FEDERAL RULES

OF

CRIMINAL PROCEDURE

DECEMBER 31, 2004

Printed for the use
of

THE COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

108TH CONGRESS
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FOREWORD

This document contains the Federal Rules of Criminal Procedure, as amended to December 31, 2004. The rules have been promulgated and amended by the United States Supreme Court pursuant to law, and further amended by Acts of Congress. This document has been prepared by the Committee in response to the need for an official up-to-date document containing the latest amendments to the rules.

For the convenience of the user, where a rule has been amended a reference to the date the amendment was promulgated and the date the amendment became effective follows the text of the rule.

The Committee on Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Criminal Procedure, Judicial Conference of the United States, prepared notes explaining the purpose and intent of the amendments to the rules. The Committee Notes may be found in the Appendix to Title 18, United States Code, following the particular rule to which they relate.

Chairman, Committee on the Judiciary.

DECEMBER 31, 2004.

AUTHORITY FOR PROMULGATION OF RULES

TITLE 28, UNITED STATES CODE

§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

(Added Pub. L. 100–702, title IV, § 401(a), Nov. 19, 1988, 102 Stat. 4648, eff. Dec. 1, 1988; amended Pub. L. 101–650, title III, § 315, Dec. 1, 1990, 104 Stat. 5115.)

§ 2073. Rules of procedure and evidence; method of prescribing

(a)(1) The Judicial Conference shall prescribe and publish the procedures for the consideration of proposed rules under this section.

(2) The Judicial Conference may authorize the appointment of committees to assist the Conference by recommending rules to be prescribed under sections 2072 and 2075 of this title. Each such committee shall consist of members of the bench and the professional bar, and trial and appellate judges.

(b) The Judicial Conference shall authorize the appointment of a standing committee on rules of practice, procedure, and evidence under subsection (a) of this section. Such standing committee shall review each recommendation of any other committees so appointed and recommend to the Judicial Conference rules of practice, procedure, and evidence and such changes in rules proposed by a committee appointed under subsection (a)(2) of this section as may be necessary to maintain consistency and otherwise promote the interest of justice.

(c)(1) Each meeting for the transaction of business under this chapter by any committee appointed under this section shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public, and states the reason for so closing the meeting. Minutes of each meeting for the transaction of business under this chapter shall be maintained by the committee and made available to the public, except that any portion of such minutes, relating to a closed meeting and made available to the public, may contain such deletions as may be necessary to avoid frustrating the purposes of closing the meeting.

(2) Any meeting for the transaction of business under this chapter, by a committee appointed under this section, shall be preceded by sufficient notice to enable all interested persons to attend.

(d) In making a recommendation under this section or under section 2072 or 2075, the body making that recommendation shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's action, including any minority or other separate views.

(e) Failure to comply with this section does not invalidate a rule prescribed under section 2072 or 2075 of this title.

(Added Pub. L. 100–702, title IV, § 401(a), Nov. 19, 1988, 102 Stat. 4649, eff. Dec. 1, 1988; amended Pub. L. 103–394, title I, § 104(e), Oct. 22, 1994, 108 Stat. 4110.)

§ 2074. Rules of procedure and evidence; submission to Congress; effective date

(a) The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law. The Supreme Court may fix the extent such rule shall apply to proceedings then pending, except that the Supreme Court shall not require the application of such rule to further proceedings then pending to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies.

(b) Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.

(Added Pub. L. 100–702, title IV, § 401(a), Nov. 19, 1988, 102 Stat. 4649, eff. Dec. 1, 1988.)

HISTORICAL NOTE

The Supreme Court prescribes rules of criminal procedure for the district courts pursuant to section 2072 of Title 28, United States Code, as enacted by Title IV ''Rules Enabling Act'' of Pub. L. 100–702 (approved November 19, 1988, 102 Stat. 4648), effective December 1, 1988. Pursuant to section 2074 of Title 28, the Supreme Court transmits to Congress (not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective) a copy of the proposed rule. The rule takes effect no earlier than December 1 of the year in which the rule is transmitted unless otherwise provided by law.

Prior to enactment of Pub. L. 100–702, the Supreme Court promulgated rules of criminal procedure for the district courts pursuant to two sections of Title 18, United States Code. Section 3771 authorized the Court to prescribe rules for all criminal proceedings prior to and including verdict, or finding of guilty or not guilty by the court, or plea of guilty. Section 3772 empowered the Court to prescribe rules with respect to all proceedings after verdict or finding of guilty by the court, or plea of guilty.

Proceedings Prior to and Including Verdict

By act of June 29, 1940, ch. 445, 54 Stat. 688 (subsequently 18 United States Code, § 3771), the Supreme Court was authorized to prescribe general rules of criminal procedure prior to and including verdict, finding of guilty or not guilty by the court, or plea of guilty, in criminal proceedings. The rules, and subsequent amendments, were not to take effect until (1) they had been first reported to Congress by the Attorney General at the beginning of a regular session and (2) after the close of that session.

Under a 1949 amendment to 18 U.S.C., § 3771, the Chief Justice of the United States, instead of the Attorney General, reported the rules to Congress. In 1950, section 3771 was further amended so that amendments to the rules could be reported to Congress not later than May 1 each year and become effective 90 days after being reported. Effective December 1, 1988, section 3771 was repealed and supplanted by new sections 2072 and 2074 of Title 28, United States Code, see first paragraph of Historical Note above.

The original rules pursuant to act of June 30, 1940, were adopted by order of the Court on December 26, 1944, transmitted to Congress by the Attorney General on January 3, 1945, and became effective March 21, 1946 (327 U.S. 821; Cong. Rec., vol. 91, pt. 1, p. 17, Exec. Comm. 4; H. Doc. 12, 79th Cong.).

Amendments were adopted by order of the Court dated December 27, 1948, transmitted to Congress by the Attorney General on January 3, 1949, and became effective October 20, 1949 (335 U.S. 917, 949; Cong. Rec., vol. 95, pt. 1, p. 13, Exec. Comm. 16; H. Doc. 30, 81st

Cong.). The amendments affected Rules 17(e)(2), 41(b)(3), 41(g), 54(a)(1), 54(b), 54(c), 55, 56, and 57(a) and Forms 1–27, inclusive.

Further amendments were adopted by order of the Court dated April 9, 1956, transmitted to Congress by the Chief Justice on the same day, and became effective July 8, 1956 (350 U.S. 1017; Cong. Rec., vol. 102, pt. 5, p. 5973, Exec. Comm. 16; H. Doc. 377, 84th Cong.). The amendments affected Rules 41(a), 46(a)(2), 54(a)(1), and 54(c).

Further amendments were adopted by order of the Court dated February 28, 1966, transmitted to Congress by the Chief Justice on the same day, and became effective July 1, 1966 (383 U.S. 1087; Cong. Rec., vol. 112, pt. 4, p. 4229, Exec. Comm. 2093; H. Doc. 390, 89th Cong.). The amendments affected Rules 4, 5, 6, 7, 11, 14, 16, 17, 18, 20, 21, 23, 24, 25, 28, 29, 30, 32, 33, 34, 35, 37, 38, 40, 44, 45, 46, 49, 54, 55, and 56, and Form 26, added new Rules 17.1 and 26.1, and rescinded Rules 19 and 45(c).

Further amendments were adopted by the Court by order dated December 4, 1967, transmitted to Congress by the Chief Justice on January 15, 1968, and became effective July 1, 1968, together with the new Federal Rules of Appellate Procedure (389 U.S. 1125; Cong. Rec., vol. 114, pt. 1, p. 113, Exec. Comm. 1361; H. Doc. 204, 90th Cong.). The amendments affected Rules 45(b), 49(c), 56, and 57, and abrogated the chapter heading ''VIII. Appeal'', Rules 37, 38(b), (c), and 39, and Forms 26 and 27.

On March 1, 1971, the Court adopted additional amendments which were transmitted to Congress by the Chief Justice on March 1, 1971. These amendments became effective July 1, 1971 (401 U.S. 1025; Cong. Rec., vol. 117, pt. 4, p. 4629, Exec. Comm. 341; H. Doc. 92–57). The amendments affected Rules 45(a) and 56.

Additional amendments were adopted by the Court by order dated April 24, 1972, transmitted to Congress by the Chief Justice, accompanied by his letter of transmittal dated April 24, 1972. These amendments became effective October 1, 1972 (406 U.S. 979; Cong. Rec., vol. 118, pt. 11, p. 14262, Exec. Comm. 1903; H. Doc. 92–285). The amendments affected Rules 1, 3, 4(b), (c), 5, 5.1, 6(b), 7(c), 9(b), (c), (d), 17(a), (g), 31(e), 32(b), 38(a), 40, 41, 44, 46, 50, 54, and 55.

Additional amendments were adopted by the Court by order dated March 18, 1974, transmitted to Congress by the Chief Justice on the same date. These amendments became effective July 1, 1974 (415 U.S. 1056; Cong. Rec., vol. 120, pt. 5, p. 7012, Exec. Comm. 2062; H. Doc. 93–241). The amendments affected Rules 41(a) and 50.

Further amendments were proposed by the Court in its order dated November 20, 1972, transmitted to Congress by the Chief Justice on February 5, 1973 (409 U.S. 1132 and 419 U.S. 1133, 1136; Cong. Rec., vol. 119, pt. 3, p. 3247, Exec. Comm. 359; H. Doc. 93–46). Although these amendments were to have become effective July 1, 1973, Public Law 93–12 (approved March 30, 1973, 87 Stat. 9) provided that the proposed amendments ''shall have no force or effect except to the extent, and with such amendments, as they may be expressly approved by Act of Congress.'' Section 3 of Public Law 93–595 (approved January 2, 1975, 88 Stat. 1949) approved the amendments proposed by the Court, to be effective July 1, 1975. The amendments affected Rules 26, 26.1, and 28.

In its order dated April 22, 1974, the Court proposed additional amendments which were transmitted to Congress by the Chief Justice on the same day. The amendments were to have become effective August 1, 1974 (416 U.S. 1001; Cong. Rec., vol. 120, pt. 9, p. 11472, Exec. Comm. 2223; H. Doc. 93–292). The effective date of the proposed amendments was postponed until August 1, 1975, by Public Law 93–361 (approved July 30, 1974, 88 Stat. 397). Public Law 94–64 (approved July 31, 1975, 89 Stat. 370) approved the amendments proposed by the Court and further amended the rules, to be effective December 1, 1975, except Rule 11(e)(6), to be effective August 1, 1975. The amendments affected Rules 4, 9(a), 11, 12, 15, 16, 17(f), 20, 32(a), (c), (e), and 43, and added Rules 12.1, 12.2, and 29.1.

Technical amendments to Rules 9(b), 9(c), 16(a), and 16(b) were made by section 5 of Public Law 94–149 (approved Dec. 12, 1975, 89 Stat. 806).

Additional amendments were proposed by the Court by order dated April 26, 1976, were transmitted to Congress by the Chief Justice on the same day (425 U.S. 1157; Cong. Rec., vol. 122, pt. 9, p. 11117, Exec. Comm. 3084; H. Doc. 94–464), and were to be effective August 1, 1976. Public Law 94–349 (approved July 8, 1976, 90 Stat. 822) delayed the effective date of the amendments to Rules 6(e), 23, 24, and 41(c)(2), and the addition of Rule 40.1 until August 1, 1977, or until and to the extent approved by Act of Congress, whichever is earlier. Also, it approved the amendments to Rules 6(f), 41(a), and 50(b), to be effective August 1, 1976. Public Law 95–78 (approved July 30, 1977, 91 Stat. 319) disapproved the amendment to Rule 24 and the addition of Rule 40.1, approved amendments to Rule 23, and modified and approved amendments to Rules 6(e) and 41(c), to be effective October 1, 1977.

Additional amendments were proposed by the Court by order dated April 30, 1979, were transmitted to Congress by the Chief Justice on the same day (441 U.S. 970, 985; Cong. Rec., vol. 125, pt. 8, p. 9366, Exec. Comm. 1456; H. Doc. 96–112), and were to be effective August 1, 1979. Amendments to Rules 6(e), 7(c)(2), 9(a), 11(e)(2), 18, 32(c)(3)(E), 35, and 41(a), (b), and (c) became effective August 1, 1979. Public Law 96–42 (approved July 31, 1979, 93 Stat. 326) delayed the effective date of the amendments to Rules 11(e)(6), 17(h), 32(f), and 44(c), and the addition of new Rules 26.2 and 32.1, until December 1, 1980, or until and to the extent approved by Act of Congress, whichever is earlier, and modified and approved the amendment to Rule 40 to be effective August 1, 1979. In the absence of further action by Congress, the amendments that were the subject of a delayed effective date pursuant to Public Law 96–42 became effective December 1, 1980.

Additional amendments were adopted by the Court by order dated April 28, 1982, transmitted to Congress by the Chief Justice on the same day (456 U.S. 1021; Cong. Rec., vol. 128, pt. 6, p. 8191, Exec. Comm. 3822; H. Doc. 97–173), and became effective August 1, 1982. The amendments affected Rules 1, 5(b), 9(a), (b)(1), (2), (c)(1), (2), 11(c)(1), (4), (5), 20(b), 40(d)(1), (2), 45(a), 54(a), (b)(4), (c), and abrogated Rule 9(d).

An amendment to Rule 32(c)(2) was made by section 3 of Public Law 97–291 (approved October 12, 1982, 96 Stat. 1249.)

Additional amendments were adopted by the Court by order dated April 28, 1983, transmitted to Congress by the Chief Justice

on the same day (461 U.S. 1117; Cong. Rec., vol. 129, pt. 8, p. 10479, Exec. Comm. 1028; H. Doc. 98–55), and became effective August 1, 1983. The amendments affected Rules 6(e), (g), 11(a), (h), 12(i), 12.2(b), (c), (d), (e), 16(a), 23(b), 32(a), (c), (d), 35(b), and 55, and abrogated Rule 58 and the Appendix of Forms.

Section 209 of Public Law 98–473 (approved October 12, 1984, 98 Stat. 1986) amended Rules 5(c), 15(a), 40(f), 46(a), (c), (e)(2), and 54(b)(3), and added Rule 46(h).

Section 215 of Public Law 98–473 (98 Stat. 2014, as amended) amended Rules 6(e)(3)(C), 32(a)(1), (2), (c)(1) to (3), (d), 35, 38, 40(d)(1), and 54(c), effective on the first day of the first calendar month beginning 36 months after October 12, 1984 (November 1, 1987).

Section 404(a) of Public Law 98–473 (98 Stat. 2067) amended Rule 12.2(a). Section 404(b) to (d) of Public Law 98–473 would have amended Rule 12.2(b) to (d), but the amendments by section 404(b) and (d) were repealed by section 11(b) of Public Law 98–596 (approved October 30, 1984, 98 Stat. 3138) and the amendment by section 404(c) of Public Law 98–473 could not be executed because it directed the deletion of language not found in the text of the Rule [that defect being cured by section 11(a) of Public Law 98–596, which amended Rule 12.2(c) and (d)]. The amendments and repeals by section 11 of Public Law 98–596 are effective on and after the date of enactment of Public Law 98–473 (October 12, 1984).

Additional amendments were adopted by the Court by order dated April 29, 1985, transmitted to Congress by the Chief Justice on the same day (471 U.S. 1167; Cong. Rec., vol. 131, pt. 7, p. 9826, Exec. Comm. 1154; H. Doc. 99–64), and became effective August 1, 1985. The amendments affected Rules 6(e)(3), 11(c)(1), 12.1(f), 12.2(e), 35(b), 45(a), 49(e), and 57. The amendment to Rule 35(b) was effective until November 1, 1986, when section 215(b) of Public Law 98–473 (approved October 12, 1984, 98 Stat. 2015) was to go into effect. Section 235(a)(1) of Public Law 98–473, which originally provided for an effective date of November 1, 1986, for the amendments made by section 215(b) of Public Law 98–473, was later amended by section 4 of Public Law 99–217 to provide for an effective date of November 1, 1987.

Section 1009 of Public Law 99–570 (approved October 27, 1986, 100 Stat. 3207–8) amended Rule 35(b), effective on the date (November 1, 1987) of the taking effect of Rule 35(b) as amended by section 215(b) of Public Law 98–473.

Sections 12(b), 24, 25(a), and 54(a) of Public Law 99–646 (approved November 10, 1986, 100 Stat. 3594, 3597, 3607) affected Rules 12.2(c), 29(d), 32(c)(2)(B), and 32.1(b). The amendments to Rules 29(d) and 32.1(b) became effective 30 days after the date of enactment of Public Law 99–646. The amendment to Rule 32(c)(2)(B) became effective November 1, 1987, when the amendment made by section 215(a)(5) of Public Law 98–473 went into effect.

Additional amendments were adopted by the Court by order dated March 9, 1987, transmitted to Congress by the Chief Justice on the same day (480 U.S. 1041; Cong. Rec., vol. 133, pt. 4, p. 5256, Exec. Comm. 825; H. Doc. 100–47), and became effective August 1, 1987. The amendments affected Rules 4(c)(1), (d)(3), (4), 5(c), 5.1(a), (c), 6(a), (c), (f), 7(b), (c)(1), (3), 10, 11(a)(2), (c)(2) to (5), (d), (e)(2), (4), 12(h), 12.1(a), (b) to (d), 12.2(a), (b), (d), 15(a) to (e), 16(a)(1)(A)

to (C), (b)(1)(B), (2), (c), 17(a), (d), (g), 17.1, 20, 21(a), (b), 24(a), 25, 26.2(a), (c), (f)(1), 30, 32(a), (c)(3)(A) to (E), 32.1, 33, 38(a)(2), (3), 40(a), (d)(3), (e), (f), 41(c)(1), (e), 42, 43(b), 44(a), (c), 45(e), 46(b), (d), (g), 49(b), and 51.

Additional amendments were adopted by the Court by order dated April 25, 1988, transmitted to Congress by the Chief Justice on the same day (485 U.S. 1057; Cong. Rec., vol. 134, pt. 7, p. 9154, Exec. Comm. 3516; H. Doc. 100–186), and became effective August 1, 1988. The amendments affected Rules 30 and 56.

Sections 6483, 7076, and 7089(c) of Public Law 100–690 (approved November 18, 1988, 102 Stat. 4382, 4406, 4409) amended Rules 11(c)(1) and 54(c), and added Rule 12.3.

Additional amendments were adopted by the Court by order dated April 25, 1989, transmitted to Congress by the Chief Justice on the same day (490 U.S. 1135; Cong. Rec., vol. 135, pt. 6, p. 7542, Exec. Comm. 1059; H. Doc. 101–55), and became effective December 1, 1989. The amendments affected Rules 11(c)(1), 32(a), (c), 32.1(a), (b), 40(d), and 41(e).

Additional amendments were adopted by the Court by order dated May 1, 1990, transmitted to Congress by the Chief Justice on the same day (495 U.S. 967; Cong. Rec., vol. 136, pt. 6, p. 9091, Ex. Comm. 3098; H. Doc. 101–185), and became effective December 1, 1990. The amendments affected Rules 5(b), 41(a), and 54(b)(4), (c), and added new Rule 58.

Additional amendments were adopted by the Court by order dated April 30, 1991, transmitted to Congress by the Chief Justice on the same day (500 U.S. 991; Cong. Rec., vol. 137, pt. 7, p. 9721, Ex. Comm. 1191; H. Doc. 102–78), and became effective December 1, 1991. The amendments affected Rules 16(a), 32(c), 32.1(a), 35(b), (c), 46(h), 54(a), and 58(b), (d).

Additional amendments were adopted by the Court by order dated April 22, 1993, transmitted to Congress by the Chief Justice on the same day (507 U.S. 1161; Cong. Rec., vol. 139, pt. 6, p. 8127, Ex. Comm. 1103; H. Doc. 103–75), and became effective December 1, 1993. The amendments affected Rules 1, 3, 4(c)(1), (d), 5, 5.1, 6(e)(4), (f), 9(a) to (c), 12(i), 16(a)(1)(E), (2), (b)(1)(C), 17(a), (g), 26.2(c), (d), (g), 32(e), 32.1(c), 40(a), (b), (d), (e), (f), 41(a), (c), (d), (g), 44(a), 46(i), 49(e), 50(b), 54(b)(3), (4), (c), 55, 57, and 58(a)(1), (b)(2), (3), (c)(2), (d)(2), (g)(2), and added new Rule 26.3.

Additional amendments were adopted by the Court by order dated April 29, 1994, transmitted to Congress by the Chief Justice on the same day (511 U.S. 1175; Cong. Rec., vol. 140, pt. 7, p. 8903, Ex. Comm. 3084; H. Doc. 103–249), and became effective December 1, 1994. The amendments affected Rules 16(a)(1)(A), 29(b), 32, and 40(d).

Sections 230101(b), (c) and 330003(h) of Public Law 103–322 (approved September 13, 1994, 108 Stat. 2078, 2141) affected Rules 32 and 46(i)(1). The amendments to Rule 32 became effective December 1, 1994. The amendment to Rule 46 became effective September 13, 1994.

Additional amendments were adopted by the Court by order dated April 27, 1995, transmitted to Congress by the Chief Justice on the same day (514 U.S. 1159; Cong. Rec., vol. 141, pt. 8, p. 11745, Ex. Comm. 805; H. Doc. 104–65), and became effective December 1, 1995. The amendments affected Rules 5, 40, 43, 49, and 57.

An additional amendment was adopted by the Court by order dated April 23, 1996, transmitted to Congress by the Chief Justice on the same day (517 U.S. 1285; Cong. Rec., vol. 142, pt. 6, p. 8831, Ex. Comm. 2488; H. Doc. 104–202), and became effective December 1, 1996. The amendment affected Rule 32(d)(2).

Sections 207(a) and 211 of Public Law 104–132 (approved April 24, 1996, 110 Stat. 1236, 1241) amended Rule 32(b), effective, to the extent constitutionally permissible, for sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment of Public Law 104–132.

Additional amendments were adopted by the Court by order dated April 11, 1997, transmitted to Congress by the Chief Justice on the same day (520 U.S. 1313; Cong. Rec., vol. 143, pt. 4, p. 5550, Ex. Comm. 2796; H. Doc. 105–68), and became effective December 1, 1997. The amendments affected Rules 16 and 58.

Additional amendments were adopted by the Court by order dated April 24, 1998, transmitted to Congress by the Chief Justice on the same day (523 U.S. 1227; H. Doc. 105–267), and became effective December 1, 1998. The amendments affected Rules 5.1, 26.2, 31, 33, 35, and 43.

Additional amendments were adopted by the Court by order dated April 26, 1999, transmitted to Congress by the Chief Justice on the same day (526 U.S. 1189; Cong. Rec., vol. 145, pt. 6, p. 7907, Ex. Comm. 1788; H. Doc. 106–55), and became effective December 1, 1999. The amendments affected Rules 6, 11, 24, and 54.

Additional amendments were adopted by the Court by order dated April 17, 2000, transmitted to Congress by the Chief Justice on the same day (529 U.S. 1179; Cong. Rec., vol. 146, pt. 5, p. 6328, Ex. Comm. 7335; H. Doc. 106–227), and became effective December 1, 2000. The amendments affected Rules 7, 31, 32, and 38, and added new Rule 32.2.

Sections 203(a) and 219 of Public Law 107–56 (approved October 26, 2001, 115 Stat. 278, 291) amended Rules 6(e)(3)(C), (D) and 41(a).

Additional amendments were adopted by the Court by order dated April 29, 2002, transmitted to Congress by the Chief Justice on the same day (535 U.S. 1157; Cong. Rec., vol. 148, p. H2104, Daily Issue, Ex. Comm. 6621; H. Doc. 107–203), and became effective December 1, 2002. The amendments affected Rules 1 to 60.

Section 11019(b), (c) of Pub. L. 107–273 (approved November 2, 2002, 116 Stat. 1825, 1826) amended Rule 16(a)(1)(G), (b)(1)(C), effective December 1, 2002.

Sections 4 and 895 of Pub. L. 107–296 (approved November 25, 2002, 116 Stat. 2142, 2256) which directed the amendment of Rule 6(e)(2), (3)(A)(ii), (C)(i), (iii), effective 60 days after the date of enactment of Pub. L. 107–296, could not be executed after the amendments of April 29, 2002, effective December 1, 2002.

Section 610(b) of Pub. L. 108–21 (approved April 30, 2003, 117 Stat. 692) amended Rule 7(c)(1).

An additional amendment was adopted by the Court by order dated April 26, 2004, transmitted to Congress by the Chief Justice on the same day (541 U.S. ——; Cong. Rec., vol. 150, p. H2482, Daily Issue, Ex. Comm. 7865; H. Doc. 108–182), and became effective December 1, 2004. The amendment affected Rule 35.

Section 6501(a) of Pub. L. 108–458 (approved December 17, 2004, 118 Stat. 3760) amended Rule 6(e).

Proceedings After Verdict

By act of February 24, 1933, ch. 119, 47 Stat. 904, as amended (subsequently 18 United States Code, §3772), the Supreme Court was authorized to prescribe general rules of criminal procedure with respect to proceedings after verdict or finding of guilty by the court, or plea of guilty, which became effective on dates fixed by the Court. These rules were not required to be submitted to Congress.

Rules 32 to 39, inclusive, were adopted by order of the Court on February 8, 1946, and became effective on March 21, 1946 (327 U.S. 825). Prior rules promulgated on May 7, 1934 (292 U.S. 659), were not specifically rescinded by that order but were superseded by these later rules.

Amendments to Rules 37(a)(1), 38(a)(3), (c), and 39(b)(2) were adopted by order of the Court dated December 27, 1948, and became effective on January 1, 1949 (335 U.S. 917).

Additional amendment to Rule 37 was adopted by order of the Court dated April 12, 1954, and became effective on July 1, 1954 (346 U.S. 941).

The Court adopted separate Federal Rules of Appellate Procedure by order dated December 4, 1967, transmitted to Congress on January 15, 1968, effective July 1, 1968. As noted above, Rules 37, 38(b), (c), and 39, and Forms 26 and 27, were abrogated effective July 1, 1968, by that same order.

Effective December 1, 1988, section 3772 of Title 18 was repealed and supplanted by section 2072 of Title 28, United States Code, see first paragraph of Historical Note above.

Committee Notes

Committee Notes prepared by the Committee on Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Criminal Procedure, Judicial Conference of the United States, explaining the purpose and intent of the amendments are set out in the Appendix to Title 18, United States Code, following the particular rule to which they relate. In addition, the rules and amendments, together with Committee Notes, are set out in the House documents listed above.

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FEDERAL RULES OF CRIMINAL PROCEDURE

Effective March 21, 1946, as amended to December 31, 2004

TITLE I. APPLICABILITY

Rule 1. Scope; Definitions

(a) Scope.

(1) ***In General.*** These rules govern the procedure in all criminal proceedings in the United States district courts, the 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 all 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.

(4) ***Removed Proceedings.*** Although these rules govern all proceedings after removal from a state court, state law governs a dismissal by the prosecution.

(5) ***Excluded Proceedings.*** Proceedings not governed by these rules include:

(A) the extradition and rendition of a fugitive;

(B) a civil property forfeiture for violating 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;

(E) a dispute between seamen under 22 U.S.C. §§256–258; and

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

(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.

(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; and

(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.

(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 empowered by statute 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 a Justice or Judge of the United States. When these rules authorize a magistrate judge to act, any other federal judge may also act.

(As amended Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 28, 1982, eff. Aug. 1, 1982; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 2. Interpretation

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.

(As amended Apr. 29, 2002, eff. Dec. 1, 2002.)

TITLE II. PRELIMINARY PROCEEDINGS

Rule 3. The Complaint

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.

(As amended Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 4. Arrest Warrant or Summons on a Complaint

(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 an 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 an attorney for the government must, issue a warrant.

(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 without unnecessary delay before a magistrate judge or, if none is reasonably available, before a state or local judicial officer; and

(D) be signed by a judge.

(2) ***Summons.*** A summons must 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.

(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) ***Location.*** A warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest.

(3) ***Manner.***

(A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the warrant to the defendant as soon as possible.

(B) A summons is served on an individual defendant:

(i) by delivering a copy to the defendant personally; or

(ii) by leaving a copy 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 is served on an organization by delivering a copy to an officer, 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.***

(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 an 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 judicial 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 an attorney for the government, a judge may deliver an unexecuted warrant, an unserved summons, or a copy of the warrant or summons to the marshal or other authorized person for execution or service.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, eff. Dec. 1, 1975; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 5. Initial Appearance

(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, unless a statute provides otherwise.

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

(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 violating 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) Arrest Without a Warrant. 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) Place of 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 Where the Offense Was Allegedly Committed.*** If the defendant was arrested in a district

other than where the offense was allegedly committed, the initial appearance must be:

(A) in the district of arrest; or

(B) in an adjacent district if:

(i) the appearance can occur more promptly there; or

(ii) the offense was allegedly committed there and the initial appearance will occur on the day of arrest.

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

(A) the magistrate judge must inform the defendant about the provisions of Rule 20;

(B) if the defendant was arrested without a warrant, the district court where the offense was allegedly committed must first issue a warrant before the magistrate judge transfers the defendant to that district;

(C) the magistrate judge must conduct a preliminary hearing if required by Rule 5.1 or Rule 58(b)(2)(G);

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

(i) the government produces the warrant, a certified copy of the warrant, 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

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

(d) Procedure in a Felony Case.

(1) ***Advice.*** If the defendant is charged with 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) ***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.

(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 consents.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 28, 1982, eff. Aug. 1, 1982; Oct. 12, 1984; Mar. 9, 1987, eff. Aug. 1, 1987; May 1, 1990, eff. Dec. 1, 1990; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 5.1. Preliminary Hearing

(a) In General. If a defendant is charged with an offense other than a petty offense, a magistrate judge must conduct a preliminary hearing unless:

(1) the defendant waives the hearing;

(2) the defendant is indicted;

(3) the government files an information under Rule 7(b) charging the defendant with a felony;

(4) the government files an information charging the defendant with a misdemeanor; or

(5) the defendant is charged with a misdemeanor and consents to trial before a magistrate judge.

(b) Selecting a 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 may not 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) Recording the Proceedings. 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 any payment required by applicable Judicial Conference regulations.

(h) Producing a Statement.

(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 Not Producing a Statement.*** If a party disobeys a Rule 26.2 order to deliver a statement to the moving party, the magistrate judge must not consider the testimony of a witness whose statement is withheld.

(As added Apr. 24, 1972, eff. Oct. 1, 1972; amended Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

TITLE III. THE GRAND JURY, THE INDICTMENT, AND THE INFORMATION

Rule 6. The Grand Jury

(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 also select alternate jurors. Alternate jurors must have the same qualifications and be selected in the same manner as any other juror. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror is subject to the same challenges, takes the same oath, and has the same authority as the other jurors.

(b) Objection 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 must not 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 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 clerk, but the record may not be made public unless the court so orders.

(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 an operator of a recording device.

(2) ***During Deliberations and Voting.*** No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting.

(e) Recording and 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) ***Secrecy.***

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;
(ii) an interpreter;
(iii) a court reporter;
(iv) an operator of a recording device;
(v) a person who transcribes recorded testimony;
(vi) an attorney for the government; or
(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

(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;

(ii) any government personnel—including those of a state, state subdivision, Indian tribe, or foreign government—that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or

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

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury.

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 401a), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate Federal, State, State subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any State, State subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only consistent with such guidelines as the Attorney General and the Director of National Intelligence shall jointly issue.

(ii) Within a reasonable time after disclosure is made under Rule 6(e)(3)(D), an attorney for the government must file, under seal, a notice with the court in the district where the grand jury convened stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

(iii) As used in Rule 6(e)(3)(D), the term ''foreign intelligence information'' means:

(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against—

- actual or potential attack or other grave hostile acts of a foreign power or its agent;
- sabotage or international terrorism by a foreign power or its agent; or
- clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to—

- the national defense or the security of the United States; or
- the conduct of the foreign affairs of the United States.

(E) 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, when sought by a foreign court or prosecutor for use in an official criminal investigation;

(iv) at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law; or

(v) 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.

(F) A petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(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) an attorney for the government;

(ii) the parties to the judicial proceeding; and

(iii) any other person whom the court may designate.

(G) If the petition to disclose arises out of a judicial 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)(F) a reasonable opportunity to appear and be heard.

(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, or of guidelines jointly issued by the Attorney General and the Director of National Intelligence pursuant to Rule 6, may be punished as a contempt of court.

(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) Discharging the Grand Jury. A grand jury must serve until the court discharges it, but it may serve more than 18 months only if the court, having determined that an extension is in the public interest, extends the grand jury's service. An extension may be granted for no more than 6 months, except as otherwise provided by statute.

(h) Excusing a Juror. At any time, for good cause, the court may excuse a juror either temporarily or permanently, and if permanently, the court may impanel an alternate juror in place of the excused juror.

(i) "Indian Tribe" Defined. ''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.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 26 and July 8, 1976, eff. Aug. 1, 1976; July 30, 1977, eff. Oct. 1, 1977; Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 28, 1983, eff. Aug. 1, 1983; Oct. 12, 1984, eff. Nov. 1, 1987; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 26, 1999, eff. Dec. 1, 1999; Oct. 26, 2001; Apr. 29, 2002, eff. Dec. 1, 2002; Nov. 25, 2002; Dec. 17, 2004.)

Rule 7. The Indictment and the Information

(a) When Used.

(1) ***Felony.*** An offense (other than criminal contempt) 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) 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 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. For purposes of an indictment referred to in section 3282 of title 18, United States Code, for which the identity of the defendant is unknown, it shall be sufficient for the indictment to describe the defendant as an individual whose name is unknown, but who has a particular DNA profile, as that term is defined in section 3282.

(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. Upon the defendant's motion, the court may strike surplusage from the indictment or information.

(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 the verdict or finding.

(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.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 30, 2003.)

Rule 8. Joinder of Offenses or Defendants

(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. 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.

(As amended Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 9. Arrest Warrant or Summons on an Indictment or Information

(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 ac-

companying the information establish probable cause to believe that an offense has been committed and that the defendant committed it. The court may issue more than one warrant or summons for the same defendant. If a defendant fails to appear in response to a summons, the court may, and upon request of an 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 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 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.

(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.*** 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.

(As amended Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, eff. Dec. 1, 1975; Dec. 12, 1975; Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 28, 1982, eff. Aug. 1, 1982; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002.)

TITLE IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

Rule 10. Arraignment

(a) In General. An 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 consents.

(As amended Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 11. Pleas

(a) Entering a Plea.

(1) ***In General.*** A defendant may plead not guilty, 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.

(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.

(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) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(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;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) the court's obligation to apply the Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances; and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(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.

(c) Plea Agreement Procedure.

(1) ***In General.*** An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an 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 does or does not apply (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 does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(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) ***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.

(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 do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to 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.

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(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. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, eff. Aug. 1 and Dec. 1, 1975; Apr. 30, 1979, eff. Aug. 1, 1979, and Dec. 1, 1980; Apr. 28, 1982, eff. Aug. 1, 1982; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 9, 1987, eff. Aug. 1, 1987; Nov. 18, 1988; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 26, 1999, eff. Dec. 1, 1999; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 12. Pleadings and Pretrial Motions

(a) Pleadings. The pleadings in a criminal proceeding are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.

(b) Pretrial Motions.

(1) ***In General.*** Rule 47 applies to a pretrial motion.

(2) ***Motions That May Be Made Before Trial.*** A party 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 instituting the prosecution;

(B) a motion alleging a defect in the indictment or information—but at any time while the case is pending, 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 notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object 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 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) 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.

(e) Waiver of a Defense, Objection, or Request. A party waives any Rule 12(b)(3) 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.

(f) Recording the Proceedings. All proceedings at a motion hearing, including any findings of fact and conclusions of law made orally by the court, must be recorded by a court reporter or a suitable recording device.

(g) Defendant's Continued Custody or Release Status. If the court grants a motion to dismiss based on a defect in instituting 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.

(h) Producing Statements at a Suppression Hearing. Rule 26.2 applies at a suppression hearing under Rule 12(b)(3)(C). At a suppression hearing, a law enforcement officer is considered a government witness.

(As amended Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, eff. Dec. 1, 1975; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 12.1. Notice of an Alibi Defense

(a) Government's Request for Notice and Defendant's Response.

(1) ***Government's Request.*** An attorney for the government may request in writing that the defendant notify an 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 at some other time the court sets, the defendant must serve written notice on an attorney for the government of any intended alibi defense. The defendant's notice must state:

(A) each specific place where the defendant claims to have been at the time of the alleged offense; and

(B) the name, address, and telephone number of each alibi witness on whom the defendant intends to rely.

(b) Disclosing Government Witnesses.

(1) ***Disclosure.*** If the defendant serves a Rule 12.1(a)(2) notice, an attorney for the government must disclose in writing to the defendant or the defendant's attorney:

(A) the name, address, and telephone number of each witness the government intends to rely on to establish the defendant's presence at the scene of the alleged offense; and

(B) each government rebuttal witness to the defendant's alibi defense.

(2) ***Time to Disclose.*** Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure 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. Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name, address, and telephone number of each 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 known of the witness earlier.

(d) Exceptions. For good cause, the court may grant an exception to any requirement of Rule 12.1(a)–(c).

(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 Intention. Evidence of an intention to rely on an alibi defense, later withdrawn, or of a statement made in connection with that intention, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

(As added Apr. 22, 1974, eff. Dec. 1, 1975; amended July 31, 1975, eff. Dec. 1, 1975; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 12.2. Notice of an 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 so notify an attorney for the government in writing within the time provided for filing a pretrial motion, or at any later time the court sets, and file a copy of the notice with the clerk. 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 filing a pretrial motion or at any later time the court sets—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 the defendant to file the notice late, grant the parties additional trial-preparation time, or make other appropriate orders.

(c) Mental Examination.

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

(A) The court may 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 regarding mental condition on which the defendant:

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

(B) has introduced expert evidence in a capital sentencing proceeding requiring 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.

(As added Apr. 22, 1974, eff. Dec. 1, 1975; amended July 31, 1975, eff. Dec. 1, 1975; Apr. 28, 1983, eff. Aug. 1, 1983; Oct. 12, 1984; Oct. 30, 1984, eff. Oct. 12, 1984; Apr. 29, 1985, eff. Aug. 1, 1985; Nov. 10, 1986; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 12.3. Notice of a Public-Authority Defense

(a) Notice of the Defense and Disclosure of Witnesses.

(1) *Notice in General.* If a defendant 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, the defendant 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 sets. The notice filed with the clerk must be under seal if the notice identifies a federal intelligence agency as the source of public authority.

(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 the 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.

(4) *Disclosing Witnesses.*

(A) *Government's Request*. An attorney for the government may request in writing that the defendant disclose the name, address, and telephone number of each witness the defendant intends to rely on to establish a public-authority defense. An attorney for the government may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(3), or later, but must serve the request no later than 20 days before trial.

(B) *Defendant's Response*. Within 7 days after receiving the government's request, the defendant must serve on an attorney for the government a written statement of the name, address, and telephone number of each witness.

(C) *Government's Reply*. Within 7 days after receiving the defendant's statement, an 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.

(5) ***Additional Time.*** The court may, for good cause, allow a party additional time to comply with this rule.

(b) Continuing Duty to Disclose. Both an attorney for the government and the defendant 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 known of the witness earlier.

(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 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 Intention. 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.

(As added Nov. 18, 1988; amended Apr. 29, 2002, eff. Dec. 1, 2002.)

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 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.

(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) to the extent it can be obtained through due diligence.

(b) Time for Filing; Supplemental Filing. A party must:

(1) file the Rule 12.4(a) statement upon the defendant's initial appearance; and

(2) promptly file a supplemental statement upon any change in the information that the statement requires.

(As added Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 13. Joint Trial of Separate Cases

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.

(As amended Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 14. Relief from Prejudicial Joinder

(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 an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 15. Depositions

(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 the motion because of exceptional circumstances 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 material that is not privileged, including any book, paper, document, record, recording, or data.

(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.

(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 may, for good cause, 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.

(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 being warned by the court 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.

(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 costs of the deposition transcript.

(e) Manner of Taking. Unless these rules or a court order provides otherwise, a deposition must be taken and filed in the same manner as a deposition in a civil action, except that:

(1) A defendant may not be deposed without that defendant's consent.

(2) The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial.

(3) The government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial.

(f) Use as Evidence. A party may use all or part of a deposition as provided by the Federal Rules of Evidence.

(g) Objections. A party objecting to deposition testimony or evidence must state the grounds for the objection during the deposition.

(h) Depositions by Agreement Permitted. The parties may by agreement take and use a deposition with the court's consent.

(As amended Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, eff. Dec. 1, 1975; Oct. 12, 1984; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

(1) *Information Subject to Disclosure.*

(A) *Defendant's Oral Statement.* Upon a defendant's 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 a defendant's 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:

- the statement is within the government's possession, custody, or control; and
- 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 a defendant's 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.

(D) *Defendant's Prior Record*. Upon a defendant's 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.

(E) *Documents and Objects*. Upon a defendant's request, the government must permit the defendant to inspect and to 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 preparing 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.

(F) *Reports of Examinations and Tests*. Upon a defendant's request, the government must permit a defendant to inspect and to 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 preparing the defense or the government intends to use the item in its case-in-chief at trial.

(G) *Expert Witnesses*. At the defendant's request, the government must give to the defendant a written summary of any 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) and the defendant

complies, the government must, at the defendant's request, give 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 as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph 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 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 an attorney for the government or other government agent in connection with investigating or 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.*** 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.

(b) Defendant's Disclosure.

(1) ***Information Subject to Disclosure.***

(A) *Documents and Objects*. If a 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 to 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 a defendant requests disclosure under Rule 16(a)(1)(F) and the government complies, the defendant must permit the government, upon request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

(C) *Expert Witnesses*. The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if—

(i) the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or

(ii) 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 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 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.

(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) 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.*** If a party fails to comply with 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.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, eff. Dec. 1, 1975; Dec. 12, 1975; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 29, 2002, eff. Dec. 1, 2002; Nov. 2, 2002, eff. Dec. 1, 2002.)

Rule 17. Subpoena

(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) 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) 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.

(d) Service. A marshal, a 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 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) Issuing a 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. The court (other than a magistrate judge) may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal 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 in 28 U.S.C. §636(e).

(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 statement.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, eff. Dec. 1, 1975; Apr. 30, 1979, eff. Dec. 1, 1980; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 17.1. Pretrial Conference

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 memo-

randum 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 is signed by the defendant and the defendant's attorney.

(As added Feb. 28, 1966, eff. July 1, 1966; amended Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 29, 2002, eff. Dec. 1, 2002.)

TITLE V. VENUE

Rule 18. Place of Prosecution and Trial

Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where 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.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 19. [Reserved]

Rule 20. Transfer for Plea and Sentence

(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.

(c) Effect of a Not Guilty Plea. If the defendant pleads not guilty after the case has been transferred under Rule 20(a), the clerk must return the papers to the court where the prosecution began, and that court must restore the proceeding to its docket. The defendant's statement that the defendant wished to plead guilty or nolo contendere is not, in any civil or criminal proceeding, admissible against the defendant.

(d) Juveniles.

(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, 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.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, eff. Dec. 1, 1975; Apr. 28, 1982, eff. Aug. 1, 1982; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 21. Transfer for Trial

(a) For Prejudice. Upon the defendant's motion, the court must transfer the proceeding against 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) For Convenience. Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties and witnesses and in the interest of justice.

(c) Proceedings on Transfer. When the court orders a transfer, the clerk must send to the transferee district the file, or a certified copy, 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.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 22. [Transferred]

TITLE VI. TRIAL

Rule 23. Jury or Nonjury Trial

(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 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) 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.

(As amended Feb. 28, 1966, eff. July 1, 1966; July 30, 1977, eff. Oct. 1, 1977; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 24. Trial Jurors

(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. Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly.

(1) ***Capital Case.*** Each side has 20 peremptory challenges when the government seeks the death penalty.

(2) ***Other Felony Case.*** The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year.

(3) ***Misdemeanor Case.*** Each side has 3 peremptory challenges when the defendant is charged with a crime punishable by fine, imprisonment of one year or less, or both.

(c) Alternate Jurors.

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

(2) ***Procedure.***

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

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

(3) ***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. These additional challenges 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.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 26, 1999, eff. Dec. 1, 1999; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 25. Judge's Disability

(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 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.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 26. Taking Testimony

In every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§ 2072–2077.

(As amended Nov. 20, 1972, eff. July 1, 1975; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 26.1. Foreign Law Determination

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.

(As added Feb. 28, 1966, eff. July 1, 1966; amended Nov. 20, 1972, eff. July 1, 1975; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 26.2. Producing a Witness's Statement

(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 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 of the witness's testimony.

(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) 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 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 or Deliver a Statement. If the party who called the witness disobeys an order to produce or deliver a statement, the court must strike the witness's testimony from the record. If an attorney for the government disobeys the order, the court must declare a mistrial if justice so requires.

(f) "Statement" Defined. 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. 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(i)(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.

(As added Apr. 30, 1979, eff. Dec. 1, 1980; amended Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 26.3. Mistrial

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.

(As added Apr. 22, 1993, eff. Dec. 1, 1993; amended Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 27. Proving an Official Record

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.

(As amended Apr. 29, 2002, eff. Dec, 1, 2002.)

Rule 28. Interpreters

The court may select, appoint, and set 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.

(As amended Feb. 28, 1966, eff. July 1, 1966; Nov. 20, 1972, eff. July 1, 1975; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 29. Motion for a Judgment of Acquittal

(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 for 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 a 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) Reserving Decision. The court may reserve decision on the motion, 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) After Jury Verdict or Discharge.

(1) ***Time for a Motion.*** A defendant may move for a 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 sets during the 7-day period.

(2) ***Ruling on the 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 a judgment of acquittal.

(3) ***No Prior Motion Required.*** A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

(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.

(As amended Feb. 28, 1966, eff. July 1, 1966; Nov. 10, 1986, eff. Dec. 10, 1986; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 29.1. Closing Argument

Closing arguments proceed in the following order:

(a) the government argues;
(b) the defense argues; and
(c) the government rebuts.

(As added Apr. 22, 1974, eff. Dec. 1, 1975; amended Apr. 29, 2002, eff. Dec. 1, 2002.)

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 sets. 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. Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 25, 1988, eff. Aug. 1, 1988; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 31. Jury Verdict

(a) Return. The jury must return its verdict to a judge in open court. The verdict must be unanimous.

(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 about 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 on which it has agreed.

(3) ***Mistrial and Retrial.*** If the jury cannot agree on a verdict on one or more counts, the court may declare a mistrial on those counts. The government may retry any defendant on any count on which the jury could not agree.

(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) 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.

(As amended Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 29, 2002, eff. Dec. 1, 2002.)

TITLE VII. POST–CONVICTION PROCEDURES

Rule 32. Sentencing and Judgment

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

(1) ''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.

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

(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 this rule.

(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) ***Applying the Sentencing Guidelines.*** The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

(2) ***Additional Information.*** The presentence report must also 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) 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;

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

(D) when the law provides for restitution, information sufficient for a restitution order;

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

(F) any other information that the court requires.

(3) ***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 an 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 the opposing 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) Notice of Possible Departure from Sentencing Guidelines. Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

(i) 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 to the defendant and an attorney for the government a written summary of—or summarize in camera—any information excluded from the presentence report under Rule 32(d)(3) 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 a Statement.*** 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 fails to comply with a Rule 26.2 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—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.

(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 must permit the victim to speak or submit any information about 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 and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

(j) 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.

(k) 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 order. The judge must sign the judgment, and the clerk must enter it.

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

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, eff. Dec. 1, 1975; Apr. 30, 1979, eff. Aug. 1, 1979, and Dec. 1, 1980; Oct. 12, 1982; Apr. 28, 1983, eff. Aug. 1, 1983; Oct. 12, 1984, eff. Nov. 1, 1987; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Sept. 13, 1994, eff. Dec. 1, 1994; Apr. 23, 1996, eff. Dec. 1, 1996; Apr. 24, 1996; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 32.1. Revoking or Modifying Probation or Supervised Release

(a) Initial Appearance.

(1) ***Person In Custody.*** A person held in custody for violating probation or supervised release must be taken without unnecessary delay before a magistrate judge.

(A) If the person is held in custody in the district where an alleged violation occurred, the initial appearance must be in that district.

(B) If the person 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 violating 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; and

(C) the person's right, if held in custody, to a preliminary hearing under Rule 32.1(b)(1).

(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 promptly conduct a 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, 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 any 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.*** 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 any adverse witness 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.

(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 counsel.

(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) an 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).

(e) Producing a Statement. Rule 26.2(a)–(d) and (f) applies at a hearing under this rule. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(As added Apr. 30, 1979, eff. Dec. 1, 1980; amended Nov. 10, 1986, eff. Dec. 10, 1986; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 32.2. Criminal Forfeiture

(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) Entering a Preliminary Order of Forfeiture.

(1) ***In General.*** As soon as practicable after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, 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, the court must determine the amount of money that the defendant will be ordered to pay. The court's determination may be based on evidence already in the record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt.

(2) ***Preliminary Order.*** If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment or directing the forfeiture of specific property without regard to any third party's interest in all or part of it. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(3) ***Seizing Property.*** The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party

rights. At sentencing—or at any time before sentencing if the defendant consents—the order of forfeiture becomes final as to the defendant and must be made a part of the sentence and be 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) ***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; Entering a 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 Federal Rule of Civil Procedure 56.

(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 on the ground that the property belongs, in whole or in part, to a codefendant or third party; nor may a third party object to the final order on the ground that the third party had an interest in the property.

(3) ***Multiple Petitions.*** If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all the petitions, unless the court determines that there is no just reason for delay.

(4) ***Ancillary Proceeding Not Part of Sentencing.*** An ancillary proceeding is not part of sentencing.

(d) Stay Pending Appeal. If a defendant appeals from a conviction or an order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party's rights

or interests. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but must not transfer any property interest to a third party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.

(e) Subsequently Located Property; Substitute Property.

(1) ***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) ***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 a jury trial under Rule 32.2(e).

(As added Apr. 17, 2000, eff. Dec. 1, 2000; amended Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 33. New Trial

(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.*** Any motion for a new trial grounded on newly discovered evidence must be filed 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.*** Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty, or within such further time as the court sets during the 7-day period.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 34. Arresting Judgment

(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 does not have jurisdiction of the charged offense.

(b) Time to File. The defendant must move to arrest judgment within 7 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere, or within such further time as the court sets during the 7-day period.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 29, 2002, eff. Dec. 1, 2002.)

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.*** Upon the government's motion made more than one year 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 more than one year after sentencing; or

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

(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) "Sentencing" Defined. As used in this rule, ''sentencing'' means the oral announcement of the sentence.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 28, 1983, eff. Aug. 1, 1983; Oct. 12, 1984, eff. Nov. 1, 1987; Apr. 29, 1985, eff. Aug. 1, 1985; Oct. 27, 1986, eff. Nov. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 26, 2004, eff. Dec. 1, 2004.)

Rule 36. Clerical Error

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.

(As amended Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 37. [Reserved]

Rule 38. Staying a Sentence or a Disability

(a) Death Sentence. The court must stay a death sentence if the defendant appeals the conviction or sentence.

(b) Imprisonment.

(1) ***Stay Granted.*** If the defendant is released pending appeal, the court must stay a sentence of imprisonment.

(2) ***Stay Denied; Place of Confinement.*** 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. 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 appropriate 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. If the defendant appeals, the court may stay a sentence of probation. The court must set the terms of any stay.

(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 restitution under 18 U.S.C. § 3556 or notice under 18 U.S.C. § 3555.

(2) ***Ensuring Compliance.*** The court may issue any order reasonably necessary to ensure compliance with a restitution order or a notice 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) 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.

(As amended Dec. 27, 1948, eff. Jan. 1, 1949; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Apr. 24, 1972, eff. Oct. 1, 1972; Oct. 12, 1984, eff. Nov. 1, 1987; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 39. [Reserved]

TITLE VIII. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

Rule 40. Arrest for Failing to Appear in Another District

(a) In General. If a person is 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—the person 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)(3) as applicable.

(c) Release or Detention Order. The judge may modify any previous release or detention order issued in another district, but must state in writing the reasons for doing so.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 28, 1982, eff. Aug. 1, 1982; Oct. 12, 1984, eff. Oct. 12, 1984, and Nov. 1, 1987; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 41. Search and Seizure

(a) Scope and Definitions.

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

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

(A) ''Property'' includes documents, books, papers, 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 enforcing the criminal laws and is within any category of officers authorized by the Attorney General to request 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 with authority in the district—or if none is reasonably available, a judge of a state court of record in the district—has authority to issue a warrant to search for and seize a person or property located within the district;

(2) a magistrate judge with authority in the district has authority to 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 or be moved outside the district before the warrant is executed; and

(3) a magistrate judge—in an investigation of domestic terrorism or international terrorism (as defined in 18 U.S.C. § 2331)—having authority in any district in which activities related to the terrorism may have occurred, may issue a warrant for a person or property within or outside that district.

(c) Persons or Property Subject to Search or Seizure. A warrant may be issued for any of the following:

(1) evidence 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 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 a 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.

(2) ***Contents of the Warrant.*** The warrant must identify the person or property to be searched, 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 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 proceed 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 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) ***Noting the Time.*** The officer executing the warrant must enter on its face the exact date and time it is executed.

(2) ***Inventory.*** An officer present during the execution of the warrant must 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.

(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.

(g) Motion to Return Property. A person aggrieved by an unlawful search and seizure of property or by the deprivation of prop-

erty 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, of the inventory, and of all other related papers and must deliver them to the clerk in the district where the property was seized.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949; Apr. 9, 1956, eff. July 8, 1956; Apr. 24, 1972, eff. Oct. 1, 1972; Mar. 18, 1974, eff. July 1, 1974; Apr. 26 and July 8, 1976, eff. Aug. 1, 1976; July 30, 1977, eff. Oct. 1, 1977; Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 25, 1989, eff. Dec. 1, 1989; May 1, 1990, eff. Dec. 1, 1990; Apr. 22, 1993, eff. Dec. 1, 1993; Oct. 26, 2001; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 42. Criminal Contempt

(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 the 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.

(b) Summary Disposition. Notwithstanding any other provision of these rules, the court (other than a magistrate judge) may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies; a magistrate judge may summarily punish a person as provided in 28 U.S.C. § 636(e). The contempt order must recite the facts, be signed by the judge, and be filed with the clerk.

(As amended Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 29, 2002, eff. Dec. 1, 2002.)

TITLE IX. GENERAL PROVISIONS

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, the initial arraignment, and the 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, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

(As amended Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, eff. Dec. 1, 1975; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 44. Right to and Appointment of Counsel

(a) Right to Appointed Counsel. A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right.

(b) Appointment Procedure. Federal law and local court rules govern the procedure for implementing the right to counsel.

(c) Inquiry Into Joint Representation.

(1) ***Joint Representation.*** Joint representation occurs when:

(A) two or more defendants have been charged jointly under Rule 8(b) or have been joined for trial under Rule 13; and

(B) the defendants are represented by the same counsel, or counsel who are associated in law practice.

(2) ***Court's Responsibilities in Cases of Joint Representation.*** The court must promptly inquire about the propriety of joint representation and must personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 30, 1979, eff. Dec. 1, 1980; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 45. Computing and Extending Time

(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 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) the day set aside by statute for observing:

(i) New Year's Day;
(ii) Martin Luther King, Jr.'s Birthday;
(iii) Washington's Birthday;
(iv) Memorial Day;
(v) Independence Day;
(vi) Labor Day;
(vii) Columbus Day;
(viii) Veterans' Day;
(ix) Thanksgiving Day;
(x) Christmas Day; and

(B) any other day declared a holiday by the President, the Congress, or the state where the district court is held.

(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 because of 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) 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 Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D).

(As amended Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 1, 1971, eff. July 1, 1971; Apr. 28, 1982, eff. Aug. 1, 1982; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 46. Release from Custody; Supervising Detention

(a) Before Trial. The provisions of 18 U.S.C. §§3142 and 3144 govern pretrial release.

(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 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.

(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.

(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.***

(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 ir-

revocably 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).

(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.

(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.*** An 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, an attorney for the government must state why the witness should not be released with or without a deposition being taken under Rule 15(a).

(i) Forfeiture of Property. The court may dispose of a charged offense by ordering the 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.

(j) Producing a Statement.

(1) ***In General.*** Rule 26.2(a)–(d) and (f) applies at a detention hearing under 18 U.S.C. §3142, unless the court for good cause rules otherwise.

(2) ***Sanctions for Not Producing a Statement.*** If a party disobeys a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony at the detention hearing.

(As amended Apr. 9, 1956, eff. July 8, 1956; Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Oct. 12, 1984; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Sept. 13, 1994; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 47. Motions and Supporting Affidavits

(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.

(As amended Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 48. Dismissal

(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.

(As amended Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 49. Serving and Filing Papers

(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) 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 a Court Order. When the court issues an order on any post-arraignment motion, the clerk must provide notice in a manner provided for in 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. A party must file with the court a copy of any paper the party is required to serve. A paper must be filed in a manner provided for in a civil action.

(As amended Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 50. Prompt Disposition

Scheduling preference must be given to criminal proceedings as far as practicable.

(As amended Apr. 24, 1972, eff. Oct. 1, 1972; Mar. 18, 1974, eff. July 1, 1974; Apr. 26 and July 8, 1976, eff. Aug. 1, 1976; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 51. Preserving Claimed Error

(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.

(As amended Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

(As amended Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 53. Courtroom Photographing and Broadcasting Prohibited

Except as otherwise provided by a 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.

(As amended Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 54. [Transferred] [1]

Rule 55. Records

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.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 56. When Court Is Open

(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 than those set aside by statute for ob-

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

serving New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 1, 1971, eff. July 1, 1971; Apr. 25, 1988, eff. Aug. 1, 1988; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 57. District Court Rules

(a) In General.

(1) ***Adopting Local Rules.*** Each district court acting by a majority of its district judges may, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice. A local rule must be consistent with—but not duplicative of—federal statutes and rules adopted under 28 U.S.C. §2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(2) ***Limiting Enforcement.*** 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 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 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.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949; Dec. 4, 1967, eff. July 1, 1968; Apr. 29, 1985, eff. Aug. 1, 1985; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 58. Petty Offenses and Other Misdemeanors

(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 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 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 imprisonment, fines, 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 defendant's right not to make a statement, and that any statement made may be used against the defendant;

(E) the right to trial, judgment, and sentencing before a district judge—unless:

(i) the charge is a petty offense; 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) *Arraignment.*

(A) *Plea Before a Magistrate Judge.* A magistrate judge may take the defendant's plea in a petty offense case. 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 in a petty offense case, 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 in Certain Petty Offense Cases. The following procedures also apply in 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) *Sentencing.* The court must give the defendant an opportunity to be heard in mitigation and then proceed immediately to sentencing. The court may, however, postpone sentencing to allow the probation service to investigate or to permit either party to submit additional information.

(4) *Notice of a Right to Appeal.* After imposing sentence in a case tried on a not-guilty plea, the court must advise the defendant of a right to appeal the conviction and of any right to appeal the sentence. If the defendant was convicted on a plea of guilty or nolo contendere, the court must advise the defendant of any right to appeal the sentence.

(d) 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 an 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) Recording the Proceedings. The court must record any proceedings under this rule by using a court reporter or a suitable recording device.

(f) New Trial. Rule 33 applies to a motion for a new trial.

(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 must 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 must serve a copy on an attorney for the government.

(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 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.

(As added May 1, 1990, eff. Dec. 1, 1990; amended Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 59. [Deleted]

Rule 60. Title

These rules may be known and cited as the Federal Rules of Criminal Procedure.

(As amended Apr. 29, 2002, eff. Dec. 1, 2002.)

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