a civil contempt,

the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

"(7) APPEALS OF MAGISTRATE JUDGE CONTEMPT ORDERS.—The appeal of an order of contempt under this subsection shall be made to the court of appeals in cases proceeding under subsection (c) of this section. The appeal of any other order

of contempt issued under this section shall be made to the district court.".

SEC. 203. CONSENT TO MAGISTRATE JUDGE AUTHORITY IN PETTY OFFENSE CASES AND MAGISTRATE JUDGE AUTHORITY IN MISDEMEANOR CASES INVOLVING JUVENILE DEFENDANTS.

(a) AMENDMENTS TO TITLE 18.—

(1) PETTY OFFENSE CASES.—Section 3401(b) of title 18, United States Code, is amended by striking "that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction," after "petty offense".

(2) CASES INVOLVING JUVENILES.—Section 3401(g) of title 18, United States Code, is amended—

(A) by striking the first sentence and inserting the following: "The magistrate judge may, in a petty offense case involving a juvenile, exercise all powers granted to the district court under chapter 403 of this title.";

(B) in the second sentence by striking "any other class B or C misdemeanor case" and inserting "the case of any misdemeanor, other than a petty offense,"; and

(C) by striking the last sentence.

(b) AMENDMENTS TO TITLE 28.—Section 636(a) of title 28, United States Code, is amended by striking paragraphs (4) and (5) and inserting the following:

"(4) the power to enter a sentence for a petty offense; and

"(5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.".

SEC. 204. [illegible] REPORTING REQUIREMENTS.

Section 604 of title 28, United States Code, is amended in subsection (a) by striking the second paragraph designated (24).

SEC. 205. MEMBERSHIP IN CIRCUIT JUDICIAL COUNCILS.

Section 332(a) of title 28, United States Code, is amended—

(1) by striking paragraph (3) and inserting the following:

"(3) Except for the chief judge of the circuit, either judges in regular active service or judges retired from regular active service under section 371(b) of this title may serve as members of the council. Service as a member of a judicial council by a judge retired from regular active service under section 371(b) may not be considered for meeting the requirements of section 371(f)(1) (A), (B), or (C).''; and

(2) in paragraph (5) by striking "retirement," and inserting "retirement under section 371(a) or 372(a) of this title,".

SEC. 206. SUNSET OF CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS.

Section 103(b)(2)(A) of the Civil Justice Reform Act of 1990 (Public Law 101–650; 104 Stat. 5096; 28 U.S.C. 471 note), as amended by Public Law 105–53 (111 Stat. 1173), is amended by inserting "471," after "sections".

SEC. 207. REPEAL OF COURT OF FEDERAL CLAIMS FILING FEE.

Section 2520 of title 28, United States Code, and the item relating to such section in the table of contents for chapter 165

Rule 17

(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.

Attachment 2

Rule 20

(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 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.

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.

(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: Petty offense (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.

Attachment 3

(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~~ Petty offense. 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~~ Petty offense, 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.

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

December 13, 2000

MEMORANDUM

To: Honorable W. Eugene Davis, Honorable Tommy E. Miller, and Professor David A. Schlueter

From: Roger A. Pauley

Subject: Judge Miller's Memorandum Relating to Amendments Necessitated by the Federal Courts Improvements Act of 2000

In these turbulent times, when the eyes of ordinary mortals are focused on the extraordinary events surrounding our Presidential election and the Supreme Court's historic opinion of yesterday, I know that your unwavering attention, as mine, is rather on the sublime issue of magistrates judges' contempt authority under the recently enacted Federal Courts Improvements Act of 2000 (FCIA), and in particular on Judge Miller's December 7, 2000, memorandum in which he concludes that no amendments to the pending restyled rules are necessitated by the FCIA, other than to Rule 58.

I agree with Judge Miller as to Rule 58 but otherwise must respectfully disagree, for the reasons set forth below.

Considering first Rule 17(g), as that rule is currently drafted for public comment, it allows the "court" to hold in contempt a witness who without adequate excuse disobeys a subpoena issued by a "federal court" in that district. As the Committee discussed at its last meeting, at the very least the word "federal" should be deleted since it is superfluous in light of the definition of "court" in Rule 1. Admittedly, this amendment is not prompted by the enactment of the FCIA. But there is another problem that is.

The Act amends 28 U.S.C. 636(e) to empower magistrate judges to hold persons in contempt for "disobedience or resistance to **the magistrate judge's** lawful writ, process, order, rule, or command." This clearly limits the magistrate

judge's contempt authority to cases in which *his own* order, not that of another magistrate or judge in the district, has been disobeyed. As I read our rule, however, there is no such limitation generally. Under the published rule (as indeed under the existing rule), a judge is empowered to hold in contempt a witness who disobeys the subpoena of *another* judge in the district. If the Committee doesn't intend this result, then we should clarify our own Rule 17(g).[1] But if we do (or if that is the current law), then the newly enacted statute is a limitation that the pending rule does not reflect.

With respect to general contempt procedures in Rule 42, there is also an inconsistency between the rule and the new statute. The rule simply speaks in terms of a "person who commits criminal contempt," whereas the statute says, as quoted above, that magistrate judges have contempt power only for disobedience or resistance to *lawful* orders, commands, etc. Leaving aside the question whether the universe of contempts is wholly defined by the nouns used in the statute (that is, whether there may be contempts other than for violating an order, command, etc.), the statutory limitation to violation of magistrate judges' "lawful" orders is clearly not consistent with the law of contempt generally. The Supreme Court has held that, where other avenues such as a stay or appeal are available to preserve a contemnor's interests, even an unlawful judicial order must be obeyed, and disobedience is punishable by contempt. E.g., Walker v. City of Birmingham, 388 U.S. 307 (1967); Maness v. Meyers, 419 U.S. 449, 458 (1975). This doctrine is applicable under federal law as well. E.g., United States v. Seale, 461 F.2d 345, 361 (7th Cir. 1972).

The final discrepancy between the FCIA and the contempt rules concerns summary contempt. Under both the existing rule (42(a)) and its published version (42(b)), the contemptuous conduct must have been seen or heard by the judge. But under the FCIA (28 U.S.C. 636(e)(2)) the conduct must occur "in the presence" of the magistrate judge and be such as to "obstruct the administration of justice." It is arguable that "presence" is broader than the existing rule since misbehavior could occur while the alleged contemnor was in the courtroom with the

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[1] I am troubled by the inclusion of Rule 17(g), which seems to me to define an offense and therefore to be beyond the scope of the Rules Enabling Act. You will recall that the Committee Note so concluded as to Rule 6(e)(7)(as published), which says that a violation of Rule 6 is punishable by contempt. But the saving grace there was that research showed that the contempt-defining provision was directly added by Congress. That is not the case for Rule 17(g). The Committee should consider this question, in my view.

magistrate judge but outside the judge's field of vision or hearing (e.g. stabbing a witness or whispering a threat). At the same time, the requirement that the conduct obstruct the administration of justice may well import a narrower scope than is covered by the current rule.

All of the above differences between the contempt rules and the FCIA lead me to believe that the best approach is to bifurcate the contempt rules so that the rules that spell out the procedures deal with contempts imposed by judges other than magistrates and address separately magistrate judge contempts through a cross-reference to the applicable statute. By way of illustration, Rule 42(b)(as published) would read:

Summary disposition. Notwithstanding any other provision of these rules -- **(1)** the court **(other than a magistrate judge)** may summarily punish a person, etc., **and (2) a magistrate judge may summarily punish a person as provided in [the applicable statute][28 U.S.C. 636(e)].**

The other affected rules would be amended in parallel fashion.

Lastly, my investigation of the contempt issue has unearthed a possible reason to amend Rule 7 dealing with indictment. Contempt represents a longstanding exception to the constitutional requirement for indictment in federal felony cases. It has always been the law that, regardless of the punishment imposed (which uniquely determines whether a contempt is a felony or a misdemeanor), a contempt prosecution need not be instituted by indictment but may be begun on proper notice under Rule 42. E.g., United States v. Mensik, 440 F.2d 1232 (4th Cir. 1971); United States v. Eichhorst, 544 F.2d 1383 (7thg Cir. 1976). Therefore, the categorical statement in Rule 7(a) that a felony "must be prosecuted by an indictment" should in my view be amended to reflect an exception for contempt.

I look forward to seeing you at the next meeting.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
SUITE 173
WALTER E. HOFFMAN UNITED STATES COURTHOUSE
600 GRANBY STREET
NORFOLK, VIRGINIA 23510-1915
(757) 222-7007

CHAMBERS OF
TOMMY E. MILLER
UNITED STATES MAGISTRATE JUDGE

FACSIMILE NO.
(757) 222-7027

MEMORANDUM

TO: THE HONORABLE W. EUGENE DAVIS
CHAIR, CRIMINAL RULES ADVISORY COMMITTEE

FROM: TOMMY E. MILLER

RE: AMENDMENTS TO THE CRIMINAL CONTEMPT RULES REQUIRED BY ENACTMENT OF THE FEDERAL COURTS IMPROVEMENT ACT OF 2000

DATE: FEBRUARY 7, 2001

On December 7, 2000, I sent you a memo suggesting that no changes are needed to the Criminal Rules by the enactment of the Federal Courts Improvement Act of 2000 (Public Law 106-518). Roger Pauley responded with a memo dated December 13, 2000, suggesting that some changes need to be made. He and I have had several telephone conversations and exchanges of memoranda since that date.

I am now persuaded that two modest changes to the Federal Rules of Criminal Procedure should be made to reduce confusion and also to assure that Magistrate Judges are in compliance with both the statute and the Federal Rules of Criminal Procedure when exercising their newly authorized contempt power.

Attached is a memorandum dated January 30, 2001, from Roger Pauley, setting forth his proposed language for restyled Rules 17(g) and 42(b). In this memo he provides a choice in drafting either using the language of the statute or the actual cite. My preference is to use the actual cite as the cross reference, to aid practitioners in discovering this new statute.

Roger and I also discussed the exercise of criminal contempt authority under the provisions of restyled Rule of Criminal Procedure 42(a). Unlike the restyled version of Rule 42(b), the restyled Rule 42(a) is a purely procedural provision and is cross referenced by 28 U.S.C. § 636(e)(3) as the procedure to be used for conducting a hearing on criminal contempt upon notice and hearing. We believe that no

amendment need be made in the restyled Rule 42(a) to accommodate the new provision under subsection 28 U.S.C. § 636(e)(3).

I am taking the liberty of forwarding a copy of this memorandum to Thomas Hnatowski, Chief, Magistrate Judges Division, and The Honorable Robert Collings, U.S. Magistrate Judge, Boston, Massachusetts. The Magistrate Judges Division played a key role in the drafting and legal research leading to the adoption of the Magistrate Judge contempt provisions and Judge Collings spent four years pushing this provision through Congress as the Legislative Advisor of the Federal Magistrate Judges Association. I am requesting that if they have comments regarding my memorandum they present them in writing to me and John Rabiej so that the appropriate subcommittees may consider their comments.

cc: The Honorable Robert Collings
Professor David Schleuter
John Rabiej, Chief
Rules Committee Support Office
Roger Pauley, Esq.
Thomas Hnatowski, Chief,
Magistrate Judges Division

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

January 30, 2001

MEMORANDUM

To: Honorable Tommy E. Miller

From: Roger A. Pauley RAP

Subject: Criminal Contempt

I got your telephone message from yesterday about drafting the criminal contempt rules to reflect enactment of the FCIA of 2000 and will call back later this morning. But as a prelude to our conversation to be, I wanted to provide you with a possible solution below. Perhaps the circularity you mentioned stems from the FCIA's provisions that reference the Federal Rules of Criminal Procedure in describing the procedural manner in which magistrate judge's are to issue contempt orders. 28 U.S.C. 636(e)(2) and (3). But I don't think this is an insuperable drafting problem, and (at least until persuaded otherwise) believe the draft below avoids circularity.

17(g) Contempt. A federal judge (other than a magistrate judge) may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a court in that district. A magistrate judge may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by that judge, under the circumstances and in the manner provided by [the applicable statute][28 U.S.C. § 636(e)].

42(b) Summary Disposition. Notwithstanding any other provision of these rules --

(1) a federal judge (other than a magistrate judge) may summarily punish a person who commits criminal contempt in the judge's presence if the judge saw or heard the contemptuous conduct and so certifies; and

(2) a magistrate judge may summarily punish a person for criminal contempt under the circumstances and in the manner provided by [the applicable statute][28 U.S.C. § 636(e)].

The contempt order must recite the facts, be signed by the judge, and be filed with the clerk.

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

January 8, 2001

Roger A. Pauley, Esq.
Dr., Ofc. Of Legislation, Crim. Div.
U.S. Dept. Of Justice
601 D St., N.W., Room 6637
Washington, D.C. 20530

Re: Rule 32, Federal Rules of Criminal Procedure

Dear Roger:

As you know from the discussion at the Standing Committee meeting last week, many, if not most of the judges on that committee, have concerns about our proposed revision to Rule 32. Their concerns, which I share, focus on our proposed committee note that in effect directs the district judges to rule on objections to the presentence report that may affect the Bureau of Prisons treatment of the prisoner during his incarceration.

Even if the Advisory Committee decides to retain this proposed amendment, I doubt that we can muster the votes in the Standing Committee to approve this change unless we can demonstrate that the change is absolutely essential. In order to help our Advisory Committee decide whether to retain this proposed change, I would appreciate it if you would see if you can have a knowledgeable official with the Bureau of Prisons attend our April meeting in Washington on April 25 or 26 to help us gain some insight into the necessity for this change. For example, the following questions occur to me:

(1) From the BOP's prospective, how well is the present system working? In other words when the defendant at sentencing objects to a provision in the PSR that may affect his future incarceration, are the judges resolving those objections?

(2) If the judges are not resolving those objections can the BOP give us some idea of objections that are not being resolved and how frequently this occurs.

(3) When a prisoner--after incarceration--challenges a statement in the PSR that is affecting his treatment in the

institution, what procedure if any does the BOP have in place to resolve these challenges?

Thanks for your help.

Sincerely,

W. Eugene Davis

cc: Mr. John K. Rabiej
Prof. David A. Schlueter

U.S. Department of Justice

Federal Bureau of Prisons

Washington, D.C. 20534
February 16, 2001

MEMORANDUM FOR ROGER PAULEY, DIRECTOR
OFFICE OF POLICY & LEGISLATION
CRIMINAL DIVISION

/s/
FROM: Christopher Erlewine
Assistant Director/General Counsel

SUBJECT: Bureau of Prisons Comments (#2) to Proposed Amendments, Rule 32, Fed. R. Crim. P.

Thank you for this opportunity to further comment on the proposed amendments to Rule 32, Fed. R. Crim. P. This memorandum addresses the issues raised in your December 18, 2000, memorandum, as well as Judge Davis' January 8, 2001, letter. In preparing this response, we solicited information from our regional and community corrections offices. For further assistance in this matter please contact Paul W. Layer, Assistant General Counsel, at (202) 307-2105.

How Well is the Present System Working?

In short, fairly well. None of our field inquiries revealed systemic deficiencies related to the courts' resolution of controverted PSR issues. A caveat to this comment, however, is that Bureau staff are rarely involved in sentencing and have limited exposure to the Rule 32 process of resolving PSR issues at sentencing. Instead, Bureau staff normally receive the PSR, and any subsequent amendments, after sentencing is complete.

Notwithstanding the lack of Bureau concerns with the Rule 32 process itself, and in response to your other inquiries, Bureau field staff responded that insuring the accuracy and completeness of the following PSR topics significantly assists post-sentence

administration, designations, and programming. These issues are presented in descending order of importance as reported by the field.

* **Current Offense Conduct** - Every office responded that a thorough description of "current offense conduct" is of greatest importance in post-sentence administration. Important information in this section includes the date of offense; descriptions of the bases for U.S.S.G. sentence enhancements; the amount of drugs for which the defendant is held responsible; and descriptions of the offender's use of violence, firearms, or sexual activity in committing the offense(s).

* **Prior and Pending Criminal Offenses** - Prior and pending criminal offenses play a major role in designating and programming inmates. Prior offense dispositions involving firearms, violence, escape, drug abuse, and sexual activity are especially important. Pending offense(s) information is necessary for lodging necessary detainers, which can affect an inmate's security status and facility designation.

  Additionally, one office indicated approximately 35%-40% of court recommendations for Intensive Confinement Center (ICC) placement are not fulfilled because inmates are ineligible based on prior offenses which were inaccurately or incompletely included in the PSR. Had the information been accurate and complete, it is possible the courts would never have made the recommendations.

* **Verification of Offender Provided Information** - The accuracy and completeness of following PSR information is important. Often times, however, the only source for this information is the inmate him/herself.

  * Substance abuse history;
  * Medical condition;
  * Education;
  * Financial resources;
  * Medical condition;
  * Immediate family members; and
  * Employment history.

  The accuracy of this information is vital to post-sentence programming such as Residential Drug Abuse Programs (RDAP) and Community Corrections Center (CCC) placements (commonly called "halfway houses"). Insuring offenders are placed in a facility which can provide the necessary level of health care is also vitally important, and often a topic of discussion at

sentencing.

* **Alien Status** - A recently sentenced offender's alien status may significantly impact initial security level and facility designations. Ideally, the PSR contains verified information obtained directly, and recently, from the Immigration and Naturalization Service (INS).

While the aforementioned areas are important to fulfilling the Bureau's primary function of appropriately designating and programming inmates, it is not clear that a Rule 32 amendment to address these issues is warranted. Instead, the Bureau may more effectively address these issues directly to the U.S. Probation Office, or have them included as part of the Committee Notes.

How Does the Bureau Resolve Inmate Complaints Alleging PSR Inaccuracies?

Unless an amendment or attachment directs otherwise, Bureau staff ordinarily accept and rely on the PSR in making post-sentence administration decisions. This is the case even if a PSR issue was contested at sentencing, but left unresolved by the court as not affecting the sentence imposed.

When alleged PSR inaccuracies exist, inmates normally notify Bureau staff without delay. The challenged information may be the basis for a designation, security level, or other programming decision, or simply maintained in the inmate's central file unattached to any specific Bureau decision. Whatever the case, this often results in the inmate protesting the Bureau's related decision, or challenging the mere fact that inaccurate information exists in the Bureau's inmate record.

Bureau policy is two-fold when dealing with inmate challenges to the accuracy of its inmate records. First, the Bureau exempted itself from the Privacy Act of 1974's amendment provisions. See 28 C.F.R. § 16.97. As detailed therein, the Bureau may legitimately deny inmate requests to "correct" its individual inmate records. This is often the case when "correcting" the information would require a labor intensive and extensive

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[1] Notwithstanding the Bureau's self-exemption from the Privacy Act's amendment provisions, it has not exempted itself (and probably cannot) from the Privacy Act's civil cause of action for monetary damages under 5 U.S.C. § 552a(g)(4). See

fact-finding process which would unreasonably disrupt Bureau functions, and possibly fail to ever resolve the disputed issue.[1] The second prong of Bureau policy requires staff to make "reasonable" efforts to correct information which can be easily verified. See Program Statement No. 1351.04, Release of Information (January 8, 1997). Staff choose this avenue when the inmate presents some credible evidence supporting the claimed inaccuracy, and which staff can follow-up for verification. With regards to PSR's, Bureau staff often forward the inmate's information directly to the Probation Officer who authored the report, requesting verification. Any response received is then filed along with the PSR in the central file. Bureau staff do not amend PSR's because they are written by probation officers and considered court documents. If not amended by the author, the most Bureau staff will do is attach a written statement to the record detailing the inmate's objection.

Are the Proposed Changes to Rule 32 "Absolutely Essential?"

Judge Davis questions whether resolving all "material" PSR issues, as suggested by the amendment language, is "absolutely essential." You both provide valuable insight to the Standing Committee's view that the PSR is primarily a tool for imposing sentences, and only secondarily, or collaterally, a tool for post-sentence administration.

Because the Bureau has no significant concerns with the current Rule 32 process, we would not object to an amendment which does not require court resolution of issues which only affect

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Sellers v. Bureau of Prisons, 959 F.2d 307 (D.C. Cir. 1992). In the D.C. Circuit, the elements of a title 5 U.S.C. § 552a(g)(4) cause of action against the agency are as follows: (1) that the agency failed to maintain sufficiently complete (or accurate) records; (2) that adverse agency action resulted from the incompleteness (or inaccuracy) of the records; and (3) that the agency's failure to maintain the files in sufficient form was done willfully or intentionally. White v. Office of Personnel Management, 840 F.2d 85 (D.C. Cir. 1988). The Bureau defends over one hundred such cases nationwide every year. Usually, inmates are challenging designation and programming decisions under the guise of a Privacy Act (g)(4) cause of action, and as the result of "inaccurate" inmate records. These cases are rarely, if ever, successful, but require significant Bureau resources to defend.

post-sentence administration. Nevertheless, in drafting Committee Notes, or otherwise providing guidance to the courts, we ask the Committee to recognize the Bureau's reliance on the PSR as the primary information tool for administering the sentence imposed. Consequently, language to this effect in Committee Notes to the Rule, or other court recommendations drafted by the Administrative Office of the U.S. Courts, would assist the Bureau in fulfilling its mission. Please feel free to consult us for assistance in drafting appropriate language.

Conclusion

As requested, Bureau staff are available to appear before the Advisory Committee March 22 or 23, 2001. Two staff from the Correctional Programs Divisions of the Central and Mid-Atlantic Regional Offices are available to attend. Additionally, Paul W. Layer, Assistant General Counsel, will attend. Please coordinate this meeting with Paul by calling him at (202) 307-2105.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Rule 32.1: Rights Warnings at Revocation Proceedings.

DATE: February 16, 2001

The Committee has added a new provision in Rule 32.1(a)(3)(D) that would require the court to give rights warnings to the defendant concerning the offense or act that leads to the possible revocation of probation or supervised release. The Committee Note recognizes that there may be a real question regarding whether there is any privilege left to claim with regard to the offense for which the defendant was convicted. But there should be a privilege, the Note continues, "regarding the alleged violation leading to the Rule 32.1 proceeding."

Mr. Pauley has prepared an extensive memo setting out reasons why the provision should be deleted. Memo to Mr. Goldberg, dated, October 24th.

I am attaching copies of pages from the LaFave and Israel text, *Criminal Procedure*, Second Edition, § 8-10 (1991). The 2000 Supplement to those pages includes a short discussion of *United States v. Balsys*, 524 U.S. 666 (1998) in which the Court held that a person could not claim protection under the Fifth Amendment for fear of foreign prosecutions.

What seems clear from the attached materials is that while the threat of incrimination must be "real and appreciable" and not "imaginary and unsubstantial," there is authority for the proposition that the courts should give the benefit of the doubt to the witness/defendant in making that assessment. *See* the quoted language from *Murphy* on page 417 of the text.

In theory, at least, much could be made of the level of danger the witness or defendant faces. While an argument might be made that the cases require a showing that the danger is 'substantial," it is not clear that that is what the cases require. As noted in the text, the Supreme Court has simply indicated that the danger be real and *appreciable*.

Even assuming that there may be case where there is really no appreciable danger of self-incrimination regarding the alleged violation of probation or supervised release, the question remains whether as a matter of policy (there is no case holding that such warnings are constitutionally required) such warnings should be given at a Rule 32.1 proceeding.

Several analogies arise. First, the court requires Miranda warnings before custodial interrogation of a person, without regard to whether the police believe that there

is a real and appreciable chance of self-incrimination. The court has simply concluded that the coercive environment of custodial interrogation requires such warnings. Thus, although warnings would not be required before a probation officer questions a defendant, such questions coming from a judge in a courtroom, following an arrest seems closer to the environment the *Miranda* case addressed. Such warnings are already required in Rule 5 proceedings—for generally the same reasons.

Second, as the attached material points out, although the Supreme Court has never held that rights warnings are required for persons appearing before grand juries, warnings for "target" witnesses are used in almost all jurisdictions—including federal grand juries. See page 421. If such warnings are given in grand jury proceedings, it would seem to be a short step to require the same protections for a defendant appearing before a magistrate judge in a Rule 32.1 proceeding.

I recommend that the current language in Rule 32.1(a)(3)(D) be retained.

hand, many courts also believe that recalcitrant grand jury witnesses, seeking delay, will not be reluctant to raise totally unfounded *Gelbard* objections. Balancing these concerns, some courts have concluded that the "mere assertion" of wiretapping is sufficient to require a response, but the prosecutor need not make an extensive investigation in responding to such a general claim. Other courts, however, have held that the prosecutor has no obligation to inquire and respond unless the witness makes some minimal showing, supported by specific factual averments. That showing may be based on the subject matter of the questions, the fact that the witness was required to furnish a voice exemplar, or unique telephone difficulties.

In determining whether a government denial of wiretapping is supported by sufficient investigation, the Court will consider the strength of the witness' showing that there may have been a wiretap, the likelihood that a particular unchecked source may have contributed to the investigation, and the range of the questions asked of the witness. The fact that law enforcement agents working directly on the case are unaware of a wiretap does not necessarily mean that one did not exist; the agents may be relying on information obtained from other agencies (perhaps more than once removed) that did come from a wiretap. However, prosecutors rarely are required to check with all seven of the federal agencies that customarily conduct electronic surveillance. Indeed, unless the witness' claim is supported by substantial indication of a probable wiretap, the courts are likely to permit a response that does not go beyond checking with the single agent in charge of the investigation.

§ 8.10 Grand Jury Testimony and the Privilege Against Self-Incrimination

(a) The Standard of Potential Incrimination. *Counselman v. Hitchcock,*[1] decided in 1892, put to rest any doubts as to whether the Fifth Amendment privilege against self-incrimination was available to a grand jury witness. The grand jury witness testifies pursuant to a subpoena so the requisite element of "compulsion" clearly is present. However, the Amendment states only that a person shall not be compelled to be a witness against himself "in a criminal case." But this language, the *Counselman* Court noted, refers to the eventual use of the testimony, not the nature of the proceeding in which testimony is compelled. The Fifth Amendment, it concluded, applies to a witness "in any proceeding" who is being compelled to give testimony that might be used against him in a subsequent criminal case.

Counselman furnished the subpoenaed party with what is undoubtedly his most significant safeguard in responding to a subpoena ad testificandum. Of course, the grand jury witness is not limited to the privilege against self-incrimination. He also may utilize any other testimonial privileges recognized in the particular jurisdiction. But it is the self-incrimination privilege that usually grants the witness his broadest range of privacy.

The Fifth Amendment privilege is available, of course, only where the compelled testimony causes a potential for incrimination. Although potential incrimination encompasses a great deal, it is not without limits. The threat of incrimination is limited only to criminal liability,[2] and that liability must relate to the witness himself, not others. Moreover, the threat must be "real and appreciа-

§ 8.10

1. 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110 (1892).

2. Incrimination in what the Fifth Amendment describes as a "criminal case" extends to the determination of sentence as well as the assessment of guilt. See Estelle v. Smith, discussed in § 6.10(e). It also includes liability in a criminal forfeiture proceeding, see Boyd v. United States, discussed at §§ 8.7(a) and 8.12(a), or in a juvenile delinquency proceeding that is based on a criminal violation and permits potential institutional commitment, see In re Gault, discussed in § 6.10(e). It does not include the classification of an accused as a sexually dangerous person where that classification is made strictly for rehabilitative treatment purposes and thus is analogous to a traditional civil commitment though it looks in part to a propensity to commit a criminal act (e.g., sexual assault). See Allen v. Illinois, discussed at § 6.10(e). See also, Estelle v. Smith, supra (privilege does not encompass the determination of competency to stand trial); Baxter v. Palmigiano, discussed in § 6.10(e) (prison discipline not within protection of privilege).

ble," not "imaginary and unsubstantial." A witness' assertion of the privilege is not conclusive in this regard. As *Hoffman v. United States*[3] stressed, "it is for the court to say whether [the witness'] silence is justified, and to require him to answer 'if it clearly appears to the court that he is mistaken.'" *Hoffman* also indicated, however, that courts are to give the witness every benefit of the doubt in reviewing his assertion of the privilege. The Court there noted:

> This provision of the [Fifth] Amendment must be accorded liberal construction in favor of the right it was intended to secure. The privilege afforded not only extends to answers that would in themselves support a conviction * * * but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. * * * [T]his protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. * * * However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.

Applying the *Hoffman* directive, it should be a rare case in which a claim of the privilege will be rejected by a court. Two leading decisions of the Supreme Court are illustrative. In *Hoffman* itself, the Court ruled that the district court had erred in holding the privilege inapplicable to questions concerning the witness' current occupation and his contacts with a person who was a fugitive witness. The lower court had held that there was "no real appreciable danger of incrimination," but the Supreme Court found that conclusion untenable. Since the lower court was aware that the grand jury was investigating racketeering, it should have recognized that questions concerning Hoffman's current occupation might require answers relating to violations of various gambling laws. It also should have recognized that the answers concerning Hoffman's contacts with the fugitive witness might relate to efforts to hide that witness. In *Malloy v. Hogan*,[4] the lower court was held to have erred in rejecting a self-incrimination claim by a witness who had pled guilty to a gambling charge and was now being asked about the circumstances surrounding his arrest and plea. The questions were obviously designed to determine the identity of his employer, and "if this person were still engaged in unlawful activity, disclosure of his identity might furnish a link in a chain of evidence sufficient to connect the [witness] with a more recent crime for which he still might be prosecuted."[5]

(b) Incrimination Under the Laws of Another Sovereign. For many years, American courts took the position that the privilege protected only against incrimination under the laws of the sovereign which was attempting to compel the incriminating testimony. Thus, if a witness appearing before a federal grand jury was granted immunity against federal prosecution, he could not refuse to testify on the ground that his answers might be incriminating under the laws of a state or a foreign nation. In *Murphy v. Waterfront Commission*,[6] the Supreme Court rejected this "separate sovereign" doctrine as applied to state and federal proceedings. Noting that the doctrine would allow a witness to

3. 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (1951).

4. 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

5. A different result would have followed if the questions were limited to the commission of the offense. Thus, Reina v. United States, 364 U.S. 507, 81 S.Ct. 260, 5 L.Ed.2d 249 (1960) notes: "The ordinary rule is that once a person is convicted of a crime, he no longer has the privilege against self-incrimination as he can no longer be incriminated by his testimony about the crime." However, if a person though convicted still has the opportunity for appellate review (and therefore a possible reversal and new trial), many courts hold that the privilege remains applicable as to questions concerning the offense. Where the individual has been pardoned or acquitted of the offense, the same standard applies as to a person whose conviction is final.

6. 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964).

be "whipsawed into incriminating himself under both state and federal law," the Court concluded that the "policies and purposes" of the Fifth Amendment required that the privilege protect "a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law."

Should *Murphy* be read as making the privilege available where testimony will be incriminating only in a foreign country? The *Murphy* opinion contains language suggesting that the separate sovereign doctrine has no stronger grounding as applied to prosecution by a different country than as applied to prosecution by a different jurisdiction within our federal system. On the other hand, *Murphy* was written within the context of the necessary reach of state and federal immunity grants. The federal government can grant immunity against state as well as federal prosecution, and state grants of immunity can be extended by federal courts to encompass federal prosecutions. Neither the federal government nor the states, however, have the authority to grant immunity against foreign prosecution.

In *Zicarelli v. New Jersey Investigation Commission,*[7] the Court suggested that it was an open issue as to whether a witness fully immunized under federal and state law could nevertheless plead the privilege because the state could not prevent "either prosecution or use of his testimony by a foreign sovereign." It also indicated that even if the privilege does apply to incrimination under foreign law, it may be used only when the witness would be in "real danger" of foreign prosecution, not simply relying upon a "remote and speculative possibility." Lower courts faced with self-incrimination claims based on potential foreign prosecution have commonly relied on this limitation to deny the claims without reaching the ultimate issue left open in *Zicarelli.* They have required the witness to make a substantial showing of likely foreign prosecution based upon both the applicability of foreign law and a demonstration of interest by foreign authorities in the enforcement of that law against a person in the witness' situation. Several courts have reasoned that the requirements of grand jury secrecy render the possibility that incriminating testimony will be "funneled to foreign officials" too "remote and speculative" to present the "real and substantial fear" required by *Zicarelli.*

(c) Compelling the Target to Appear. The self-incrimination privilege has long been held to prohibit the prosecution from forcing a defendant to appear as a witness at his own trial. Should the prosecutor similarly be prohibited from forcing the target of an investigation to appear before the grand jury, or is the Fifth Amendment satisfied by simply allowing the target-witness, like any other witness, to refuse to respond to individual questions where his answer might be incriminating? Several state courts have argued that the target of an investigation is, in effect, a "putative" or "de facto" defendant, and he therefore should be allowed to exercise his privilege in much the same manner as a "de jure defendant" at trial. They hold that, unless the target expressly waives his self-incrimination privilege, the prosecution cannot use the grand jury's subpoena authority to force him to appear. This protection presumably could be utilized by a subpoenaed target as a defense to a contempt charge for refusing to respond, but it most frequently comes into issue when the prosecution seeks to use against a defendant his earlier grand jury testimony that was given without an express waiver. The critical question for the court under this view of the privilege's protection therefore becomes whether the defendant was a mere witness or true target at the time he testified.[8]

7. 406 U.S. 472, 92 S.Ct. 1670, 32 L.Ed.2d 234 (1972).

8. In this setting, the issue posed is very much the same as that presented by prosecution use of the grand jury testimony of an "unwarned" witness in a jurisdiction that holds that the target may be compelled to appear (see discussion infra) but requires that the target be given appropriate warnings (see subsection (d) infra). Jurisdictions applying a prohibition against compelling the "putative defendant" to appear without an express waiver have experienced some difficulty in determining, in the context of a subsequent objection to the use of grand jury testimony, whether the witness fell within that category

Federal courts and most state courts have taken the position that the Fifth Amendment, as to all witnesses, presents only "an option of refusal and not a prohibition of inquiry." "The obligation to appear," the Supreme Court has noted, "is no different for a person who may himself be the subject of the grand jury inquiry." [9] The right of the defendant at trial to refrain from appearing as a witness is said to rest on considerations largely inapplicable to the grand jury. The defendant's right of silence grew out of the early common law rule on the incompetency of parties to testify, which had bearing only on the trial. It also rested in part on the fear that a defendant "forced in open court to refuse to answer questions" might be viewed by the jury as having something to hide. This concern has less significance in the grand jury setting; since that body looks only to the issue of probable cause, its proceedings need not be conducted "with the assiduous regard for the preservation of procedural safeguards which normally attends the ultimate trial of the issues."

Federal courts have also argued that the right to subpoena targets is inherent in the grand jury's combined investigative and shielding roles. Having an obligation to "run down every available clue," the grand jury cannot ignore the possibility that any one participant in a criminal enterprise may be willing to identify others. Having an obligation to "shield against arbitrary accusations," it has a right to be certain that the target's own testimony might not explain away the evidence against him. Some courts have also expressed concern that the establishment of a right not to appear based upon whether the prosecutor knew or should have known someone was a "target" would create a new source of tangential disputation.[10]

(d) Advice as to Rights. It generally is agreed that the Fifth Amendment does not demand that a non-target witness be advised of his privilege against self-incrimination. As to the target, however, there is a division of opinion. In the several jurisdictions in which the target cannot be compelled to appear without an express waiver, a notification of rights is an integral part of gaining such a waiver. In the vast majority of jurisdictions that do not recognize a target privilege not to appear, the courts have divided, with several of the more recent rulings holding that self-incrimination warnings are constitutionally

when he testified. It generally is agreed that a person already arrested on the charges under investigation falls within the category. Beyond that, some would prefer a subjectively oriented test (e.g., whether the prosecutor must have believed that an indictment would be sought against the witness), while others prefer a strictly objective test (e.g., whether the evidence known to the government established probable cause to believe the witness had committed a crime). New York, perhaps influenced by the difficulties posed in retrospective judicial identification of target witnesses, grants transactional immunity to all grand jury witnesses, subject only to the witness' right to waive that immunity. If the prosecution wishes to retain the possibility of bringing charges against a witness, it must obtain a written waiver from that witness (after giving complete warnings). See N.Y.—McKinney's Crim.P.Law §§ 190.40–190.45.

9. United States v. Dionisio, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973). See also United States v. Washington, infra note 15.

10. See note 8 supra. Federal courts have indicated that the prosecution may not subpoena an indicted defendant for the purpose of asking him questions relating to the subject of the indictment. See United States v. Mandujano, infra note 11 (Brennan, J., concurring); United States v. Doss, 545 F.2d 548 (6th Cir.1976), on rehearing 563 F.2d 265 (1977). It is not clear, however, whether this prohibition is thought to rest on the Fifth Amendment or the rule against use of the grand jury for post-indictment discovery. See § 8.8(e).

Internal Justice Department guidelines provide that targets ordinarily should not be subpoenaed, but asked to appear voluntarily. Targets may be subpoenaed only with the approval of both the grand jury and federal prosecutor. In making that determination, consideration is to be given both to the importance of the target's anticipated testimony and the availability of other sources of information. If the subpoenaed target then gives advance notice of an intention to claim the privilege, he ordinarily should be excused from appearing. The grand jury and prosecutor can jointly insist upon appearance, however, where justified by consideration of the importance of the testimony and the possible inapplicability of the privilege. Also, while not constitutionally compelled to do so (see United States v. Washington, infra note 15), federal prosecutors are directed to advise witnesses who are known targets of their target status. A target is defined as "a person as to whom the prosecutor or grand jury has substantial evidence linking him to the commission of a crime, and who, in the judgment of the prosecutor is a putative defendant." United States Attorneys' Manual §§ 9–11.250, 9–11.254.

required. In *United States v. Mandujano,*[11] the Supreme Court left the issue open for future consideration. *Mandujano* held that even if warnings were required, the failure to give the warnings could not constitute a defense to a perjury charge based on the witness' false grand jury testimony.[12] Six justices, however, went on to speak to the need for warnings, with four suggesting that they were not required even as to the target.

Although the witness in *Mandujano* had been informed of both his privilege against self-incrimination and his right to consult with counsel, the district court had held that that warning was insufficient. It had reasoned that the witness was a "putative defendant" and therefore should have been given full *Miranda* warnings,[13] including notification of a right to appointed counsel. Chief Justice Burger's plurality opinion, speaking for four members of the Court, rejected the district court's reasoning. *Miranda,* he noted, applied only to "custodial interrogation," which clearly did not include questioning before the grand jury. The position of the subpoenaed witness could hardly be compared to that of the arrestee subjected to interrogation in the "hostile" and "isolated" setting of the police station. The appropriate analogy was to the questioning of a witness in an administrative or judicial hearing. As noted by Justice Frankfurter in *United States v. Monia,*[14] a witness in that setting "if * * * he desires the protection of the privilege, * * * must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment."

Chief Justice Burger added that, since Mandujano had been given self-incrimination warnings, there was no need to rule on whether such warnings were constitutionally required. Nevertheless, the Chief Justice's reliance on *Monia* would indicate that grand jury witnesses, whether targets or non-targets, are not entitled to any special notification of rights. Rather, they would seem to bear the obligation, like witnesses generally, to assert the privilege on their own initiative. Justice Brennan, joined by Justice Marshall, viewed the Chief Justice's reference to *Monia* in this way, and responded that the plurality had read the privilege too narrowly. The *Monia* principle, he argued, rests on the assumption that the government ordinarily had no grounds for assuming that its compulsory processes are eliciting incriminating information. However, where the prosecutor is questioning a target witness, he is "acutely aware of the potentially incriminating nature of the disclosures sought." This knowledge, Justice Brennan reasoned, carried with it an obligation to advise the witness of his rights so as to ensure that any waiver of the privilege was "intelligent and intentional."

Justice Brennan's opinion in *Mandujano* did not stop with requiring warnings as to the privilege alone. In his view, the Fifth Amendment also required the prosecution to inform the target-witness that "he was currently subject to possible criminal prosecution for the commission of a stated crime." In *United States v. Washington,*[15] the Court rejected (over Justice Brennan's dissent) any suggestion that the Fifth Amendment required some form of "target" warning. The witness there had been given full *Miranda*-type warnings, but had not been told that he might be indicted in connection with his possession of a stolen motorcycle. The Court initially noted that previous discussions with the police and prosecutor had given the witness ample notice that he was a suspect in the motorcycle theft, but it then added that such awareness was, in any event, "largely irrelevant." A failure to give a potential defendant

11. 425 U.S. 564, 96 S.Ct. 1768, 48 L.Ed.2d 212 (1976).

12. The Court followed a long line of cases holding that "the Fifth Amendment privilege against compulsory self-incrimination provides no protection for the commission of perjury." See Id. (Stewart, J., concurring). In United States v. Wong, 431 U.S. 174, 97 S.Ct. 1823, 52 L.Ed.2d 231 (1977), the same principle was applied to uphold a perjury conviction of a witness who claimed that, due to language difficulties, she had misunderstood the self-incrimination warnings and had therefore testified under compulsion.

13. See § 6.8.

14. 317 U.S. 424, 63 S.Ct. 409, 87 L.Ed. 376 (1943) (Frankfurter, J., dissenting).

15. 431 U.S. 181, 97 S.Ct. 1814, 52 L.Ed.2d 238 (1977).

a target warning simply did not put the witness at a "constitutional disadvantage." His status as a target "neither enlarg[ed] nor diminish[ed]" the scope of his constitutional protection. He "knew better than anyone else" whether his answers would be incriminating, and he also knew that anything he did say, after failing to exercise the privilege, could be used against him. The "constitutional guarantee," the Court noted, ensures "only that the witness be not *compelled* to give self-incriminating testimony."

Although the Court in *Washington* again left open the constitutional necessity of providing self-incrimination warnings to target witnesses,[16] the warnings are now used in almost all jurisdictions. In addition to the various states in which courts have held the warnings to be constitutionally required, roughly a dozen others have added statutory requirements. In most other jurisdictions, prosecutors give warnings to targets as a matter of local practice. Indeed, in a substantial number of jurisdictions, warnings are given to all witnesses, whether target or not. Several jurisdictions impose such a requirement as a matter of state law, while prosecutors in others simply find it easier to attach a notification of rights to all subpoenas than to attempt to distinguish between targets and non-targets. The Justice Department has been following such a practice for several years. Opponents of that practice express concern that: (1) "improvidently given warnings" may unduly frighten the non-target witness and deter him from testifying freely; (2) warnings may lead the non-target witness to obtain counsel, causing him an unnecessary expense; and (3) giving non-target witnesses warnings would be inconsistent with the treatment of trial witnesses, who are not given such warnings. In the end, administrative convenience and the favorable experience in the federal system is likely to outweigh these concerns.

(e) Waiver. Assuming the witness receives those warnings, if any, that are constitutionally required, the privilege may be relinquished by a witness without an express statement of waiver. When the witness answers the question, his waiver is automatically assumed. Indeed, a witness may by providing certain incriminating information relinquish his right to raise the privilege with respect to further incriminating information. *Rogers v. United States*[17] is the leading case on such "testimonial waiver." The witness there testified before a grand jury that, as treasurer of the Communist Party of Denver, she had been in possession of party records, but had subsequently delivered those records to another person. She refused, however, to identify the recipient of the records, asserting that would be incriminating. A divided Supreme Court affirmed her contempt conviction, holding the privilege inapplicable. The Court noted that Rogers had already incriminated herself by admitting her party membership and past possession of the records; disclosure of her "acquaintanceship with her successor present[ed] no more than a 'mere imaginary possibility' of increasing the danger of prosecution." A witness would not be allowed to disclose a basic incriminating fact and then claim the privilege as to "details." To uphold such a claim of the privilege would "open the way to distortion of facts by permitting a witness to select any stopping point in her testimony."

Although *Rogers* often is described as posing great danger for the witness who answers even seemingly "innocuous questions," the decision actually is fairly limited. Courts have held, for example, that where a witness' initial admission related to only one element of an offense, that did not constitute a waiver as to questions that might require him to admit other elements of the offense. The fact that the second question asks for further detail as to the same event does not in itself establish that the privilege is not available. Indeed,

16. See also Minnesota v. Murphy, discussed at § 6.6, note 16, where the Court, in holding *Miranda* inapplicable to the interrogation there, noted that it "subjected Murphy to less intimidating pressure than is imposed on grand jury witnesses, who are sworn to tell the truth and placed in a setting conducive to truthtelling," but "we have never held that [*Miranda* warnings] must be given to grand jury witnesses."

17. 340 U.S. 367, 71 S.Ct. 438, 95 L.Ed. 344 (1951).

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

February 5, 2001

MEMORANDUM

To: Criminal Rules Committee

From: Roger A. Pauley RAP

Subject: Rule 52

Rule 52 is one of the rules assigned to me but which heretofore has not received close scrutiny by the Committee because no one (properly in my view) has suggested that it be modified in any substantive respect. I propose no such amendment here. However, I believe the Supreme Court's recent decisions interpreting Rule 52 strongly counsel at least one change in language from the form in which this rule was published for comment. This change may in turn suggest the appropriateness of another, though I conclude otherwise.

It is appropriate first to focus on Rule 52(b). The published version states: "A plain error or defect that affects substantial rights may be considered even though it was not brought to the court's attention." (This version is, and is intended to be, substantively the same as the existing rule, and embodies only stylistic differences.)

The Supreme Court explicated Rule 52(b) in United States v. Olano, 507 U.S. 725, 732 (1993), where it observed:

"Rule 52(b) defines a single category of forfeited-but-reversible error. Although it is possible to read the Rule in the disjunctive, as creating two separate categories - "plain errors" and "defects affecting substantial rights" - that reading is surely wrong. See Young, 470 U.S., at 15,n.12 (declining to adopt disjunctive reading). As we explained in Young, the phrase 'error or defect' is more simply read as 'error.' Ibid."

In its earlier Young decision (United States v. Young, 470 U.S. 1 (1985), the Court in footnote 12 discussed the rule's

history and drafting and remarked that: "The Committee's use of the disjunctive in the phrasing of the Rule is misleading, for as one commentator has noted, this 'may simply be a means of distinguishing for definitional purposes between 'errors' (e.g., exclusion of evidence) and 'defects' (e.g., defective pleading),' and in either case the Rule applies only to errors affecting substantial rights.'" [Citation to Moore's Federal Practice omitted]

Since the Court has found the words "or defect" in Rule 52(b) to be not merely redundant but "misleading," I recommend that they be removed.[1]

This suggestion, however, highlights the terminological difference between Rule 52(a) and 52(b) and poses the question whether the three nouns used in 52(a), besides "error," should likewise be deleted. Rule 52(a) provides as published (again identically to the existing rule save for stylistic changes): "Any error, defect, irregularity, or variance[2] that does not affect substantial rights must be disregarded."

To the best of my knowledge, no Supreme Court decision has explicated (as have the Olano and Young decisions for Rule 52(b)) whether the terms "defect, irregularity or variance" in Rule 52(a) add anything to "error." And while I doubt that the terms are anything but surplusage, there is at least nothing misleading about the noun string in Rule 52(a), since it is not reasonable to read the rule as creating "two separate categories" - errors, defects, and irregularities on the one hand, and variances that do *not* affect substantial rights on the other. I therefore recommend against any elimination of the nouns in Rule 52(a).

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[1]Ideally, the same change should be made in 28 U.S.C. 2111, which employs the same two nouns and formulation, but we do not have the power to effect this. See also Rule 61, F.R.Civ.P.

[2]The term "variance" is also used, alone, in the special harmless error provision of Rule 11(h).

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 4

I. SUMMARY OF COMMENTS: Rule 4

[To be completed]

II. LIST OF COMMENTATORS: Rule 4

CR-015 Judge Bernard Zimmerman, United States Magistrate Judge, United States District Court, ND California, January 26, 2001

III. COMMENTS: Rule 4

Judge Bernard Zimmerman (CR-015)
United States Magistrate Judge
United States District Court, ND California
January 26, 2001

In a short comment, Judge Zimmerman urges the Committee to consider amending Rule 4 to clarify the ability of the judge to issue warrants via facsimile transmission.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 5

I. SUMMARY OF COMMENTS: Rule 5

[To be completed]

II. LIST OF COMMENTATORS: Rule 5

CR-003	Guy Miller Struve (Committee on Fed. Courts, NY Bar Assn.), New York, N.Y., September 28, 2000
CR-004	Judge Alan B. Johnson, D.Wyoming, Cheyenne, WY, October 4, 2000
CR-007	Jack E. Horsley, Esq., Matoon, Illinois, October 13, 2000
CR-009	Andrew M. Franck, Esq., Williamsburg, VA, November 8, 2000
CR-011	Judge Paul D. Borman, United States District Judge, Detroit, Michigan, January 2, 2001
CR-013	Elizabeth Phillips Marsh, Professor of Law, ABA, Criminal Justice Section, January 10, 2001
CR-015	Judge Bernard Zimmerman, United States Magistrate Judge, United States District Court, ND California, January 26, 2001
CR-017	Judge Robin J. Cauthron, Chair, Committee on Defender Services, Judicial Conference, January 30, 2001
CR-018	Judge Robert P. Murrian, United States Magistrate Judge, ED Tenn., February 5, 2001
CR-019	Judge Thomas W. Phillips, United States Magistrate Judge, ED Tenn., February 5, 2001
CR-022	Judge James E. Seibert, United States Magistrate Judge, Wheeling West Virginia, February 7, 2001
CR-023	Judge William G. Hussmann, United States Magistrate Judge, Indianapolis, Indiana, February 5, 2001

CR-024	Judge Robert Collings, United States Magistrate Judge, Boston, Mass.' February 14, 2001.
CR-025	Dean A. Stang, Federal Defender, Eastern District of Wisconsin, Milwaukee, Wisc., February 12, 2001.
CR-026	Judge Michael J. Watanabe, United States Magistrate Judge, Denver, Colorado, February 13, 2001
CR-027	Thomas W. Hillier, II, Federal Public Defender, Western District of Washington, February 12, 2001
CR-029	Judge Cynthia Imbrogno, United States Magistrate Judge, Eastern District of Washington, February 12, 2001
CR-030	Judge William A. Knox, United States Judge, February 13, 2001
CR-031	Judge Leslie G. Foschio, United States Magistrate Judge, Buffalo, New York, February 13, 2001
CR-033	Larry Propes, Clerk of Court, United States District Court, South Carolina, February 13, 2001
CR-034	Judge Lorenzo F. Garcia, United States Magistrate Judge, United States District Court, Albuquerque, New Mexico, February 13, 2001
CR-035	Judge George P. Kazen, United States District Judge, Southern District of Texas, February 13, 2001
CR-036	Donna A. Bucella, United States Attorney, Middle District of Florida, Tampa, Florida, February 14, 2001
CR-037	Judge James E. Bredar, United States Magistrate Judge, United States District Court for Maryland, February 13, 2001
CR-038	Judge John C. Coughenour, Chief Judge, United States District Court, Western District of Washington, Seattle, Wash., February 6, 2001
CR-039	Judge Jerry A. Davis, United States Magistrate Judge, ND of Mississippi, February 12, 2001
CR-040	Judge Janice M. Stewart, United States Magistrate Judge, Portland, Oregon, February 12, 2001

CR-041 Judge David Nuffer, United States Magistrate Judge, St George, Utah, February 13, 2001

CR-042 Judge William Beaman, February 12, 2001

CR-043 Judge Susan K. Gauvey, United States Magistrate Judge, D. Maryland, February 15, 2001

CR-044 Federal Magistrate Judges Association (Draft Report—Subject to Board Ratification), February 15, 2001

CR-045 Judge Tommy Miller, United States Magistrate Judge, Eastern District of Virginia (Law Student Comments from William and Mary Law School, Williamsburg, Virginia), February 12, 2001

CR-046 Judge Ronald E. Longstaff, Chief Judge, Southern District of Iowa, February 15, 2001

CR-047 Judge Catherine A. Walter, United States Magistrate Judge, Topeka, Kansas, February 15, 2001

CR-048 Judge Mikel h. Williams, February 15, 2001

CR-049 Judge Richard A, Schell, Chief Judge, Eastern District of Texas, Beaumont, Texas, February 12, 2001

CR-050 Fredric F. Kay, Federal Public Defender, District of Arizona, Tucson, Arizona, February 15, 2001

III. COMMENTS: Rule 5

Guy Miller Struve CR-003
On behalf of the Committee on Federal Courts, NY Bar Assn.
New York, N.Y.
September 28, 2000

Writing on behalf of the Federal Courts Committee of the New York City Bar Association, Mr. Struve indicates that the Committee has a favorable impression of the amendments generally. But it opposes the amendment to Rule 5 that would permit video teleconferencing of initial appearances. He provides a long list of concerns, focusing primarily on the important need for the defense counsel and defendant to meet in person and conduct critical business. The Committee does not object to using video

teleconferencing for arraignments under Rule 10. That procedure, he notes, is often a formality. A rule 5 proceeding, on the other hand, is not a simple formality.

Judge Alan B. Johnson, CR-004
United States District Judge
D.Wyoming
Cheyenne, WY
October 4, 2000

Judge Johnson favors the proposed amendments to Rules 5, 5.1, 10, and 26 that would permit greater use of video teleconferencing and transmission of live testimony. He notes that in Wyoming the courts face problems with requiring prisoners and security personnel to travel great distances for relatively short appearances. That process is expensive and inefficient, given that at least two persons are detailed to transport prisoners. He adds that such movements are usually on short notice and do not provide an adequate opportunity for United States Marshals to screen and develop information on the general health of the individual. This presents special problems in light of exposure to resistant strains of tuberculosis. He notes that the Wyoming courts are equipped with excellent technology to use video teleconferencing.

Jack E. Horsley, Esq. (CR-007)
Matoon, Illinois
October 13, 2000

Mr. Horsley recommends that Rule 5(d) be amended by adding the words "or any other document," before the words "filed with it."

Andrew M. Franck, Esq.(CR-009)
Williamsburg, VA
November 8, 2000

Mr. Franck opposes the amendments to Rules 5, 10 and 43 that would permit video teleconferencing—even if the defendant consents. First, he notes, because the preliminary hearing and arraignment are administrative in nature, there is no practical problem of permitting video teleconferencing. But it is important for the defendant to be subjected to a personal appearance before the judge and realize the full impact of what he is facing. Also, is important for the judge to observe the defendant personally. He observes that there are always nuances involved in such proceedings and that it is critical that both parties are in each other's presence.

Judge Paul D. Borman (CR-011)
United States District Judge
Detroit, Michigan

January 2, 2001

Judge Borman has requested the opportunity to present testimony to the Committee.

Elizabeth Phillips Marsh (CR-013)
Professor of Law
ABA, Criminal Justice Section
January 10, 2001

Professor Marsh has requested the opportunity to present testimony to the Committee.

Judge Bernard Zimmerman (CR-015)
United States Magistrate Judge
United States District Court, ND California
January 26, 2001

Judge Zimmerman supports the amendments that would permit video teleconferencing. In his view, the amendments are long overdue. He also urges the Committee to consider amending Rule 4 to clarify the ability of the judge to issue warrants via facsimile transmission.

Judge Robin J. Cauthron (CR-017)
Chair, Committee on Defender Services
Judicial Conference of the United States
January 30, 2001

Judge Cauthron notes that her predecessor, Judge Diamond, had expressed concern in 1994 (when the Committee had last proposed video teleconferencing) that costs would not be saved by implementing video teleconferencing. Although the Committee's proposals were withdrawn pending the results of pilot programs, to date there has not been an analysis of cost or quality concerns. She requests that the Committee defer action on the video teleconferencing amendments until the Committee on Defender Services can discuss the impact of those amendments.

Judge Robert P. Murrian (CR-018)
United States Magistrate Judge
Eastern District of Tennessee
February 5, 2001

Judge Murrian supports the amendments that would provide for video teleconferencing—with or without the defendant's consent. He believes, however, that

the judge should have the prerogative to require the defendant to appear in court. In his division, considerable time and resources are spent transporting defendants eighteen miles to the court for routine initial appearances and arraignments that are little more than scheduling conferences.

Judge Thomas W. Phillips (CR-019)
United States Magistrate Judge
Eastern District of Tennessee
February 5, 2001

Judge Phillips writes that he agrees with the views of Judge Murrian, *supra*.

Judge James E. Seibert (CR-022)
United States Magistrate Judge
Northern District of West Virginia
Wheeling West Virginia
February 7, 2001

Judge Seibert strongly disagrees that the defendant should be allowed to determine whether video teleconferencing is used. He notes that it is a two, three, or four hour drive to the three other cities covered by the court and that it is often not possible to plan far enough in advance to have all of the defendants at a particular location ready to appear before the court. He notes that every lawyer and defendant who has appeared before him by video conference has been "extremely grateful for the prompt hearing that wastes neither time nor money of anyone." He states that he has never had any objection to appearance by video conference. On another matter, he strongly agrees that portions of Rules 32.1 and 40 belong in Rule 5.

Judge William G. Hussmann (CR-023)
United States Magistrate Judge
Indianapolis, Indiana
February 5, 2001

Judge Hussmann believes that video teleconferencing should occur only with the consent of the defendant. Although initial proceedings, etc have limited importance, they can have great impact on some practical issues. Because of increased caseloads and crowded jails, it is common to hear complaints from defendants that they are unable to talk to their lawyer or to talk to family members about bail or other pressing family matters. Appearing in person often presents an opportunity for communication. Although video technology has improved, in his view, it does not provide an appropriate venue for communications between counsel and family.

Judge Robert Collings(CR-024)
United States Magistrate Judge

Boston, Mass.
February 14, 2001.

Writing on behalf of Magistrate Judges Lawrence P. Cohen and Judith G. Dein, Judge Collings offers a revision to proposed Rule 5(c)(2)(A). They suggest that that provision be divided into two parts to deal with different situations. They approve of the proposed revision that allows a person arrested in one district to be brought before a magistrate judge in an adjacent district if the initial appearance can be held more promptly in that district. They believe, however, that provision should be made to allow a defendant arrested in one district to be brought before a magistrate in an adjacent district "if the adjacent district is the district in which the prosecution is pending and if the initial appearance will be held in that district on the same day as the arrest." In summary, they suggest carving out a different rule when the adjacent district is the district of prosecution.

Dean A. Stang (CR-025)
Federal Defender
Eastern District of Wisconsin
Milwaukee, Wisconsin
February 12, 2001.

Mr. Stang opposes the proposed amendments involving video teleconferencing. He indicates that initial appearances and arraignments are not pro forma events and that those proceedings provide both parties with an opportunity to discuss very important matters. Using teleconferencing will result in lost plea bargains, early cooperation, and prompt release decisions. He notes a number of practical problems that will arise and that teleconferencing makes no practical accommodation for interpreters. Mr. Hillier notes that he is not aware of any special danger to law enforcement officers or court personnel by requiring in-court appearances. Further, teleconferencing will interfere with the critical stages of forming an attorney-client relationship. Finally, teleconferencing will undermine both the dignity of the federal courts and Sixth Amendment values.

Judge Michael J. Watanabe(CR-026)
United States Magistrate Judge
Denver, Colorado
February 13, 2001

Judge Watanabe briefly writes that he strongly favors use of video teleconferencing. He states that he has used it in civil cases and that it works very well.

Thomas W. Hillier, II (CR-027)
Federal Public Defender
Western District of Washington
February 12, 2001

Mr. Hillier presents a detailed objection to the video teleconferencing amendments, on behalf or the Federal Public and Community Defenders. He notes that the current practice works well and that the initial appearance is not a pro forma proceeding. He presents a careful overview of the important decisions that are made in the face-to-face meetings between the defendant, the defense counsel, and the prosecutor. Those meetings, he asserts, assure prompt processing the case. Mr. Hillier believes that video teleconferencing is impractical and presents difficult situations for both the defendant and the defense counsel who must decide whether to remain at the courthouse, with the judge and the prosecutor or travel to where the defendant is located. He notes that the system is likely to result in increased costs and that no in-depth study has been conducted. Further, he observes that in Rule 10, the ability of the defendant to waive presence at the arraignment negates the need for teleconferencing in that rule. Finally, he identifies a list of unresolved issues and urges the Committee to table its proposals pending further study.

Judge Cynthia Imbrogno (CR-029)
United States Magistrate Judge
Eastern District of Washington
February 12, 2001

Judge Imbrogno enthusiastically supports the video teleconferencing amendments. She writes that there are only two magistrate judges covering the Eastern District of Washington and that they often drive over three hours (one way) to conduct proceedings in other cities within the district. As a result, some duty stations are not covered because of the need to spend time traveling. She notes that the technology is sufficiently advanced to maintain the integrity of the proceedings. Defense counsel, she writes, are very supportive of teleconferencing because it gives them greater flexibility in scheduling. She would support video teleconferencing without requiring the defendant's consent.

Judge William A. Knox (CR-030)
United States Judge
February 13, 2001

Judge Knox favors video teleconferencing. He says that he has used it in civil proceedings, including trials, and finds it to be "reliable, practical, efficient, and [has had] no difficulty protecting the rights of the parties. Judge Knox states that if the equipment is poor it is a waste of time to use it.

Judge Leslie G. Foschio (CR-031)
United States Magistrate Judge
Buffalo, New York

the considerable apprehension about this proposal, it would be prudent to adopt a proposal that requires the defendant's consent.

Donna A. Bucella (CR-036)
United States Attorney
Middle District of Florida,
Tampa, Florida
February 14, 2001

Ms. Bucella observes that if the defendant is allowed to waive appearances at an arraignment, the government's consent should be required. She also notes that the Committee Note is ambiguous on just how video teleconferencing will be accomplished for initial appearances. She adds that if the purpose of the amendments is to save money, that the Committee ought to say so explicitly.

Judge James E. Bredar (CR-037)
United States Magistrate Judge
United States District Court for Maryland
February 13, 2001

Judge Bredar opposes the use of video teleconferencing. He believes that there is much at stake in federal criminal cases and that the sooner the defendant understands the gravity of his situation, the better. He adds that from his time as a public defender, there nothing that helps to focus the mind than to walk into a federal courtroom. He believes that the overall process will be "denigrated" by reducing those appearances to a television experience.

Judge John C. Coughenour (CR-038)
Chief Judge, United States District Court
Western District of Washington
Seattle, Washington
February 6, 2001

Judge Coughenour opposes video teleconferencing in proposed Rules 5 and 10. In his view, the solemnity and fairness of the defendant's appearance in court in the presence of counsel and the judge far outweigh the security problems. The solution, he notes, is heightened vigilance and not the sacrifice of cherished traditions. His views, he notes, are based on his research into the issue: in 1990 he was a member of the Court Administration and Case Management Committee which had supervised a pilot program. As a result of that study, the Committee had believed strongly that video teleconferencing seriously eroded the full and fair examination of facts and witnesses. He urges the Committee to reject the amendments.

Judge Jerry A. Davis (CR-039)

United States Magistrate Judge
ND of Mississippi
February 12, 2001

Judge Davis endorses video teleconferencing. He notes that state courts have been using it for years and that he has been using it for prisoner cases for several years and that there are no "downsides." He observed that it is useful for security purposes and in rural areas. He concludes by noting that any perceived constitutional problems are imagined, not real.

Judge Janice M. Stewart (CR-040)
United States Magistrate Judge
Portland, Oregon
February 12, 2001

Judge Steward favors the proposals for video teleconferencing. But due to concerns about separating the defendant and defense counsel and the problems that that creates, she believes video teleconferencing should be used only where the defendant consents.

Judge David Nuffer (CR-041)
United States Magistrate Judge
St George, Utah
February 13, 2001

Judge Nuffer, a part time magistrate judge, strongly favors video teleconferencing. In Utah he works 300 miles from the courthouse.

Judge William Beaman (CR-042)
February 12, 2001

Judge Beaman strongly approves of video teleconferencing, but would require the defendant's consent.

Judge Susan K. Gauvey (CR-043)
United States Magistrate Judge
District of Maryland
February 15, 2001

Judge Gauvey recounts her experiences in the Maryland state courts with video teleconferencing. She observed what she calls assembly line justice. The proceedings were held in a large room and appeared surreal and chilling. There was no communication between the judge and the defendant. In contrast, in federal courts, all

parties are more focused and she is concerned that a judge could not pick up the subtle hesitations or halting speech or odd manner that may be signs of impairment.

Federal Magistrate Judges Association (CR-044)
(Draft Report—Subject to Board Ratification)
February 15, 2001

The Magistrate Judges Association supports the proposed video teleconferencing. The Association recounts the benefits of using such procedures and suggests that some of the concerns about the erosion of the process might be addressed if the judge visits the detention facility and determines if that facility as a room suitable for conducting teleconferencing, along with a private telephone line and a room where the defendant can consult in private with his or her attorney. The Association favors video conferencing without requiring the defendant's consent.

Judge Tommy Miller (CR-045)
United States Magistrate Judge, Eastern District of Virginia
(Law Student Comments from William and Mary Law School, Williamsburg, Virginia)
February 12, 2001

Judge Miller, a member of the Criminal Rules Committee, submitted ten written comments from the law students in his Criminal Procedure class at William and Mary. One of the students, Kimberly Marinoff, expresses concern about the video conferencing provision. She believes that it "eviscerates the utility" of the proceedings "as a wake-up call by insulating the accused from the physical presence of the judge." She concludes, however, that if the amendment is to remain, she would support the alternate version that requires the defendant's consent.

Another student, Tom Brzozowski, applauds the style changes to the rules, but suggests that the Committee include a provision in Rule 5 that would make clear what the remedy is for failure to comply with the timing requirements of the rule. He provides a summary of the conflicting caselaw and statutory provisions and argues that whatever remedy the Committee chooses would provide predictability to practitioners.

A third student, James Ewing, addresses the video teleconferencing provisions. He cites the historical arguments for the right of the defendant to appear personally in court and believes that even if a defendant consents to video teleconferencing, there may be problems with the perception of fairness. Thus, video conferencing should be the exception rather than the general rule, even where the defendant consents.

Judge Ronald E. Longstaff (CR-046)
Chief Judge, Southern District of Iowa

February 15, 2001

On behalf of the judges of his district, Judge Longstaff indicates that they agree with the comments submitted by Magistrate Judges Cohen, Dien, and Collings, *supra* concerning taking defendants to a magistrate in an adjacent district. They also support the changes for video teleconferencing and would comport to court technology procedures already in place, including both districts in Iowa.

Judge Catherine A. Walter (CR-047)
United States Magistrate Judge
Topeka, Kansas
February 15, 2001

Although she has not used video teleconferencing, Judge Walter supports it use, especially for initial appearances. She notes that the facility used to house pretrial detainees (an hour's drive from her court) has recently installed videoconferencing equipment. In her view the opportunity for the earliest time for the hearing is more important than a face-to-face appearance before a judge. She notes that there have been occasions where the availability of video conferencing would have resulted in an earlier initial appearance.

Judge Mikel H. Williams (CR-048)
February 15, 2001

Judge Williams commends the Committee for its thorough reorganization of the criminal rules and fully endorses the use of video teleconferencing for initial criminal proceedings. He notes that for the last four years his courts have used such procedures for initial criminal proceedings; they adopted the program because of concerns for serious delays in scheduling the various parties for the hearings. The district court for Idaho covers the entire state and the 400 miles distances make automobile transportation impractical and air travel can be delayed by weather. Transporting the defendants presents similar problems. He describes the process used in his district--the defendant is taken to the closest federal courthouse where he meets his CJS counsel and within two or three hours the defendant appears with counsel before the magistrate judge via video. He cannot recall a single instance where the defendant objected to that procedure; he considers the program to be a resounding success. The defendant's rights are immediately addressed and the proceeding is conducted with the same formality as if the defendant were in the judge's court. Although he would prefer to have a rule not requiring the defendant's consent, he believes that obtaining consent is not a burden.

Judge Richard A, Schell (CR-049)
Chief Judge, Eastern District of Texas
Beaumont, Texas
February 12, 2001

Judge Schell supports the proposed amendments for video teleconferencing. Although he would prefer the version that does not require consent, a rule that requires the defendant's consent is imminently reasonable. He urges the Committee to consider extending video conferencing to pleas and sentencing. He notes the long distances involved in his district and the fact that he has been used video teleconferencing for several years for sentencing and for guilty pleas, with the defendant's consent.

Fredric F. Kay (CR-050)
Federal Public Defender, District of Arizona
Tucson, Arizona
February 15, 2001

Mr. Kay writes that in the District of Arizona there are four lawyers in his office and that in FY 2000 they were appointed to represent about 8000 indigent defendants. Many of those were immigration cases. He agrees with the views expressed by Mr. Tom Hillier, *supra,* and strongly urges the Committee to reject the amendments. He knows of no serious cost and security concerns that would support the proposed amendments and that they should not outweigh the important aspects of having the defendant and counsel appear personally before the judge. He has watched video proceedings in the state system and has observed the defendant sitting by himself in a chair answering the judge's questions. The judges he notes, may have questions about the defendant's capacity and they have to ask a guard whether the defendant appears to be sober. Using video conferencing is something that one might expect in a weird third world country where there is no concept of presumption of innocence.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 5.1

I. SUMMARY OF COMMENTS: Rule 5.1

[To be completed]

II. LIST OF COMMENTATORS: Rule 5.1

CR-004	Judge Alan B. Johnson, United States District Judge, D. Wyoming Cheyenne, WY, October 4, 2000
CR-005	Professor Harry I. Subin, New York Univ. of Law, New York, N.Y., October 6, 2000.
CR-011	Judge Paul D. Borman, United States District Judge, Detroit, Michigan, January 2, 2001
CR-013	Elizabeth Phillips Marsh, Professor of Law, ABA, Criminal Justice Section, January 10, 2001
CR-044	Federal Magistrate Judges Association (Draft Report—Subject to Board Ratification), February 15, 2001

III. COMMENTS: Rule 5.1

Judge Alan B. Johnson, CR-004
United States District Judge
D. Wyoming
Cheyenne, WY
October 4, 2000

Judge Johnson favors the proposed amendments to Rules 5, 5.1, 10, and 26 that would permit greater use of video teleconferencing and transmission of live testimony. He notes that in Wyoming the courts face problems with requiring prisoners and security personnel to travel great distances for relatively short appearances. That process is expensive and inefficient, given that at least two persons are detailed to transport prisoners. He adds that such movements are usually on short notice and do not provide an adequate opportunity for United States Marshals to screen and develop information on the general health of the individual. This presents special problems in light of exposure to

resistant strains of tuberculosis. He notes that the Wyoming courts are equipped with excellent technology to use video teleconferencing.

Professor Harry I. Subin (CR-005)
New York Univ. of Law
New York, N.Y.
October 6, 2000.

Professor Subin has no objection to the language of Rule 5.1, but urges the Committee to confront the fact that the hearing itself is virtually irrelevant in current practice, especially in large urban areas where grand juries are constantly in session. The prosecutor and avoid the need for a Rule 5.1 hearing by simply presenting the case to a grand jury. He suggests that if the Committee agrees that the ability of a defendant to present an adversarial challenge to the government's case, then it should make the hearing available to the defendant.

Judge Paul D. Borman (CR-011)
United States District Judge
Detroit, Michigan
January 2, 2001

Judge Borman has requested the opportunity to present testimony to the Committee.

Elizabeth Phillips Marsh (CR-013)
Professor of Law
ABA, Criminal Justice Section
January 10, 2001

Professor Marsh has requested the opportunity to present testimony to the Committee.

Federal Magistrate Judges Association (CR-044)
(Draft Report—Subject to Board Ratification)
February 15, 2001

The Association also supports the substantive amendment to Rule 5.1 that would permit magistrate judge to grant a continuance without the consent of the defendant--a change it has supported since 1996.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 6

I. SUMMARY OF COMMENTS: Rule 6

[To be completed]

II. LIST OF COMMENTATORS: Rule 6

CR-020 Cathy Stegman, Law Clerk, United States District Court, Nebraska, February 7, 2001

III. COMMENTS: Rule 6

Cathy Stegman (CR-020)
Law Clerk
United States District Court, Nebraska
February 7, 2001

Ms. Stegman states that proposed Rule 6(a) is not gender neutral. The rule, she says, assumes that all judges are male.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 7

I. SUMMARY OF COMMENTS: Rule 7

[To be completed]

II. LIST OF COMMENTATORS: Rule 7

CR-045 Judge Tommy Miller, United States Magistrate Judge, Eastern District of Virginia (Law Student Comments from William and Mary Law School, Williamsburg, Virginia), February 12, 2001

III. COMMENTS: Rule 7

Judge Tommy Miller (CR-045)
United States Magistrate Judge, Eastern District of Virginia
(Law Student Comments from William and Mary Law School, Williamsburg, Virginia)
February 12, 2001

Judge Miller, a member of the Criminal Rules Committee, submitted ten written comments from the law students in his Criminal Procedure class at William and Mary. One of the students, James Ewing, notes a possible inconsistency in Rule 7(b) with the video teleconferencing provisions in Rules 5 and 10. He observes that Rule 7(b) provides that a defendant may be prosecuted for a felony on an information, if the defendant waives the right to an indictment in open court. He questions whether "in open court" could include video teleconferencing. He notes that the Committee Notes are silent on this point.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 9

I. SUMMARY OF COMMENTS: Rule 9

[To be completed]

II. LIST OF COMMENTATORS: Rule 9

CR-022 Judge James E. Seibert, Magistrate Judge, Wheeling West Virginia, February 7, 2001

CR-042 Judge William Beaman, February 12, 2001

III. COMMENTS: Rule 9

Judge James E. Seibert (CR-022)
United States Magistrate Judge
Northern District of West Virginia
Wheeling West Virginia
February 7, 2001

Judge Seibert agrees with the change in Rule 9(b)(1). But he points out that he has "lost" some defendants because other magistrate judges viewed the risk of flight differently.

Judge William Beaman (CR-042)
February 12, 2001

Judge Beaman disagrees with the deletion of the last sentence of Rule 9(b)(1). He notes that if the warrant is executed out of the district, the magistrate should have some indication what the charging district believes the bail should be.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 10

I. SUMMARY OF COMMENTS: Rule 10

II. LIST OF COMMENTATORS: Rule 10

CR-004	Judge Alan B. Johnson, United States District Judge, D. Wyoming Cheyenne, WY, October 4, 2000
CR-009	Andrew M. Franck, Esq., Williamsburg, VA, November 8, 2000
CR-011	Judge Paul D. Borman, United States District Judge, Detroit, Michigan, January 2, 2001
CR-012	Richard D. Friedman, Professor of Law, Univ. of Michigan, January 8, 2001
CR-013	Elizabeth Phillips Marsh, Professor of Law, ABA, Criminal Justice Section, January 10, 2001
CR-015	Judge Bernard Zimmerman, United States Magistrate Judge, United States District Court, ND California, January 26, 2001
CR-017	Judge Robin J. Cauthron, Chair, Committee on Defender Services, Judicial Conference, January 30, 2001
CR-018	Judge Robert P. Murrian, United States Magistrate Judge, ED Tenn., February 5, 2001
CR-019	Judge Thomas W. Phillips, United States Magistrate Judge, ED Tenn., February 5, 2001
CR-022	Judge James E. Seibert, Magistrate Judge, Wheeling West Virginia, February 7, 2001

CR-023	Judge William G. Hussmann, United States Magistrate Judge, Indianapolis, Indiana, February 5, 2001
CR-025	Dean A. Stang, Federal Defender, Eastern District of Wisconsin, Milwaukee, Wisc., February 12, 2001.
CR-026	Judge Michael J. Watanabe, United States Magistrate Judge, Denver, Colorado, February 13, 2001
CR-027	Thomas W. Hillier, II, Federal Public Defender, Western District of Washington, February 12, 2001
CR-029	Judge Cynthia Imbrogno, United States Magistrate Judge, Eastern District of Washington, February 12, 2001
CR-030	Judge William A. Knox, United States Judge, February 13, 2001
CR-031	Judge Leslie G. Foschio, United States Magistrate Judge, Buffalo, New York, February 13, 2001
CR-033	Larry Propes, Clerk of Court, United States District Court, South Carolina, February 13, 2001
CR-034	Judge Lorenzo F. Garcia, United States Magistrate Judge, United States District Court, Albuquerque, New Mexico, February 13, 2001
CR-035	Judge George P. Kazen, United States District Judge, Southern District of Texas, February 13, 2001
CR-036	Donna A. Bucella, United States Attorney, Middle District of Florida, Tampa, Florida, February 14, 2001
CR-037	Judge James E. Bredar, United States Magistrate Judge, United States District Court for Maryland, February 13, 2001
CR-038	Judge John C. Coughenour, Chief Judge, United States District Court, Western District of Washington, Seattle, Wash., February 6, 2001
CR-039	Judge Jerry A. Davis, United States Magistrate Judge, ND of Mississippi, February 12, 2001
CR-040	Judge Janice M. Stewart, United States Magistrate Judge, Portland, Oregon, February 12, 2001

CR-041 Judge David Nuffer, United States Magistrate Judge, St George, Utah, February 13, 2001

CR-042 Judge William Beaman, February 12, 2001

CR-043 Judge Susan K. Gauvey, United States Magistrate Judge, D. Maryland, February 15, 2001

CR-044 Federal Magistrate Judges Association (Draft Report—Subject to Board Ratification), February 15, 2001

CR-045 Judge Tommy Miller, United States Magistrate Judge, Eastern District of Virginia (Law Student Comments from William and Mary Law School, Williamsburg, Virginia), February 12, 2001

CR-047 Judge Catherine A. Walter, United States Magistrate Judge, Topeka, Kansas, February 15, 2001

CR-048 Judge Mikel H. Williams, February 15, 2001

CR-049 Judge Richard A, Schell, Chief Judge, Eastern District of Texas, Beaumont, Texas, February 12, 2001

CR-050 Fredric F. Kay, Federal Public Defender, District of Arizona, Tucson, Arizona, February 15, 2001

III. COMMENTS: Rule 10

Judge Alan B. Johnson, CR-004
United States District Judge
D. Wyoming
Cheyenne, WY
October 4, 2000

Judge Johnson favors the proposed amendments to Rules 5, 5.1, 10, and 26 that would permit greater use of video teleconferencing and transmission of live testimony. He notes that in Wyoming the courts face problems with requiring prisoners and security personnel to travel great distances for relatively short appearances. That process is expensive and inefficient, given that at least two persons are detailed to transport prisoners. He adds that such movements are usually on short notice and do not provide an adequate opportunity for United States Marshals to screen and develop information on the general health of the individual. This presents special problems in light of exposure to

resistant strains of tuberculosis. He notes that the Wyoming courts are equipped with excellent technology to use video teleconferencing.

Andrew M. Franck, Esq.(CR-009)
Williamsburg, VA
November 8, 2000

Mr. Franck opposes the amendments to Rules 5, 10 and 43 that would permit video teleconferencing—even if the defendant consents. First, he notes, because the preliminary hearing and arraignment are administrative in nature, there is no practical problem of permitting video teleconferencing. But it is important for the defendant to be subjected to a personal appearance before the judge and realize the full impact of what he is facing. Also, is important for the judge to observe the defendant personally. He observes that there are always nuances involved in such proceedings and that it is critical that both parties are in each other's presence.

Judge Paul D. Borman (CR-011)
United States District Judge
Detroit, Michigan
January 2, 2001

Judge Borman has requested the opportunity to present testimony to the Committee.

Elizabeth Phillips Marsh (CR-013)
Professor of Law
ABA, Criminal Justice Section
January 10, 2001

Professor Marsh has requested the opportunity to present testimony to the Committee.

Judge Bernard Zimmerman (CR-015)
United States Magistrate Judge
United States District Court, ND California
January 26, 2001

Judge Zimmerman supports the amendments that would permit video teleconferencing. In his view, the amendments are long overdue. He also urges the Committee to consider amending Rule 4 to clarify the ability of the judge to issue warrants via facsimile transmission.

Judge Robin J. Cauthron (CR-017)
Chair, Committee on Defender Services
Judicial Conference of the United States
January 30, 2001

Judge Cauthron notes that her predecessor, Judge Diamond, had expressed concern in 1994 (when the Committee had last proposed video teleconferencing) that costs would not be saved by implementing video teleconferencing. Although the Committee's proposals were withdrawn pending the results of pilot programs, to date there has not been an analysis of cost or quality concerns. She requests that the Committee defer action on the video teleconferencing amendments until the Committee on Defender Services can discuss the impact of those amendments.

Judge Robert P. Murrian (CR-018)
United States Magistrate Judge
Eastern District of Tennessee
February 5, 2001

Judge Murrian supports the amendments that would provide for video teleconferencing—with or without the defendant's consent. He believes, however, that the judge should have the prerogative to require the defendant to appear in court. In his division, considerable time and resources are spent transporting defendants eighteen miles to the court for routine initial appearances and arraignments that are little more than scheduling conferences.

Judge Thomas W. Phillips (CR-019)
United States Magistrate Judge
Eastern District of Tennessee
February 5, 2001

Judge Phillips writes that he agrees with the views of Judge Murrian, *supra*.

Judge James E. Seibert (CR-022)
United States Magistrate Judge
Northern District of West Virginia
Wheeling West Virginia
February 7, 2001

Judge Seibert strongly disagrees that the defendant should be allowed to determine whether video teleconferencing is used. He notes that it is a two, three, or four hour drive to the three other cities covered by the court and that it is often not possible to plan far enough in advance to have all of the defendants at a particular location ready to appear before the court. He notes that every lawyer and defendant who has appeared before him by video conference has been "extremely grateful for the prompt hearing that

wastes neither time nor money of anyone." He states that he has never had any objection to appearance by video conference.

Judge William G. Hussmann (CR-023)
United States Magistrate Judge
Indianapolis, Indiana
February 5, 2001

Judge Hussmann believes that video teleconferencing should occur only with the consent of the defendant. Although initial proceedings, etc have limited importance, they can have great impact on some practical issues. Because of increased caseloads and crowded jails, it is common to hear complaints from defendants that they are unable to talk to their lawyer or to talk to family members about bail or other pressing family matters. Appearing in person often presents an opportunity for communication. Although video technology has improved, in his view, it does not provide an appropriate venue for communications between counsel and family.

Dean A. Stang (CR-025)
Federal Defender
Eastern District of Wisconsin
Milwaukee, Wisconsin
February 12, 2001.

Mr. Stang opposes the proposed amendments involving video teleconferencing. He indicates that initial appearances and arraignments are not pro forma events and that those proceedings provide both parties with an opportunity to discuss very important matters. Using teleconferencing will result in lost plea bargains, early cooperation, and prompt release decisions. He notes a number of practical problems that will arise and that teleconferencing makes no practical accommodation for interpreters. Mr. Hillier notes that he is not aware of any special danger to law enforcement officers or court personnel by requiring in-court appearances. Further, teleconferencing will interfere with the critical stages of forming an attorney-client relationship. Finally, teleconferencing will undermine both the dignity of the federal courts and Sixth Amendment values.

Judge Michael J. Watanabe(CR-026)
United States Magistrate Judge
Denver, Colorado
February 13, 2001

Judge Watanabe briefly writes that he strongly favors use of video teleconferencing. He states that he has used it in civil cases and that it works very well.

Thomas W. Hillier, II (CR-027)
Federal Public Defender

Western District of Washington
February 12, 2001

Mr. Hillier presents a detailed objection to the video teleconferencing amendments, on behalf or the Federal Public and Community Defenders. He notes that the current practice works well and that the initial appearance is not a pro forma proceeding. He presents a careful overview of the important decisions that are made in the face-to-face meetings between the defendant, the defense counsel, and the prosecutor. Those meetings, he asserts, assure prompt processing the case. Mr. Hillier believes that video teleconferencing is impractical and presents difficult situations for both the defendant and the defense counsel who must decide whether to remain at the courthouse, with the judge and the prosecutor or travel to where the defendant is located. He notes that the system is likely to result in increased costs and that no in-depth study has been conducted. Further, he observes that in Rule 10, the ability of the defendant to waive presence at the arraignment negates the need for teleconferencing in that rule. Finally, he identifies a list of unresolved issues and urges the Committee to table its proposals pending further study.

Judge Cynthia Imbrogno (CR-029)
United States Magistate Judge
Eastern District of Washington
February 12, 2001

Judge Imbrogno enthusiastically supports the video teleconferencing amendments. She writes that there are only two magistrate judges covering the Eastern District of Washington and that they often drive over three hours (one way) to conduct proceedings in other cities within the district. As a result, some duty stations are not covered because of the need to spend time traveling. She notes that the technology is sufficiently advanced to maintain the integrity of the proceedings. Defense counsel, she writes, are very supportive of teleconferencing because it gives them greater flexibility in scheduling. She would support video teleconferencing without requiring the defendant's consent.

Judge William A. Knox (CR-030)
United States Judge
February 13, 2001

Judge Knox favors video teleconferencing. He says that he has used it in civil proceedings, including trials, and finds it to be "reliable, practical, efficient, and [has had] no difficulty protecting the rights of the parties. Judge Knox states that if the equipment is poor it is a waste of time to use it.

Judge Leslie G. Foschio (CR-031)

United States Magistrate Judge
Buffalo, New York
February 13, 2001

Judge Foschio favors video teleconferencing for arraignments, especially for superseding arraignments, where the defendant has been already arraigned and bail has been set.

Larry Propes (CR-033)
Clerk of Court
United States District Court, South Carolina
February 13, 2001

Mr. Propes indicates that the judges in both the Greenville and Florence divisions are interested in using video teleconferencing for initial appearances because the courthouses are not in convenient or close proximity to the county jails being used by the US Marshals Service. He observes that if the rule requires the consent of the defendant, few, if any, will consent. He therefore recommends that video teleconferencing not be contingent on the defendant's consent.

Judge Lorenzo F. Garcia (CR-034)
United States Magistrate Judge
United States District Court
Albuquerque, New Mexico
February 13, 2001

Judge Garcia favors using video teleconferencing, especially for arraignments. He notes that in New Mexico, a number of defendants are simply passing through the state when they are arrested and bringing them back to court simply for an arraignment can result in unnecessary costs; where the defendant is indigent, the court must direct advancement of travel costs for the defendant. Judge Garcia also writes that he has had experience with arraignment waivers in state court and that the system worked well.

Judge George P. Kazen (CR-035)
United States District Judge
Southern District of Texas
February 13, 2001

Judge Kazen believes that it is very important to provide for waiver of personal appearance at initial proceedings (Rules 5, 10 and 43), either by written waiver or video appearance. Citing his experience in a border court, in one of five districts they hear almost 30 percent of the criminal cases for the entire nation. The initial arraignment is largely perfunctory used to set a motions schedule. Most of the defendants plead not guilty and are housed as many as 60 to 300 miles away from a courthouse. He notes that

frequently the defendants reside at a distant location and if they are released, there are problems in bringing them back for those proceedings. Judge Kazen observes that given the considerable apprehension about this proposal, it would be prudent to adopt a proposal that requires the defendant's consent.

Donna A. Bucella (CR-036)
United States Attorney
Middle District of Florida,
Tampa, Florida
February 14, 2001

Ms. Bucella observes that if the defendant is allowed to waive appearances at an arraignment, the government's consent should be required. She also notes that the Committee Note is ambiguous on just how video teleconferencing will be accomplished for initial appearances. She adds that if the purpose of the amendments is to save money, that the Committee ought to say so explicitly.

Judge James E. Bredar (CR-037)
United States Magistrate Judge
United States District Court for Maryland
February 13, 2001

Judge Bredar opposes the use of video teleconferencing. He believes that there is much at stake in federal criminal cases and that the sooner the defendant understands the gravity of his situation, the better. He adds that from his time as a public defender, there nothing that helps to focus the mind than to walk into a federal courtroom. He believes that the overall process will be "denigrated" by reducing those appearances to a television experience.

Judge John C. Coughenour (CR-038)
Chief Judge, United States District Court
Western District of Washington
Seattle, Washington
February 6, 2001

Judge Coughenour opposes video teleconferencing in proposed Rules 5 and 10. In his view, the solemnity and fairness of the defendant's appearance in court in the presence of counsel and the judge far outweigh the security problems. The solution, he notes, is heightened vigilance and not the sacrifice of cherished traditions. His views, he notes, are based on his research into the issue: in 1990 he was a member of the Court Administration and Case Management Committee which had supervised a pilot program. As a result of that study, the Committee had believed strongly that video teleconferencing seriously eroded the full and fair examination of facts and witnesses. He urges the Committee to reject the amendments.

Judge Jerry A. Davis (CR-039)
United States Magistrate Judge
ND of Mississippi
February 12, 2001

Judge Davis endorses video teleconferencing. He notes that state courts have been using it for years and that he has been using it for prisoner cases for several years and that there are no "downsides." He observed that it is useful for security purposes and in rural areas. He concludes by noting that any perceived constitutional problems are imagined, not real.

Judge Janice M. Stewart (CR-040)
United States Magistrate Judge
Portland, Oregon
February 12, 2001

Judge Steward favors the proposals for video teleconferencing. But due to concerns about separating the defendant and defense counsel and the problems that that creates, she believes video teleconferencing should be used only where the defendant consents.

Judge David Nuffer (CR-041)
United States Magistrate Judge
St George, Utah
February 13, 2001

Judge Nuffer, a part time magistrate judge, strongly favors video teleconferencing. In Utah he works 300 miles from the courthouse.

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February 12, 2001

Judge Beaman strongly approves of video teleconferencing, but would require the defendant's consent.

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United States Magistrate Judge
District of Maryland
February 15, 2001

Judge Gauvey recounts her experiences in the Maryland state courts with video teleconferencing. She observed what she calls assembly line justice. The proceedings were held in a large room and appeared surreal and chilling. There was no

communication between the judge and the defendant. In contrast, in federal courts, all parties are more focused and she is concerned that a judge could not pick up the subtle hesitations or halting speech or odd manner that may be signs of impairment.

Federal Magistrate Judges Association (CR-044)
(Draft Report—Subject to Board Ratification)
February 15, 2001

The Magistrate Judges Association supports the proposed video teleconferencing. The Association recounts the benefits of using such procedures and suggests that some of the concerns about the erosion of the process might be addressed if the judge visits the detention facility and determines if that facility as a room suitable for conducting teleconferencing, along with a private telephone line and a room where the defendant can consult in private with his or her attorney. The Association favors video conferencing without requiring the defendant's consent.

The Association also supports the proposed amendment that would permit a defendant to waive appearance at the arraignment. It notes that other rules already provide for waiver of various proceedings and rights. For example, Rule 40 (removal proceeding) and Rule 11 (guilty plea waives various constitutional rights).

Judge Tommy Miller (CR-045)
United States Magistrate Judge, Eastern District of Virginia
(Law Student Comments from William and Mary Law School,
Williamsburg, Virginia)
February 12, 2001

Judge Miller, a member of the Criminal Rules Committee, submitted ten written comments from the law students in his Criminal Procedure class at William and Mary. One of the students, David S. Johnson, is opposed to using video teleconferencing. He notes a number of obstacles that the courts will face, including delays in transmission. He believes that the amendment is "before its time." Only when the technology has advanced further should the amendment be adopted.

A second student, Kimberly Marinoff, expresses concern about the video conferencing provision. She believes that it "eviscerates the utility" of the proceedings "as a wake-up call by insulating the accused from the physical presence of the judge." She concludes, however, that if the amendment is to remain, she would support the alternate version that requires the defendant's consent.

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summary of the conflicting caselaw and statutory provisions and argues that whatever remedy the Committee chooses would provide predictability to practitioners.

A fourth student, James Ewing, addresses the video teleconferencing provisions. He cites the historical arguments for the right of the defendant to appear personally in court and believes that even if a defendant consents to video teleconferencing, there may be problems with the perception of fairness. Thus, video conferencing should be the exception rather than the general rule, even where the defendant consents.

Judge Ronald E. Longstaff (CR-046)
Chief Judge, Southern District of Iowa
February 15, 2001

On behalf of the judges of his district, Judge Longstaff indicates that they agree with the comments submitted by Magistrate Judges Cohen, Dien, and Collings, *supra* concerning taking defendants to a magistrate in an adjacent district. They also support the changes for video teleconferencing and would comport to court technology procedures already in place, including both districts in Iowa.

Judge Catherine A. Walter (CR-047)
United States Magistrate Judge
Topeka, Kansas
February 15, 2001

Although she has not used video teleconferencing, Judge Walter supports it use, especially for initial appearances. She notes that the facility used to house pretrial detainees (an hour's drive from her court) has recently installed videoconferencing equipment. In her view the opportunity for the earliest time for the hearing is more important than a face-to-face appearance before a judge. She notes that there have been occasions where the availability of video conferencing would have resulted in an earlier initial appearance.

Judge Mikel H. Williams (CR-048)
February 15, 2001

Judge Williams commends the Committee for its thorough reorganization of the criminal rules and fully endorses the use of video teleconferencing for initial criminal proceedings. He notes that for the last four years his courts have used such procedures for initial criminal proceedings; they adopted the program because of concerns for serious delays in scheduling the various parties for the hearings. The district court for Idaho covers the entire state and the 400 miles distances make automobile transportation impractical and air travel can be delayed by weather. Transporting the defendants presents similar problems. He describes the process used in his district--the defendant is taken to the closest federal courthouse where he meets his CJS counsel and within two or

three hours the defendant appears with counsel before the magistrate judge via video. He cannot recall a single instance where the defendant objected to that procedure; he considers the program to be a resounding success. The defendants rights are immediately addressed and the proceeding is conducted with the same formality as if the defendant were in the judge's court. Although he would prefer to have a rule not requiring the defendant's consent, he believes that obtaining consent is not a burden.

Judge Richard A, Schell (CR-049)
Chief Judge, Eastern District of Texas
Beaumont, Texas
February 12, 2001

Judge Schell supports the proposed amendments for video teleconferencing. Although he would prefer the version that does not require consent, a rule that requires the defendant's consent is imminently reasonable. He urges the Committee to consider extending video conferencing to pleas and sentencing. He notes the long distances involved in his district and the fact that he has been used video teleconferencing for several years for sentencing and for guilty pleas, with the defendant's consent.

Fredric F. Kay (CR-050)
Federal Public Defender, District of Arizona
Tucson, Arizona
February 15, 2001

Mr. Kay writes that in the District of Arizona there are four lawyers in his office and that in FY 2000 they were appointed to represent about 8000 indigent defendants. Many of those were immigration cases. He agrees with the views expressed by Mr. Tom Hillier, *supra,* and strongly urges the Committee to reject the amendments. He knows of no serious cost and security concerns that would support the proposed amendments and that they should not outweigh the important aspects of having the defendant and counsel appear personally before the judge. He has watched video proceedings in the state system and has observed the defendant sitting by himself in a chair answering the judge's questions. The judges he notes, may have questions about the defendant's capacity and they have to ask a guard whether the defendant appears to be sober. Using video conferencing is something that one might expect in a weird third world country where there is no concept of presumption of innocence.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 12.1

I. SUMMARY OF COMMENTS: Rule 12.1

[To be completed]

II. LIST OF COMMENTATORS: Rule 12.1

CR-045 Judge Tommy Miller, United States Magistrate Judge, Eastern District of Virginia (Law Student Comments from William and Mary Law School, Williamsburg, Virginia), February 12, 2001

III. COMMENTS: Rule 12.1

Judge Tommy Miller (CR-045)
United States Magistrate Judge, Eastern District of Virginia
(Law Student Comments from William and Mary Law School, Williamsburg, Virginia)
February 12, 2001

Judge Miller, a member of the Criminal Rules Committee, submitted ten written comments from the law students in his Criminal Procedure class at William and Mary. One of the students, Kimberly Marinoff, observes that the Committee Note reference to the fact that requiring the parties to provide phone numbers of alibi witnesses should not really be viewed as a major change. In her view this is only a nominal increase, considering our telephone-driven society. She also states that the requirement that the parties be notified of the information may be problematic if both the defendant and the defense counsel are not served. Finally, she believes that the revised version of the rule is an improvement.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 12.2

I. SUMMARY OF COMMENTS: Rule 12.2

[To be completed]

II. LIST OF COMMENTATORS: Rule 12.2

CR-045 Judge Tommy Miller, United States Magistrate Judge, Eastern District of Virginia (Law Student Comments from William and Mary Law School, Williamsburg, Virginia), February 12, 2001

III. COMMENTS: Rule 12.2

Judge Tommy Miller (CR-045)
United States Magistrate Judge, Eastern District of Virginia
(Law Student Comments from William and Mary Law School, Williamsburg, Virginia)
February 12, 2001

Judge Miller, a member of the Criminal Rules Committee, submitted ten written comments from the law students in his Criminal Procedure class at William and Mary. One of the students, LaRona Owens believes that the revised version of Rule 12.2 is pro-government and will frustrate a defendant's opportunities to raise the insanity defense. This is demonstrated, she notes, by the restrictions on the judge's discretion to permit the defendant to present evidence of insanity if the defendant does not meet the notice requirements of the rule.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 23

I. SUMMARY OF COMMENTS: Rule 23

[To be completed]

II. LIST OF COMMENTATORS: Rule 23

CR-045 Judge Tommy Miller, United States Magistrate Judge, Eastern District of Virginia (Law Student Comments from William and Mary Law School, Williamsburg, Virginia), February 12, 2001

III. COMMENTS: Rule 23

Judge Tommy Miller (CR-045)
United States Magistrate Judge, Eastern District of Virginia
(Law Student Comments from William and Mary Law School, Williamsburg, Virginia)
February 12, 2001

Judge Miller, a member of the Criminal Rules Committee, submitted ten written comments from the law students in his Criminal Procedure class at William and Mary. One of the students, Jeremy Bell, has written a paper in support of his argument that Rule 23 should specify with clarity when a defendant is entitled to a jury trial. Although the failure of Rule 23(a) to address that issue could be understandable considering that the caselaw was in flux, the problems are now pretty well settled and amending Rule 23(a) to address that issue would further the intended purpose of the rules.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 26

I. SUMMARY OF COMMENTS: Rule 26

[To be completed]

II. LIST OF COMMENTATORS: Rule 26

CR-004	Judge Alan B. Johnson, United States District Judge, D. Wyoming Cheyenne, WY, October 4, 2000
CR-011	Judge Paul D. Borman, United States District Judge, Detroit, Michigan, January 2, 2001
CR-012	Richard D. Friedman, Professor of Law, Univ. of Michigan, January 8, 2001
CR-013	Elizabeth Phillips Marsh, Professor of Law, ABA, Criminal Justice Section, January 10, 2001
CR-014	Professor John B. Mitchell, Assoc. Prof. of Law, Seattle Univ., January 8, 2001
CR-044	Federal Magistrate Judges Association (Draft Report—Subject to Board Ratification), February 15, 2001
CR-045	Judge Tommy Miller, United States Magistrate Judge, Eastern District of Virginia (Law Student Comments from William and Mary Law School, Williamsburg, Virginia), February 12, 2001

III. COMMENTS: Rule 26

Judge Alan B. Johnson, CR-004
United States District Judge
D. Wyoming
Cheyenne, WY
October 4, 2000

Judge Johnson favors the proposed amendments to Rules 5, 5.1, 10, and 26 that would permit greater use of video teleconferencing and transmission of live testimony.

He notes that in Wyoming the courts face problems with requiring prisoners and security personnel to travel great distances for relatively short appearances. That process is expensive and inefficient, given that at least two persons are detailed to transport prisoners. He adds that such movements are usually on short notice and do not provide an adequate opportunity for United States Marshals to screen and develop information on the general health of the individual. This presents special problems in light of exposure to resistant strains of tuberculosis. He notes that the Wyoming courts are equipped with excellent technology to use video teleconferencing.

Judge Paul D. Borman (CR-011)
United States District Judge
Detroit, Michigan
January 2, 2001

Judge Borman has requested the opportunity to present testimony to the Committee.

Richard D. Friedman (CR-012)
Professor of Law
Univ. of Michigan
January 8, 2001

Professor Friedman has requested the opportunity to present testimony to the Committee on Rule 26. His request is accompanied by a lengthy article detailing reasons why the proposed amendment for remote transmission of live testimony should be rejected.

Elizabeth Phillips Marsh (CR-013)
Professor of Law
ABA, Criminal Justice Section
January 10, 2001

Professor Marsh has requested the opportunity to present testimony to the Committee.

Professor John B. Mitchell (CR-014)
Assoc. Prof. of Law
Seattle University School of Law
January 8, 2001

Professor Mitchell provides an in-depth critique of the proposed amendment that would permit remote transmission of live testimony. He concludes that proposed Rule 26(b) is not the constitutional equivalent of Rule 15 (depositions). That is because there is no real opportunity for effective, face-to-face, cross-examination. He believes that the

decision in *United States v. Gigante* is wrong. He is concerned that the requirement for truly compelling circumstances will not be effective. Finally, he believes that the amendment is bad public policy.

Federal Magistrate Judges Association (CR-044)
(Draft Report—Subject to Board Ratification)
February 15, 2001

The Association supports the proposed amendment to permit remote transmission of live testimony as being a "prudent and practical concept." It believes that the defendant's rights will be preserved, considering the judge's role in imposing appropriate safeguards and procedures. Finally, it notes that in many districts it is already the practice to present videotaped testimony of unavailable witnesses--particularly with material witnesses under 18 USC 3144. Thus, the experience of the courts demonstrates the value of the proposed amendment.

Judge Tommy Miller (CR-045)
United States Magistrate Judge, Eastern District of Virginia
(Law Student Comments from William and Mary Law School, Williamsburg, Virginia)
February 12, 2001

Judge Miller, a member of the Criminal Rules Committee, submitted ten written comments from the law students in his Criminal Procedure class at William and Mary. One of the students, Mark Ries, presents a list of reasons why the proposal for remote transmission of live testimony should be rejected: The rule fails to constrict the testimony to the same extent as that required by Rule of Evidence 804(b), that is the rule of evidence limits this type of hearsay evidence to only certain types of statements. Second, there is little in the rule to guide the trial judge in exercising his or her discretion. Third, the Committee Note brushes aside the defendant's confrontation rights, even though, as he recognizes, the rule is probably in line with recent Supreme Court decisions. Fourth, he has drafted an alternative version of Rule 26. He also includes a list of issues for potential litigation should the amendment be adopted. For example, what do the terms "interests of justice," "different location," "compelling circumstances," and "appropriate safeguards" mean? He agrees with the decision to insert the word "orally" in Rule 26(a) and he applauds the proposed stylistic changes.

A second student, Stephen F. Keane, also believes that the proposed amendment for remote transmission of testimony will deny the defendant his or her rights of confrontation. Thus, it should only occur in the most extreme circumstances. He suggests that the rule should identify more specific criteria and notes that a narrower rule will ensure that the rule is not "exploited by allowing cowardly, unsure or indifferent witnesses to testify against defendants."

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 30

I. SUMMARY OF COMMENTS: Rule 30

[To be completed]

II. LIST OF COMMENTATORS: Rule 30

CR-016 James T. Miller, Esq., on behalf of Florida Assn. of Criminal Defense Lawyers (FACDL), Jacksonville, Florida, January 24, 2001

III. COMMENTS: Rule 30

James T. Miller, Esq.(CR-016)
On behalf of Florida Assn. of Criminal Defense Lawyers (FACDL)
Jacksonville, Florida
January 24, 2001

FACDL opposes the amendment to Rule 30 that would permit the court to require the parties to file their requested instructions earlier in the trial. They believe that the amendment is unfair and impractical and potentially creates an unfair burden on the trial counsel. Most Rule 30 conferences, they note, takes place at the close of the evidence and any attempt to require an earlier production would add unnecessary work and potentially encourage unnecessary pleadings. The current rule, they state, works well. Finally, requiring the defense to present its proposed instructions before trial may impinge on the right to a fair trial, by requiring the defense to disclose more than it needs to.

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 32

I. SUMMARY OF COMMENTS: Rule 32

[To be completed]

II. LIST OF COMMENTATORS: Rule 32

CR- 001 Richard Crane, Esq., Nashville, Tn, September 22, 2000

CR- 002 Robert P. Longshore, Chief Probation Officer, MD Alabama, Montgomery Alabama, October 2, 2000.

CR-011 Judge Paul D. Borman, United States District Judge, Detroit, Michigan, January 2, 2001

CR-012 Richard D. Friedman, Professor of Law, Univ. of Michigan, January 8, 2001

CR-013 Elizabeth Phillips Marsh, Professor of Law, ABA, Criminal Justice Section, January 10, 2001

CR-035 Judge George P. Kazen, United States District Judge Southern District of Texas, February 13, 2001

III. COMMENTS: Rule 32

Richard Crane, Esq. (CR-001)
Nashville, Tn.
September 22, 2000

Mr. Crane notes that he is thrilled to see the requirement in Rule 32 that courts address more carefully the information in the presentence report. In his experience, it is the single most important document that the BOP considers. He adds two suggestions. First, he recommends that the definition of "material" be placed in the rule itself. And second, he recommends that the rule or the comment contain a prohibition against including information in the report that are not related to the defendant, in the absence of good cause. He notes that the practice now is to include information about co-defendant

offenses and offenses on which the defendant was acquitted. Including such information can have an adverse impact on the defendant in attempting to get into drug rehab, etc.

Robert P. Longshore,
Chief Probation Officer, MD Alabama,
Montgomery Alabama
October 2, 2000.

Mr. Crane is concerned the changed wording in Rule 32(b)(4)(B), regarding the information that the probation officer should include regarding sentencing guidelines, will significantly weaken the independent inquiry that the probation officer currently provides. He indicates that the probation officer may simply become a sentence historian, reporting the facts as developed in the plea bargain, which may or may not reflect the actual offense conduct.

Judge Paul D. Borman (CR-011)
United States District Judge
Detroit, Michigan
January 2, 2001

Judge Borman has requested the opportunity to present testimony to the Committee.

Elizabeth Phillips Marsh (CR-013)
Professor of Law
ABA, Criminal Justice Section
January 10, 2001

Professor Marsh has requested the opportunity to present testimony to the Committee.

Judge George P. Kazen (CR-035)
United States District Judge
Southern District of Texas
February 13, 2001

Judge Kazen strongly opposes the proposal in Rule 32 that would require the judge to make findings of fact on issues that have no impact on sentencing. He observes that without reading the Committee Note it would not be clear from the rule itself what constitutes a material matter. This proposal, he states, could convert almost any sentencing hearing into a "genuine quagmire." And the impact on the appellate courts would be a problem. He appreciates the tremendous responsibility borne by the BOP and

believes that judges should make sure, without the requirement of a rule, that the information in the report is accurate.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 35

I. SUMMARY OF COMMENTS: Rule 35

[To be completed]

II. LIST OF COMMENTATORS: Rule 35

CR-011 Judge Paul D. Borman, United States District Judge, Detroit, Michigan, January 2, 2001

CR-013 Elizabeth Phillips Marsh, Professor of Law, ABA, Criminal Justice Section, January 10, 2001

CR-028 Judge Edward R. Becker, Chief Judge, United States Court of Appeals for the Third Circuit, Philadelphia, Penn., February 9, 2001.

III. COMMENTS: Rule 35

Judge Paul D. Borman (CR-011)
United States District Judge
Detroit, Michigan
January 2, 2001

Judge Borman has requested the opportunity to present testimony to the Committee.

Elizabeth Phillips Marsh (CR-013)
Professor of Law
ABA, Criminal Justice Section
January 10, 2001

Professor Marsh has requested the opportunity to present testimony to the Committee.

Judge Edward R. Becker (CR-028)
Chief Judge
United States Court of Appeals for the Third Circuit
Philadelphia, Penn.
February 9, 2001

Judge Becker proposes a revision to Rule 35(b)(2) to read: "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 at least some information not known—or the usefulness of which could not have reasonably been anticipated—until more than one year after sentencing." This suggestion, he writes, comes out of a case in the Third Circuit: *United States v. Cruz-Pagan*. He indicates that the current version and proposed amendment are not clear with respect to the question of "whether information known to the defendant prior to sentencing, or not known to the defendant until after sentencing but less than one year after sentence was imposed, can serve as the basis for the motion to reduce..." He offers the example of a defendant who provides information after the one year elapses—some of which he knew about before the one year elapsed and some of which he was not aware of. Judge Becker asks whether the judge has the authority to grant the motion under that example. He recommends that the Committee revise the text in accordance with his suggestions.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 41

I. SUMMARY OF COMMENTS: Rule 41

[To be completed]

II. LIST OF COMMENTATORS: Rule 41

CR-006	John L. Warden, Esq., New York, N.Y., October 23, 2000
CR-008	Professor Craig M. Bradley, Indiana Univ. School of Law, October 27, 2000.
CR-011	Judge Paul D. Borman, United States District Judge, Detroit, Michigan, January 2, 2001
CR-013	Elizabeth Phillips Marsh, Professor of Law, ABA, Criminal Justice Section, January 10, 2001
CR-018	Judge Robert P. Murrian, United States Magistrate Judge, ED Tenn., February 5, 2001
CR-022	Judge James E. Seibert, Magistrate Judge, Wheeling West Virginia, February 7, 2001
CR-042	Judge William Beaman, February 12, 2001
CR-044	Federal Magistrate Judges Association (Draft Report—Subject to Board Ratification), February 15, 2001
CR-045	Judge Tommy Miller, United States Magistrate Judge, Eastern District of Virginia (Law Student Comments from William and Mary Law School, Williamsburg, Virginia), February 12, 2001

III. COMMENTS: Rule 41

John L. Warden, Esq. (CR-006)
New York, N.Y.
October 23, 2000

Mr. Warden writes that the amendment to Rule 41, regarding "sneak and peak" warrants "appears to be an injudicious relaxation of the requirements of the Fourth Amendment. He states that "surely the courts should not be sponsoring lock-picking and climbing in windows as proper police procedures." He expresses the hope that the Judicial Conference will reject the proposal.

Professor Craig M. Bradley (CR-008)
Indiana Univ. School of Law
Bloomington, Illinois
October 27, 2000

Professor Bradley disagrees with the language in Rule 41(d)(1) to the effect that if probable cause exists, the judge must issue a warrant. He is aware of no requirement in constitutional criminal procedure that would require the judge to do so. Rather, the judge should be able to exercise discretion in deciding whether to issue a warrant. He also suggests that the rule include some guidance on what probable cause means, as well as address those situations where a warrant is not required. He has attached an article he has authored if such guidance was included.

Judge Paul D. Borman (CR-011)
United States District Judge
Detroit, Michigan
January 2, 2001

Judge Borman has requested the opportunity to present testimony to the Committee.

Elizabeth Phillips Marsh (CR-013)
Professor of Law
ABA, Criminal Justice Section
January 10, 2001

Professor Marsh has requested the opportunity to present testimony to the Committee.

Judge Robert P. Murrian (CR-018)
United States Magistrate Judge
Eastern District of Tennessee
February 5, 2001

Judge Murrian supports the substantive amendment to Rule 41 that would permit covert entries. He does not agree with Rule 41(e)(1). In his view, the warrant should not

be delivered to the clerk until a return is made on the warrant. There is no need, he asserts, to have this confidential information "floating around." The clerk should get all of the papers only after the return is made.

Judge James E. Seibert (CR-022)
United States Magistrate Judge
Northern District of West Virginia
Wheeling West Virginia
February 7, 2001

Judge Seibert has mixed feelings about the covert entry provision in Rule 41. He believes that such warrants should receive the same strict scrutiny that is given to wiretap warrants. Personally, he would be reluctant to grant such applications, except in case of imminent danger to national security. He notes that it is advisable to have guidelines for such procedures.

Judge William Beaman (CR-042)
February 12, 2001

Judge Beaman agrees the amendment for covert searches. He observes that often there is a need to continue the observations beyond seven days and that reasonableness is the appropriate standard.

Federal Magistrate Judges Association (CR-044)
(Draft Report—Subject to Board Ratification)
February 15, 2001

The Association supports the amendment to Rule 41 that would address the procedures for obtain a warrant for a covert search. It will of great assistance in providing procedural guidance for searches that are already recognized in the cases. The Association also agrees with the proposed amendment that officers first attempt to obtain a warrant from a federal judicial officer. It also supports the other amendments to Rule 41.

Judge Tommy Miller (CR-045)
United States Magistrate Judge, Eastern District of Virginia
(Law Student Comments from William and Mary Law School,
Williamsburg, Virginia)
February 12, 2001

Judge Miller, a member of the Criminal Rules Committee, submitted ten written comments from the law students in his Criminal Procedure class at William and Mary. One of the students, Daniel J. Fortune, believes that the restructuring of Rule 41 is very helpful. He questions, however, whether the rule could be clearer in answering the

question whether the official has to sign a faxed copy of the Duplicate Original Warrant on behalf of the judge? Or is the faxed copy good enough. He also observes that there may be an ambiguity in Rule 41(d)(3)(B)(i) on the issue of whether the rule envisions that the informant must also be involved in the phone call. Finally, he questions the language in the Rule that indicates that the magistrate must issue a warrant. Although he cannot think of any reasons why a magistrate would not want to issue a warrant, he wonders why the Committee changed the language from "shall" to "must."

Another student, Eric V.T. Nakano, states that the provision in Rule 41 for covert searches leaves out a critical third element that those warrants be granted only on a showing that there is reasonable necessity for such warrants. Permitting a covert search only on a showing of probable cause compounds any fear of government tyranny.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 43

I. SUMMARY OF COMMENTS: Rule 43

[To be completed]

II. LIST OF COMMENTATORS: Rule 43

CR-009	Andrew M. Franck, Esq., Williamsburg, VA, November 8, 2000
CR-011	Judge Paul D. Borman, United States District Judge, Detroit, Michigan, January 2, 2001
CR-012	Richard D. Friedman, Professor of Law, Univ. of Michigan, January 8, 2001
CR-013	Elizabeth Phillips Marsh, Professor of Law, ABA, Criminal Justice Section, January 10, 2001
CR-015	Judge Bernard Zimmerman, United States Magistrate Judge, United States District Court, ND California, January 26, 2001
CR-017	Judge Robin J. Cauthron, Chair, Committee on Defender Services, Judicial Conference, January 30, 2001
CR-018	Judge Robert P. Murrian, United States Magistrate Judge, ED Tenn., February 5, 2001
CR-019	Judge Thomas W. Phillips, United States Magistrate Judge, ED Tenn., February 5, 2001
CR-022	Judge James E. Seibert, Magistrate Judge, Wheeling West Virginia, February 7, 2001
CR-023	Judge William G. Hussmann, United States Magistrate Judge, Indianapolis, Indiana, February 5, 2001
CR-025	Dean A. Stang, Federal Defender, Eastern District of Wisconsin, Milwaukee, Wisc., February 12, 2001.
CR-026	Judge Michael J. Watanabe, United States Magistrate Judge, Denver,

Colorado, February 13, 2001

CR-027 Thomas W. Hillier, II, Federal Public Defender, Western District of Washington, February 12, 2001

CR-029 Judge Cynthia Imbrogno, United States Magistrate Judge, Eastern District of Washington, February 12, 2001

CR-030 Judge William A. Knox, United States Judge, February 13, 2001

CR-031 Judge Leslie G. Foschio, United States Magistrate Judge, Buffalo, New York, February 13, 2001

CR-033 Larry Propes, Clerk of Court, United States District Court, South Carolina, February 13, 2001

CR-034 Judge Lorenzo F. Garcia, United States Magistrate Judge, United States District Court, Albuquerque, New Mexico, February 13, 2001

CR-035 Judge George P. Kazen, United States District Judge, Southern District of Texas, February 13, 2001

CR-036 Donna A. Bucella, United States Attorney, Middle District of Florida, Tampa, Florida, February 14, 2001

CR-037 Judge James E. Bredar, United States Magistrate Judge, United States District Court for Maryland, February 13, 2001

CR-038 Judge John C. Coughenour, Chief Judge, United States District Court, Western District of Washington, Seattle, Wash., February 6, 2001

CR-039 Judge Jerry A. Davis, United States Magistrate Judge, ND of Mississippi, February 12, 2001

CR-040 Judge Janice M. Stewart, United States Magistrate Judge, Portland, Oregon, February 12, 2001

CR-041 Judge David Nuffer, United States Magistrate Judge, St George, Utah, February 13, 2001

CR-042 Judge William Beaman, February 12, 2001

CR-043 Judge Susan K. Gauvey, United States Magistrate Judge, D. Maryland, February 15, 2001

CR-044 Federal Magistrate Judges Association (Draft Report—Subject to Board Ratification), February 15, 2001

CR-045 Judge Tommy Miller, United States Magistrate Judge, Eastern District of Virginia (Law Student Comments from William and Mary Law School, Williamsburg, Virginia), February 12, 2001

CR-047 Judge Catherine A. Walter, United States Magistrate Judge, Topeka, Kansas, February 15, 2001

CR-048 Judge Mikel H. Williams, February 15, 2001

CR-049 Judge Richard A, Schell, Chief Judge, Eastern District of Texas, Beaumont, Texas, February 12, 2001

CR-050 Fredric F. Kay, Federal Public Defender, District of Arizona, Tucson, Arizona, February 15, 2001

III. COMMENTS: Rule 43

Andrew M. Franck, Esq.(CR-009)
Williamsburg, VA
November 8, 2000

Mr. Franck opposes the amendments to Rules 5, 10 and 43 that would permit video teleconferencing—even if the defendant consents. First, he notes, because the preliminary hearing and arraignment are administrative in nature, there is no practical problem of permitting video teleconferencing. But it is important for the defendant to be subjected to a personal appearance before the judge and realize the full impact of what he is facing. Also, is important for the judge to observe the defendant personally. He observes that there are always nuances involved in such proceedings and that it is critical that both parties are in each other's presence.

Judge Paul D. Borman (CR-011)
United States District Judge
Detroit, Michigan
January 2, 2001

Judge Borman has requested the opportunity to present testimony to the Committee.

Elizabeth Phillips Marsh (CR-013)
Professor of Law
ABA, Criminal Justice Section
January 10, 2001

Professor Marsh has requested the opportunity to present testimony to the Committee.

Judge Bernard Zimmerman (CR-015)
United States Magistrate Judge
United States District Court, ND California
January 26, 2001

Judge Zimmerman supports the amendments that would permit video teleconferencing. In his view, the amendments are long overdue. He also urges the Committee to consider amending Rule 4 to clarify the ability of the judge to issue warrants via facsimile transmission.

Judge Robin J. Cauthron (CR-017)
Chair, Committee on Defender Services
Judicial Conference of the United States
January 30, 2001

Judge Cauthron notes that her predecessor, Judge Diamond, had expressed concern in 1994 (when the Committee had last proposed video teleconferencing) that costs would not be saved by implementing video teleconferencing. Although the Committee's proposals were withdrawn pending the results of pilot programs, to date there has not been an analysis of cost or quality concerns. She requests that the Committee defer action on the video teleconferencing amendments until the Committee on Defender Services can discuss the impact of those amendments.

Judge Robert P. Murrian (CR-018)
United States Magistrate Judge
Eastern District of Tennessee
February 5, 2001

Judge Murrian supports the amendments that would provide for video teleconferencing—with or without the defendant's consent. He believes, however, that the judge should have the prerogative to require the defendant to appear in court. In his division, considerable time and resources are spent transporting defendants eighteen miles to the court for routine initial appearances and arraignments that are little more than scheduling conferences.

Judge Thomas W. Phillips (CR-019)
United States Magistrate Judge
Eastern District of Tennessee
February 5, 2001

Judge Phillips writes that he agrees with the views of Judge Murrian, *supra*.

Judge James E. Seibert (CR-022)
United States Magistrate Judge
Northern District of West Virginia
Wheeling West Virginia
February 7, 2001

Judge Seibert strongly disagrees that the defendant should be allowed to determine whether video teleconferencing is used. He notes that it is a two, three, or four hour drive to the three other cities covered by the court and that it is often not possible to plan far enough in advance to have all of the defendants at a particular location ready to appear before the court. He notes that every lawyer and defendant who has appeared before him by video conference has been "extremely grateful for the prompt hearing that wastes neither time nor money of anyone." He states that he has never had any objection to appearance by video conference.

Judge William G. Hussmann (CR-023)
United States Magistrate Judge
Indianapolis, Indiana
February 5, 2001

Judge Hussmann believes that video teleconferencing should occur only with the consent of the defendant. Although initial proceedings, etc. have limited importance, they can have great impact on some practical issues. Because of increased caseloads and crowded jails, it is common to hear complaints from defendants that they are unable to talk to their lawyer or to talk to family members about bail or other pressing family matters. Appearing in person often presents an opportunity for communication. Although video technology has improved, in his view, it does not provide an appropriate venue for communications between counsel and family.

Dean A. Stang (CR-025)
Federal Defender
Eastern District of Wisconsin
Milwaukee, Wisconsin
February 12, 2001.

Mr. Stang opposes the proposed amendments involving video teleconferencing. He indicates that initial appearances and arraignments are not pro forma events and that

those proceedings provide both parties with an opportunity to discuss very important matters. Using teleconferencing will result in lost plea bargains, early cooperation, and prompt release decisions. He notes a number of practical problems that will arise and that teleconferencing makes no practical accommodation for interpreters. Mr. Hillier notes that he is not aware of any special danger to law enforcement officers or court personnel by requiring in-court appearances. Further, teleconferencing will interfere with the critical stages of forming an attorney-client relationship. Finally, teleconferencing will undermine both the dignity of the federal courts and Sixth Amendment values.

Judge Michael J. Watanabe(CR-026)
United States Magistrate Judge
Denver, Colorado
February 13, 2001

Judge Watanabe briefly writes that he strongly favors use of video teleconferencing. He states that he has used it in civil cases and that it works very well.

Thomas W. Hillier, II (CR-027)
Federal Public Defender
Western District of Washington
February 12, 2001

Mr. Hillier presents a detailed objection to the video teleconferencing amendments, on behalf or the Federal Public and Community Defenders. He notes that the current practice works well and that the initial appearance is not a pro forma proceeding. He presents a careful overview of the important decisions that are made in the face-to-face meetings between the defendant, the defense counsel, and the prosecutor. Those meetings, he asserts, assure prompt processing the case. Mr. Hillier believes that video teleconferencing is impractical and presents difficult situations for both the defendant and the defense counsel who must decide whether to remain at the courthouse, with the judge and the prosecutor or travel to where the defendant is located. He notes that the system is likely to result in increased costs and that no in-depth study has been conducted. Further, he observes that in Rule 10, the ability of the defendant to waive presence at the arraignment negates the need for teleconferencing in that rule. Finally, he identifies a list of unresolved issues and urges the Committee to table its proposals pending further study.

Judge Cynthia Imbrogno (CR-029)
United States Magistrate Judge
Eastern District of Washington
February 12, 2001

Judge Imbrogno enthusiastically supports the video teleconferencing amendments. She writes that there are only two magistrate judges covering the Eastern District of Washington and that they often drive over three hours (one way) to conduct proceedings in other cities within the district. As a result, some duty stations are not covered because of the need to spend time traveling. She notes that the technology is sufficiently advanced to maintain the integrity of the proceedings. Defense counsel, she writes, are very supportive of teleconferencing because it gives them greater flexibility in scheduling. She would support video teleconferencing without requiring the defendant's consent.

Judge William A. Knox (CR-030)
United States Judge
February 13, 2001

Judge Knox favors video teleconferencing. He says that he has used it in civil proceedings, including trials, and finds it to be "reliable, practical, efficient, and [has had] no difficulty protecting the rights of the parties. Judge Knox states that if the equipment is poor it is a waste of time to use it.

Judge Leslie G. Foschio (CR-031)
United States Magistrate Judge
Buffalo, New York
February 13, 2001

Judge Foschio favors video teleconferencing for arraignments, especially for superseding arraignments, where the defendant has been already arraigned and bail has been set.

Larry Propes (CR-033)
Clerk of Court
United States District Court, South Carolina
February 13, 2001

Mr. Propes indicates that the judges in both the Greenville and Florence divisions are interested in using video teleconferencing for initial appearances because the courthouses are not in convenient or close proximity to the county jails being used by the US Marshals Service. He observes that if the rule requires the consent of the defendant, few, if any, will consent. He therefore recommends that video teleconferencing not be contingent on the defendant's consent.

Judge Lorenzo F. Garcia (CR-034)
United States Magistrate Judge
United States District Court
Albuquerque, New Mexico

February 13, 2001

Judge Garcia favors using video teleconferencing, especially for arraignments. He notes that in New Mexico, a number of defendants are simply passing through the state when they are arrested and bringing them back to court simply for an arraignment can result in unnecessary costs; where the defendant is indigent, the court must direct advancement of travel costs for the defendant. Judge Garcia also writes that he has had experience with arraignment waivers in state court and that the system worked well.

Judge George P. Kazen (CR-035)
United States District Judge
Southern District of Texas
February 13, 2001

Judge Kazen believes that it is very important to provide for waiver of personal appearance at initial proceedings (Rules 5, 10 and 43), either by written waiver or video appearance. Citing his experience in a border court, in one of five districts they hear almost 30 percent of the criminal cases for the entire nation. The initial arraignment is largely perfunctory used to set a motions schedule. Most of the defendants plead not guilty and are housed as many as 60 to 300 miles away from a courthouse. He notes that frequently the defendants reside at a distant location and if they are released, there are problems in bringing them back for those proceedings. Judge Kazen observes that given the considerable apprehension about this proposal, it would be prudent to adopt a proposal that requires the defendant's consent.

Donna A. Bucella (CR-036)
United States Attorney
Middle District of Florida,
Tampa, Florida
February 14, 2001

Ms. Bucella observes that if the defendant is allowed to waive appearances at an arraignment, the government's consent should be required. She also notes that the Committee Note is ambiguous on just how video teleconferencing will be accomplished for initial appearances. She adds that if the purpose of the amendments is to save money, that the Committee ought to say so explicitly.

Judge James E. Bredar (CR-037)
United States Magistrate Judge
United States District Court for Maryland
February 13, 2001

Judge Bredar opposes the use of video teleconferencing. He believes that there is much at stake in federal criminal cases and that the sooner the defendant understands the

gravity of his situation, the better. He adds that from his time as a public defender, there nothing that helps to focus the mind than to walk into a federal courtroom. He believes that the overall process will be "denigrated" by reducing those appearances to a television experience.

Judge John C. Coughenour (CR-038)
Chief Judge, United States District Court
Western District of Washington
Seattle, Washington
February 6, 2001

Judge Coughenour opposes video teleconferencing in proposed Rules 5 and 10. In his view, the solemnity and fairness of the defendant's appearance in court in the presence of counsel and the judge far outweigh the security problems. The solution, he notes, is heightened vigilance and not the sacrifice of cherished traditions. His views, he notes, are based on his research into the issue: in 1990 he was a member of the Court Administration and Case Management Committee which had supervised a pilot program. As a result of that study, the Committee had believed strongly that video teleconferencing seriously eroded the full and fair examination of facts and witnesses. He urges the Committee to reject the amendments.

Judge Jerry A. Davis (CR-039)
United States Magistrate Judge
ND of Mississippi
February 12, 2001

Judge Davis endorses video teleconferencing. He notes that state courts have been using it for years and that he has been using it for prisoner cases for several years and that there are no "downsides." He observed that it is useful for security purposes and in rural areas. He concludes by noting that any perceived constitutional problems are imagined, not real.

Judge Janice M. Stewart (CR-040)
United States Magistrate Judge
Portland, Oregon
February 12, 2001

Judge Steward favors the proposals for video teleconferencing. But due to concerns about separating the defendant and defense counsel and the problems that that creates, she believes video teleconferencing should be used only where the defendant consents.

Judge David Nuffer (CR-041)
United States Magistrate Judge
St George, Utah
February 13, 2001

Judge Nuffer, a part time magistrate judge, strongly favors video teleconferencing. In Utah he works 300 miles from the courthouse.

Judge William Beaman (CR-042)
February 12, 2001

Judge Beaman strongly approves of video teleconferencing, but would require the defendant's consent.

Judge Susan K. Gauvey (CR-043)
United States Magistrate Judge
District of Maryland
February 15, 2001

Judge Gauvey recounts her experiences in the Maryland state courts with video teleconferencing. She observed what she calls assembly line justice. The proceedings were held in a large room and appeared surreal and chilling. There was no communication between the judge and the defendant. In contrast, in federal courts, all parties are more focused and she is concerned that a judge could not pick up the subtle hesitations or halting speech or odd manner that may be signs of impairment.

Federal Magistrate Judges Association (CR-044)
(Draft Report—Subject to Board Ratification)
February 15, 2001

The Magistrate Judges Association supports the proposed changes to Rule 43, as being consistent with the proposed rules governing video teleconferencing. The Association recounts the benefits of using such procedures and suggests that some of the concerns about the erosion of the process might be addressed if the judge visits the detention facility and determines if that facility as a room suitable for conducting teleconferencing, along with a private telephone line and a room where the defendant can consult in private with his or her attorney. The Association favors video conferencing without requiring the defendant's consent.

Judge Tommy Miller (CR-045)
United States Magistrate Judge, Eastern District of Virginia
(Law Student Comments from William and Mary Law School,
Williamsburg, Virginia)
February 12, 2001

Judge Miller, a member of the Criminal Rules Committee, submitted ten written comments from the law students in his Criminal Procedure class at William and Mary. One of the students, David S. Johnson, is opposed to using video teleconferencing. He notes a number of obstacles that the courts will face, including delays in transmission. He believes that the amendment is "before its time." Only when the technology has advanced further should the amendment be adopted.

A second student, Kimberly Marinoff, expresses concern about the video conferencing provision. She believes that it "eviscerates the utility" of the proceedings "as a wake-up call by insulating the accused from the physical presence of the judge." She concludes, however, that if the amendment is to remain, she would support the alternate version that requires the defendant's consent.

Tom Brzozowski, another student, applauds the style changes to the rules, but suggests that the Committee include a provision in Rule 5 that would make clear what the remedy is for failure to comply with the timing requirements of the rule. He provides a summary of the conflicting caselaw and statutory provisions and argues that whatever remedy the Committee chooses would provide predictability to practitioners.

A fourth student, James Ewing, addresses the video teleconferencing provisions. He cites the historical arguments for the right of the defendant to appear personally in court and believes that even if a defendant consents to video teleconferencing, there may be problems with the perception of fairness. Thus, video conferencing should be the exception rather than the general rule, even where the defendant consents.

Judge Ronald E. Longstaff (CR-046)
Chief Judge, Southern District of Iowa
February 15, 2001

On behalf of the judges of his district, Judge Longstaff indicates that they agree with the comments submitted by Magistrate Judges Cohen, Dien, and Collings, *supra* concerning taking defendants to a magistrate in an adjacent district. They also support the changes for video teleconferencing and would comport to court technology procedures already in place, including both districts in Iowa.

Judge Catherine A. Walter (CR-047)
United States Magistrate Judge
Topeka, Kansas
February 15, 2001

Although she has not used video teleconferencing, Judge Walter supports it use, especially for initial appearances. She notes that the facility used to house pretrial detainees (an hour's drive from her court) has recently installed videoconferencing

equipment. In her view the opportunity for the earliest time for the hearing is more important than a face-to-face appearance before a judge. She notes that there have been occasions where the availability of video conferencing would have resulted in an earlier initial appearance.

Judge Mikel H. Williams (CR-048)
February 15, 2001

Judge Williams commends the Committee for its thorough reorganization of the criminal rules and fully endorses the use of video teleconferencing for initial criminal proceedings. He notes that for the last four years his courts have used such procedures for initial criminal proceedings; they adopted the program because of concerns for serious delays in scheduling the various parties for the hearings. The district court for Idaho covers the entire state and the 400 miles distances make automobile transportation impractical and air travel can be delayed by weather. Transporting the defendants presents similar problems. He describes the process used in his district--the defendant is taken to the closest federal courthouse where he meets his CJS counsel and within two or three hours the defendant appears with counsel before the magistrate judge via video. He cannot recall a single instance where the defendant objected to that procedure; he considers the program to be a resounding success. The defendant's rights are immediately addressed and the proceeding is conducted with the same formality as if the defendant were in the judge's court. Although he would prefer to have a rule not requiring the defendant's consent, he believes that obtaining consent is not a burden.

Judge Richard A, Schell (CR-049)
Chief Judge, Eastern District of Texas
Beaumont, Texas
February 12, 2001

Judge Schell supports the proposed amendments for video teleconferencing. Although he would prefer the version that does not require consent, a rule that requires the defendant's consent is imminently reasonable. He urges the Committee to consider extending video conferencing to pleas and sentencing. He notes the long distances involved in his district and the fact that he has been used video teleconferencing for several years for sentencing and for guilty pleas, with the defendant's consent.

Fredric F. Kay (CR-050)
Federal Public Defender, District of Arizona
Tucson, Arizona
February 15, 2001

Mr. Kay writes that in the District of Arizona there are four lawyers in his office and that in FY 2000 they were appointed to represent about 8000 indigent defendants. Many of those were immigration cases. He agrees with the views expressed by Mr. Tom

Hillier, *supra,* and strongly urges the Committee to reject the amendments. He knows of no serious cost and security concerns that would support the proposed amendments and that they should not outweigh the important aspects of having the defendant and counsel appear personally before the judge. He has watched video proceedings in the state system and has observed the defendant sitting by himself in a chair answering the judge's questions. The judges he notes, may have questions about the defendant's capacity and they have to ask a guard whether the defendant appears to be sober. Using video conferencing is something that one might expect in a weird third world country where there is no concept of presumption of innocence.

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 53

I. SUMMARY OF COMMENTS: Rule 53

[To be completed]

II. LIST OF COMMENTATORS: Rule 53

CR-045 Judge Tommy Miller, United States Magistrate Judge, Eastern District of Virginia (Law Student Comments from William and Mary Law School, Williamsburg, Virginia), February 12, 2001

III. COMMENTS: Rule 53

Judge Tommy Miller (CR-045)
United States Magistrate Judge, Eastern District of Virginia
(Law Student Comments from William and Mary Law School,
Williamsburg, Virginia)
February 12, 2001

Judge Miller, a member of the Criminal Rules Committee, submitted ten written comments from the law students in his Criminal Procedure class at William and Mary. One of the students, David S. Johnson, has presented an extensive written comment on amending Rule 53 to permit electronic coverage of criminal trials under the trial judge's discretion. Although he recognizes the concerns associated with broadcasting trials, he believes that the current rule goes too far. He has drafted a revised Rule 53 that includes a list of factors for the court to consider in deciding whether to broadcast the case.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO THE STYLE PACKAGE

I. SUMMARY OF COMMENTS: STYLE PACKAGE

A number of the comments received by the Committee, a number of commentators presented written statements on the "style" package. Those comments are noted here.

Written comments about substantive changes to particular rules have been summarized on a rule-by-rule basis.

II. LIST OF COMMENTATORS: STYLE PACKAGE

CR-001 (Style)	Joe F. Spaniol, Jr., Esq., Bethesda, MD., August 24, 2000
CR-002 (Style)	Judge Donald C. Ashmanskas, United States Magistrate Judge, District of Oregon, October 4, 2000
CR-003 (Style)	Jack E. Horsley, Mattoon, Illinois, October 134, 2000
CR-004 (Style)	Holly Bench, Williamsburg, VA, November 29, 2000
CR-005 (Style)	Steven W. Allen, Jersey City, NJ, December 19, 2000
CR-006 (Style)	Judge Sam A. Joyner, United States Magistrate Judge, Northern District of OK, January 30, 2001
CR-007 (Style)	Judge James B. Seibert, :United States Magistrate Judge, ND of West Virginia, February 7, 2001
CR-008 (Style)	Judge William G. Hussmann, United States Magistrate Judge, February 5, 2001
CR-009 (Style)	Judge Robert G. Doumar, Norfolk, VA, February 9, 2001
CR-010 (Style)	Judge William Beaman, February 12, 2001

COMMENTS: STYLE PACKAGE

Joe F. Spaniol, Jr., Esq. (CR-001 (Style))
Bethesda, MD.
August 24, 2000

Mr. Spaniol offers two style changes.

Rule 5. First, he recommends that Rule 5(a)(1)(B) should be clarified by adding the words "without a warrant"

Rule 11. He believes there is an inconsistency between terms used in Rule 11(e) and 28 U.S.C. § 2255. Rule 11(e) refers to an appellate court setting aside a guilty plea but § 2255 speaks in terms of a court setting aside judgments and sentences. He notes that there are thus problems using the words "the plea may be set aside" in Rule 11. He recommends that the words in Rule 11(e) should be changed to "and a judgment or sentence may be set aside."

Judge Donald C. Ashmanskas (CR-002 (Style))
United States Magistrate Judge
District of Oregon
October 4, 2000

Rule 6. Judge Ashmanskas recommends changes to Rules 6 and 53. With regard to Rule 6(f) he suggests substituting the term "presiding grand juror" for jury foreperson. And in Rule 6(f) he suggests that unless there is a provision for district judges to assume the responsibilities of a magistrate judge, that the indictment could be returned to either a federal magistrate judge or a district court judge.

Rule 53. In Rule 53 he recommends new language that would extend the prohibition of cameras, etc. to other areas in the courthouse. He also recommends that the rule be amended to permit cameras for coverage of naturalization, ceremonial, or investiture proceedings and for instructional purposes in educational institutions.

Jack E. Horsley, Esq. (CR-003 (Style))
Mattoon, Illinois
October 13, 2000

Rule 5. Mr. Horsley suggests that in referring to an affidavit, the words "or any other document" be added before the words "filed with it."

Holly Bench (CR-004 (Style))
Williamsburg, VA
November 29, 2000

Rule 4. Ms. Bench points out that in Rule 4(b)(1)(C) the words "none" may be referring to something other than the magistrate not being available. She suggests the following language: "command that the defendant be arrested an brought without unnecessary delay before a magistrate judge or, if none is available, before a state or local judicial officer."

She also suggests adding commas in Rule 4(c)(3)(C) (See her memo)

Ms. Bench also suggests that the language in Rule (c)(4)(B) be changed to read, "the person on whom the summons was served must return it" as opposed to "the person to whom a summons was delivered for service must return it."

In Rule 4(c)(4)(C), she suggests adding a comma after the word "summons."

Rule 5. She notes that there may be ambiguity in Rule 5(a)(1)(A) and (a)(1)(B) regarding who must be the one to personally take the defendant before a magistrate judge. She asks whether person executing the arrest must be the one or can that person merely have the responsibility for insuring that the defendant is taken to the magistrate.

She states that there is a possible inconsistency in Rules 5(b) and Rule 5(c)(2)(C). In (b) if the defendant is arrested without a warrant, a complaint must be filed. But in (c)(2)(C), if a defendant is arrested without a warrant, a warrant must be issued before the defendant can be transferred.

Steven W. Allen, Esq. (CR-005 (Style))
Jersey City, NJ
December 19, 2000

Rule 26.2(a). Mr. Allen, who is responsible for incorporating the new rules into MOORE'S FEDERAL PRACTICE has noticed several errors. First in regard to Rule 26.2(a), he notes that the phrase "the possession" is ungrammatical. The existing rule, he notes, uses the term "their possession" which is also ungrammatical but better than the new language. He suggests adding the words, "of the party that called the witness," after the words, "the possession."

Second, in the same rule, he states that the word "witnesses's" appears to be a typo although he notes that it might mean that production is required if it relates to the testimony of all of the witnesses.

Judge Sam A. Joyner (CR-006 (Style))
United States Magistrate Judge
Northern District of Oklahoma
January 30, 2001

Judge Joyner provides a positive endorsement for all of the rules but gives his strongest recommendation for Rules 1(b), 4, 5,5.1, 9(b), 17(a), 32.1, 41, 43, and 55 as the most helpful.

He offers no changes to the rules.

Judge James B. Seibert (CR-007 (Style))
(Also CR-022 on the Substantive Rules)
United States Magistrate Judge
ND of West Virginia
February 7, 2001

Rule 5. Judge Seibert strongly approves the consolidation of Rules 32.1 and 40 into Rule 5.

Judge William G. Hussmann (CR-008 (Style))
(Also CR-023 on the Substantive Rules)
United States Magistrate Judge
February 5, 2001

Judge Hussmann believes that all of the rules that most directly impact his work are improvements to current practice (E.g. Rules 5, 5.1, 9, 10, 12, 41, and 43).

Judge Robert G. Doumar (CR-009 (Style))
Norfolk, VA
February 9, 2001

Judge Doumar offers style suggestions on a number of rules:

Rule 6. He suggests that in Rules 6(e)(3)(A) and 6(e)(3)(B) that the words "laws of the United States" be used instead of the "Federal criminal laws." He notes that it may be problematical on those situations where it is not clear whether the act violates the civil laws and prosecution may proceed in an indirect manner.

In Rule 6(f) he suggests that the words "federal judge" should be substituted for "magistrate judge' because it is district judges that most often receive indictments in open court.

Rule 7. In Rule 7(d) he recommends the following language, "the court may itself or on motion of any party strike surplusage from the indictment or information" instead of the proposed language.

Rule 11. He suggests substitute wording for Rule 11(b)(H): "Any maximum possible prison penalty, special assessment, criminal forfeiture, fine, term of supervised release and that restitution may be ordered as determined as a result of the commission of the offense." This wording, he notes, would eliminate other possible penalties and clarify the issue of restitution.

He also suggests that in Rule 11(b)(J) that the word "authority" should be deleted and substitute the words "that the court's ability to depart from the guidelines is severely limited." He believes that the word "authority" can create problems beyond belief.

He commends the Committee for deleting the language in Rule 11(d) concerning whether the defendant had talked with the government about a plea. He states that that portion of the inquiry has always caused problems.

In Rule 11(d)(2)(B) he recommends that it be changed to "on motion of the defendant, if the court determines good cause to have been shown, to allow withdrawal of the plea."

Rule 12.1 Rule 12.1(b)(2). He suggests adding the words, "unless the court otherwise directs." The 10-day rule may be impossible, he notes, because of the time of service of the alibi defense.

Rule 12.2 Regarding Rule 12.2(a), he recommends that the words "in the case" be added as well as Rule 12.2(b) after the words "attorney for the government."

Rule 12.3. In Rule 12.3 he would add "in the case" after the words "attorney for the government."

Rule 16. Regarding Rule 16(a)(1)(G), recommends that the experts to be disclosed be "technical or scientific" expert witnesses, not "specialized knowledge." He notes that lay witnesses sometimes have specialized knowledge and that the disclosure should be limited to technical or scientific experts.

Rule 17. He recommends that it should be a requisite to returned all served subpoenas to the clerk before trial and also those summons not served

Rule 24. Rule 24(a)(2)(A). He suggests that instead of the proposed language, that the following be substituted: "submit further questions that the court may ask if it considers them proper or with the court's permission ask further questions that the court considers proper."

Finally, in Rule 24(b) he recommends the reduction of the number of peremptory challenges to six and three instead of ten and six. *Batson,* he says, has eliminated the need for any peremptory challenges.

Judge William Beaman (CR-010 (Style))
February 12, 2001

Rule 41. He agrees with the language regarding covert searches but notes that often it is necessary to continue those observations beyond 7 days. Reasonableness, he states, is the appropriate test.

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULES GOVERNING § 2254 AND § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: Proposed Amendments To Rules Governing § 2254 and § 2255 Proceedings Rule 43

[To be completed]

II. LIST OF COMMENTATORS: Proposed Amendments To Rules Governing § 2254 and § 2255 Proceedings Rule 43

CR-010 Gregory C. Krog, Jr., Memphis, TN, December 12, 2000.

CR-021 Gell R. Kingery, Pro se Staff Attorney, United States District Court, WD Texas, February 7, 2001

CR-032 Judge Catherine A. Walter, United States Magistrate Judge, United States District Court, Topeka, Kansas, February 13, 2001.

III. COMMENTS: Proposed Amendments To Rules Governing § 2254 and § 2255 Proceedings Rule 43

Gregory C. Krog, Jr. (CR-010)
Memphis, TN
December 12, 2000.

Mr. Krog is a pro se staff attorney for the United States District Court in the Western District of Tennessee. He observes that the proposed amendments to the rules are "merely cosmetic." He notes that the AEDPA has created new procedural problems for the federal courts. He believes that the rules should clarify the problem of dealing with innumerable frivolous successive petitions being sent to the wrong courts. Further, he notes the inconsistent manner in which petitions are handled. Next, he recommends that Rule 9 be amended to "flat out" prohibit the filing of such petitions unless an appellate court has ordered it. He also believes that the rules should more explicitly explain the relationship and operation of the rules of civil procedure. Until more substantive changes are made, the rules will lag behind the actual practice.

Gell R. Kingery(CR-021)

Pro se Staff Attorney
United States District Court, WD Texas
February 7, 2001

Mr. Kingery recommends that the word "petition" in the Committee Note to Rule 3 of the Rules Governing § 2255 Proceedings be changed to "motion" for consistency.

Judge Catherine A. Walter (CR-032)
United States Magistrate Judge
United States District Court
Topeka, Kansas
February 13, 2001.

Judge Walter suggests that Rule 6 of the Rules Governing §§ 2254 and 2255 Proceedings be made gender neutral.