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**AMENDMENTS TO THE FEDERAL RULES OF  
CRIMINAL PROCEDURE**

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**COMMUNICATION**

**FROM**

**THE CHIEF JUSTICE OF THE SUPREME  
COURT**

**TRANSMITTING**

**AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCE-  
DURE ADOPTED BY THE COURT, PURSUANT TO 18 U.S.C. 3771  
AND 2772**



**MARCH 10, 1987.—Referred to the Committee on the Judiciary and  
ordered to be printed**

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

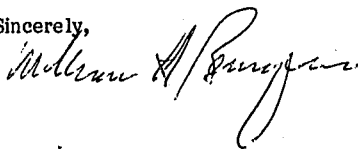
March 9, 1987

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress various amendments to the Federal Rules of Criminal Procedure which have been adopted by the Supreme Court pursuant to Sections 3771 and 3772 of Title 18, United States Code.

Accompanying these rules is an excerpt from the report of the Judicial Conference of the United States containing the Advisory Committee notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,



Honorable James C. Wright, Jr.  
Speaker of the House of Representatives  
Washington, D. C. 20515

(III)

SUPREME COURT OF THE UNITED STATES

March 9, 1987

ORDERED:

That the Federal Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Criminal Rules 4, 5, 5.1, 6, 7, 10, 11, 12, 12.1, 12.2, 15, 16, 17, 17.1, 20, 21, 24, 25, 26.2, 30, 32, 32.1, 33, 38, 40, 41, 42, 43, 44, 45, 46, 49, and 51, as hereinafter set forth:

[See infra., pp. \_\_\_\_\_ .]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on August 1, 1987 and shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Sections 3771 and 3772 of Title 18, United States Code.

RULES OF CRIMINAL PROCEDURE FOR THE  
UNITED STATES DISTRICT COURTS

**Rule 4. Arrest Warrant or Summons Upon Complaint**

\* \* \* \* \*

(c) FORM.

(1) Warrant. The warrant shall be signed by the magistrate and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate.

\* \* \* \* \*

(d) EXECUTION OR SERVICE; AND RETURN.

\* \* \* \* \*

(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant at the time of the arrest but upon request shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant at the time of the arrest, the officer shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to the defendant personally, or by leaving it at the

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defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein and by mailing a copy of the summons to the defendant's last known address.

(4) Return. The officer executing a warrant shall make return thereof to the magistrate or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to and canceled by the magistrate by whom it was issued. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the magistrate before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not canceled or a summons returned unserved or a duplicate thereof may be delivered by the magistrate to the marshal or other authorized person for execution or service.

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

\* \* \* \* \*

(c) OFFENSES NOT TRIABLE BY THE UNITED STATES MAGISTRATE. If the charge against the defendant is not triable by the United States magistrate, the defendant shall not be called upon

to plead. The magistrate shall inform the defendant of the complaint against the defendant and of any affidavit filed therewith, of the defendant's right to retain counsel or to request the assignment of counsel if the defendant is unable to obtain counsel, and of the general circumstances under which the defendant may secure pretrial release. The magistrate shall inform the defendant that the defendant is not required to make a statement and that any statement made by the defendant may be used against the defendant. The magistrate shall also inform the defendant of the right to a preliminary examination. The magistrate shall allow the defendant reasonable time and opportunity to consult counsel and shall detain or conditionally release the defendant as provided by statute or in these rules.

A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate shall forthwith hold the defendant to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if the defendant is not in custody, provided, however, that the preliminary examination shall not be held if the

## RULES OF CRIMINAL PROCEDURE

defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

**Rule 5.1. Preliminary Examination**

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

\* \* \* \* \*



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

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

(2) On application of a defendant addressed to the court or any judge thereof, an order may issue that the federal magistrate make available a copy of the transcript, or of a portion thereof, to defense counsel. Such order shall provide for prepayment of costs of such transcript by the defendant unless the defendant makes a sufficient affidavit that the defendant is unable to pay or to give security therefor, in which case the expense shall be paid by the Director of the Administrative Office of the United States Courts from available appropriated funds. Counsel for the government may move also that a copy of the transcript, in whole or in part, be made available to it, for good cause

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shown, and an order may be entered granting such motion in whole or in part, on appropriate terms, except that the government need not prepay costs nor furnish security therefor.

**Rule 6. The Grand Jury****(a) SUMMONING GRAND JURIES.**

(1) Generally. The court shall order one or more grand juries to be summoned at such time as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

(2) Alternate Jurors. The court may direct that alternate jurors may be designated at the time a grand jury is selected. Alternate jurors in the order in which they were designated may thereafter be impanelled as provided in subdivision (g) of this rule. Alternate jurors shall be drawn in the same manner and shall have the same qualifications as the regular jurors, and if impanelled shall be subject to the same challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors.

\* \* \* \* \*

## RULES OF CRIMINAL PROCEDURE

(c) FOREPERSON AND DEPUTY FOREPERSON. The court shall appoint one of the jurors to be foreperson and another to be deputy foreperson. The foreperson shall have power to administer oaths and affirmations and shall sign all indictments. The foreperson or another juror designated by the foreperson shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreperson, the deputy foreperson shall act as foreperson.

\* \* \* \* \*

(f) FINDING AND RETURN OF INDICTMENT. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a federal magistrate in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in finding an indictment, the foreperson shall so report to a federal magistrate in writing forthwith.

\* \* \* \* \*

**Rule 7. The Indictment and the Information**

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(b) WAIVER OF INDICTMENT. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after

## RULES OF CRIMINAL PROCEDURE

having been advised of the nature of the charge and of the rights of the defendant, waives in open court prosecution by indictment.

(c) NATURE AND CONTENTS.

(1) In General. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

\* \* \* \* \*

(3) Harmless Error. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.

\* \* \* \* \*

**Rule 10. Arraignment**

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

**Rule 11. Pleas**

(a) ALTERNATIVES.

\* \* \* \* \*

(2) Conditional Pleas. With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

\* \* \* \* \*

(c) ADVICE TO DEFENDANT. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

\* \* \* \* \*

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an

## RULES OF CRIMINAL PROCEDURE

attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

(d) **INSURING THAT THE PLEA IS VOLUNTARY.** The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

## (e) PLEA AGREEMENT PROCEDURE.

\* \* \* \* \*

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

\* \* \* \* \*

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of

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the case may be less favorable to the defendant than that contemplated by the plea agreement.

\* \* \* \* \*

**Rule 12. Pleadings and Motions Before Trial; Defenses and Objections**

\* \* \* \* \*

(h) EFFECT OF DETERMINATION. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be continued in custody or that bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any Act of Congress relating to periods of limitations.

\* \* \* \* \*

**Rule 12.1. Notice of Alibi**

(a) NOTICE BY DEFENDANT. Upon written demand of the attorney for the government stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such different time as the court may direct, upon the attorney for the government a written notice of the defendant's intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi.



(b) DISCLOSURE OF INFORMATION AND WITNESS. Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the attorney for the government shall serve upon the defendant or the defendant's attorney a written notice stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(c) CONTINUING DUTY TO DISCLOSE. If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (a) or (b), the party shall promptly notify the other party or the other party's attorney of the existence and identity of such additional witness.

(d) FAILURE TO COMPLY. Upon the failure of either party to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.

\* \* \* \* \*

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

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

(b) **EXPERT TESTIMONY OF DEFENDANT'S MENTAL CONDITION.** If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

\* \* \* \* \*

(d) **FAILURE TO COMPLY.** If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an

examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt.

\* \* \* \* \*

### **Rule 15. Depositions**

(a) **WHEN TAKEN.** Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is detained pursuant to section 3144 of title 18, United States Code, the court on written motion of the witness and upon notice to the parties may direct that the witness' deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(b) **NOTICE OF TAKING.** The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for

## RULES OF CRIMINAL PROCEDURE

taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at the examination and keep the defendant in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause the defendant's removal from the place of the taking of the deposition, the defendant persists in conduct which is such as to justify exclusion from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but a failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(c) **PAYMENT OF EXPENSES.** Whenever a deposition is taken at the instance of the government, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and the defendant's attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the government.

(d) **HOW TAKEN.** Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the

manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without that defendant's consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or the defendant's counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.

(e) USE. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with that witness' deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering of all of it which is relevant to the part offered and any party may offer other parts.

\* \* \* \* \*

**Rule 16. Discovery and Inspection****(a) DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.****(1) Information Subject to Disclosure.**

(A) STATEMENT OF DEFENDANT. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of that testimony, so situated as an officer or employee as to have been able legally

to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which the witness was involved.

(B) DEFENDANT'S PRIOR RECORD. Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) DOCUMENTS AND TANGIBLE OBJECTS. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence

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in chief at the trial, or were obtained from or belong to the defendant.

\* \* \* \* \*

(b) DISCLOSURE OF EVIDENCE BY THE DEFENDANT.

(1) Information Subject to Disclosure.

\* \* \* \* \*

(B) REPORTS OF EXAMINATIONS AND TESTS. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony.

(2) Information Not Subject To Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant,



or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorneys.

\* \* \* \* \*

(c) CONTINUING DUTY TO DISCLOSE. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.

\* \* \* \* \*

#### **Rule 17. Subpoena**

(a) FOR ATTENDANCE OF WITNESSES; FORM; ISSUANCE.

A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a United States magistrate in a proceeding before that magistrate, but it need not be under the seal of the court.

## RULES OF CRIMINAL PROCEDURE

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(d) SERVICE. A subpoena may be served by the marshal, by a deputy marshal or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to that person the fee for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof.

\* \* \* \* \*

(g) CONTEMPT. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate.

\* \* \* \* \*

**Rule 17.1. Pretrial Conference**

At any time after the filing of the indictment or information the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. No admissions made by the defendant or the defendant's attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by

the defendant and the defendant's attorney. This rule shall not be invoked in the case of a defendant who is not represented by counsel.

**Rule 20. Transfer from the District for Plea and Sentence**

(a) INDICTMENT OR INFORMATION PENDING. A defendant arrested, held, or present in a district other than that in which an indictment or information is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending, and to consent to disposition of the case in the district in which that defendant was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is arrested, held, or present, and the prosecution shall continue in that district.

(b) INDICTMENT OR INFORMATION NOT PENDING. A defendant arrested, held, or present, in a district other than the district in which a complaint is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive venue and trial in the district in which the warrant was issued, and to consent to disposition of the case in the district in which that

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defendant was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon filing the written waiver of venue in the district in which the defendant is present, the prosecution may proceed as if venue were in such district.

(c) EFFECT OF NOT GUILTY PLEA. If after the proceeding has been transferred pursuant to subdivision (a) or (b) of this rule the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced, and the proceeding shall be restored to the docket of that court. The defendant's statement that the defendant wishes to plead guilty or nolo contendere shall not be used against that defendant.

(d) JUVENILES. A juvenile (as defined in 18 U.S.C. § 5031) who is arrested, held, or present in a district other than that in which the juvenile is alleged to have committed an act in violation of a law of the United States not punishable by death or life imprisonment may, after having been advised by counsel and with the approval of the court and the United States attorney for each district, consent to be proceeded against as a juvenile delinquent in the district in which the juvenile is arrested, held, or present. The consent shall be given in writing before the court but only after the court has apprised the juvenile of the juvenile's rights, including the right to be returned to the district in which the juvenile is alleged to have committed the act, and of the consequences of such consent.

**Rule 21. Transfer From the District for Trial**

(a) FOR PREJUDICE IN THE DISTRICT. The court upon motion of the defendant shall transfer the proceeding as to that defendant to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

(b) TRANSFER IN OTHER CASES. For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to that defendant or any one or more of the counts thereof to another district.

\* \* \* \* \*

**Rule 24. Trial Jurors**

(a) EXAMINATION. The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors

such additional questions by the parties or their attorneys as it deems proper.

\* \* \* \* \*

**Rule 25. Judge; Disability**

(a) DURING TRIAL. If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying familiarity with the record of the trial, may proceed with and finish the trial.

(b) AFTER VERDICT OR FINDING OF GUILT. If by reason of absence, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if that judge is satisfied that a judge who did not preside at the trial cannot perform those duties or that it is appropriate for any other reason, that judge may grant a new trial.

**Rule 26.2. Production of Statements of Witnesses**

(a) MOTION FOR PRODUCTION. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the government or the defendant and the defendant's attorney, as the case may be, to produce, for the examination and

use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

\* \* \* \* \*

(c) PRODUCTION OF EXCISED STATEMENT. If the other party claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over the defendant's objection shall be preserved by the attorney for the government, and, in the event of a conviction and an appeal by the defendant, shall be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

\* \* \* \* \*

(f) DEFINITION. As used in this rule, a "statement" of a witness means:

(1) a written statement made by the witness that is signed or otherwise adopted or approved by the witness;

\* \* \* \* \*

**Rule 30. Instructions**

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

**Rule 32. Sentence and Judgment****(a) SENTENCE.**

(1) Imposition of Sentence. Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall

(A) determine that the defendant and the defendant's counsel have had the opportunity to read and discuss the presentence investigation report made



available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B);

(B) afford counsel an opportunity to speak on behalf of the defendant; and

(C) address the defendant personally and ask the defendant if the defendant wishes to make a statement in the defendant's own behalf and to present any information in mitigation of punishment.

The attorney for the government shall have an equivalent opportunity to speak to the court.

(2) Notification of Right to Appeal. After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

\* \* \* \* \*

(c) PRESENTENCE INVESTIGATION.

\* \* \* \* \*

## RULES OF CRIMINAL PROCEDURE

**(3) Disclosure.**

(A) At a reasonable time before imposing sentence the court shall permit the defendant and the defendant's counsel to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. The court shall afford the defendant and the defendant's counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the

defendant and the defendant's counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material which may be disclosed to the defendant and the defendant's counsel shall be disclosed to the attorney for the government.

(D) If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons or the Parole Commission.

(E) Any copies of the presentence investigation report made available to the defendant and the defendant's counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or

## RULES OF CRIMINAL PROCEDURE

the granting of probation, unless the court, in its discretion otherwise directs.

\* \* \* \* \*

**Rule 32.1. Revocation or Modification of Probation****(a) REVOCATION OF PROBATION.**

(1) Preliminary Hearing. Whenever a probationer is held in custody on the ground that the probationer has violated a condition of probation, the probationer shall be afforded a prompt hearing before any judge, or a United States magistrate who has been given authority pursuant to 28 U.S.C. § 636 to conduct such hearings, in order to determine whether there is probable cause to hold the probationer for a revocation hearing. The probationer shall be given

(A) notice of the preliminary hearing and its purpose and of the alleged violation of probation;

(B) an opportunity to appear at the hearing and present evidence in the probationer's own behalf;

(C) upon request, the opportunity to question witnesses against the probationer unless, for good cause, the federal magistrate decides that justice does not require the appearance of the witness; and

(D) notice of the probationer's right to be represented by counsel.

## RULES OF CRIMINAL PROCEDURE

The proceedings shall be recorded stenographically or by an electronic recording device. If probable cause is found to exist, the probationer shall be held for a revocation hearing. The probationer may be released pursuant to Rule 46(c) pending the revocation hearing. If probable cause is not found to exist, the proceeding shall be dismissed.

(2) Revocation Hearing. The revocation hearing, unless waived by the probationer, shall be held within a reasonable time in the district of probation jurisdiction. The probationer shall be given

(A) written notice of the alleged violation of probation;

(B) disclosure of the evidence against the probationer;

(C) an opportunity to appear and to present evidence in the probationer's own behalf;

(D) the opportunity to question adverse witnesses;  
and

(E) notice of the probationer's right to be represented by counsel.

(b) **MODIFICATION OF PROBATION.** A hearing and assistance of counsel are required before the terms or conditions of probation can be modified, unless the relief to be granted to the probationer upon the probationer's request or the court's own motion is favorable to the probationer, and the attorney for the government, after having been given notice of the proposed relief

and a reasonable opportunity to object, has not objected. An extension of the term of probation is not favorable to the probationer for the purposes of this rule.

**Rule 33. New Trial**

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

**Rule 38. Stay of Execution, and Relief Pending Review**

(a) STAY OF EXECUTION.

\* \* \* \* \*

(2) Imprisonment. A sentence of imprisonment shall be stayed if an appeal is taken and the defendant is released pending disposition of the appeal pursuant to Rule 9(b) of the Federal Rules of Appellate Procedure. If not stayed, the court may recommend to the Attorney General that the defendant be retained at, or transferred to, a place of confinement near the place of trial or the place where an

appeal is to be heard, for a period reasonably necessary to permit the defendant to assist in the preparation of an appeal to the court of appeals.

(3) Fine. A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the district court or by the court of appeals upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating such defendant's assets.

\* \* \* \* \*

#### **Rule 40. Commitment to Another District**

(a) **APPEARANCE BEFORE FEDERAL MAGISTRATE.** If a person is arrested in a district other than that in which the offense is alleged to have been committed, that person shall be taken without unnecessary delay before the nearest available federal magistrate. Preliminary proceedings concerning the defendant shall be conducted in accordance with Rules 5 and 5.1, except that if no preliminary examination is held because an indictment has been returned or an information filed or because the defendant elects to have the preliminary examination conducted in the district in which the prosecution is pending, the person shall be held to answer upon a finding that such person is the person named in the indictment,

information or warrant. If held to answer, the defendant shall be held to answer in the district court in which the prosecution is pending, provided that a warrant is issued in that district if the arrest was made without a warrant, upon production of the warrant or a certified copy thereof.

\* \* \* \* \*

(d) ARREST OF PROBATIONER. If a person is arrested for a violation of probation in a district other than the district having probation jurisdiction, such person shall be taken without unnecessary delay before the nearest available federal magistrate. The federal magistrate shall:

\* \* \* \* \*

(3) Otherwise order the probationer held to answer in the district court of the district having probation jurisdiction upon production of certified copies of the probation order, the warrant, and the application for the warrant, and upon a finding that the person before the magistrate is the person named in the warrant.

(e) ARREST FOR FAILURE TO APPEAR. If a person is arrested on a warrant in a district other than that in which the warrant was issued, and the warrant was issued because of the failure of the person named therein to appear as required pursuant to a subpoena or the terms of that person's release, the person arrested shall be taken without unnecessary delay before the nearest available federal magistrate. Upon production of the warrant or a



certified copy thereof and upon a finding that the person before the magistrate is the person named in the warrant, the federal magistrate shall hold the person to answer in the district in which the warrant was issued.

(f) RELEASE OR DETENTION. If a person was previously detained or conditionally released, pursuant to chapter 207 of title 18, United States Code, in another district where a warrant, information, or indictment issued, the federal magistrate shall take into account the decision previously made and the reasons set forth therefor, if any, but will not be bound by that decision. If the federal magistrate amends the release or detention decision or alters the conditions of release, the magistrate shall set forth the reasons therefore in writing.

#### **Rule 41. Search and Seizure**

\* \* \* \* \*

##### **(c) ISSUANCE AND CONTENTS.**

(1) Warrant Upon Affidavit. A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, that

## RULES OF CRIMINAL PROCEDURE

magistrate or state judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

\* \* \* \* \*

(e) **MOTION FOR RETURN OF PROPERTY.** A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

\* \* \* \* \*

#### **Rule 42. Criminal Contempt**

(a) **SUMMARY DISPOSITION.** A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) **DISPOSITION UPON NOTICE AND HEARING.** A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given

orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

**Rule 43. Presence of the Defendant**

\* \* \* \* \*

(b) CONTINUED PRESENCE NOT REQUIRED. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,

(1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), or

(2) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

\* \* \* \* \*

**Rule 44. Right to and Assignment of Counsel**

(a) **RIGHT TO ASSIGNED COUNSEL.** Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent that defendant at every stage of the proceedings from initial appearance before the federal magistrate or the court through appeal, unless that defendant waives such appointment.

\* \* \* \* \*

(c) **JOINT REPRESENTATION.** Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

**Rule 45. Time**

\* \* \* \* \*

(e) **ADDITIONAL TIME AFTER SERVICE BY MAIL.** Whenever a party has the right or is required to do an act within a prescribed

## RULES OF CRIMINAL PROCEDURE

period after the service of a notice or other paper upon that party and the notice or other paper is served by mail, 3 days shall be added to the prescribed period.

**Rule 46. Release From Custody**

\* \* \* \* \*

(b) **RELEASE DURING TRIAL.** A person released before trial shall continue on release during trial under the same terms and conditions as were previously imposed unless the court determines that other terms and conditions or termination of release are necessary to assure such person's presence during the trial or to assure that such person's conduct will not obstruct the orderly and expeditious progress of the trial.

\* \* \* \* \*

(d) **JUSTIFICATION OF SURETIES.** Every surety, except a corporate surety which is approved as provided by law, shall justify by affidavit and may be required to describe in the affidavit the property by which the surety proposes to justify and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by the surety and remaining undischarged and all the other liabilities of the surety. No bond shall be approved unless the surety thereon appears to be qualified.

\* \* \* \* \*

(g) **SUPERVISION OF DETENTION PENDING TRIAL.** The court shall exercise supervision over the detention of defendants and

witnesses within the district pending trial for the purpose of eliminating all unnecessary detention. The attorney for the government shall make a biweekly report to the court listing each defendant and witness who has been held in custody pending indictment, arraignment or trial for a period in excess of ten days. As to each witness so listed the attorney for the government shall make a statement of the reasons why such witness should not be released with or without the taking of a deposition pursuant to Rule 15(a). As to each defendant so listed the attorney for the government shall make a statement of the reasons why the defendant is still held in custody.

\* \* \* \* \*

**Rule 49. Service and Filing of Papers**

\* \* \* \* \*

(b) SERVICE: HOW MADE. Whenever under these rules or by an order of the court service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party personally is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided in civil actions.

\* \* \* \* \*

**Rule 51. Exceptions Unnecessary**

Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been

necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party.



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

EDWARD T. GIGNOUX  
CHAIRMAN

JAMES E. MACKLIN, JR.  
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES  
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CRIMINAL RULES  
LLOYD D. GEORGE  
BANKRUPTCY RULES

January 12, 1987

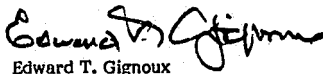
The Chief Justice of the  
United States  
Washington, D.C. 20543

Dear Chief Justice:

On October 28, 1986, at the direction of the Judicial Conference of the United States, the Director of the Administrative Office transmitted to the Court proposed amendments to the Federal Rules of Criminal Procedure, including proposed amendments to eliminate gender specific language from the rules. The proposed amendments included amendments to eliminate gender specific language in Rule 32.1(b). On November 10, however, the President signed into law the Criminal Law and Procedure Technical Amendments Act of 1986 (Public Law 99-696). Section 12(b) of that Act amended Rule 32.1(b), effective 30 days after the date of enactment. Although the Act added new language to the rule, it does not require any change in the proposed gender-neutralizing amendments.

Nonetheless, the October 28 transmittal shows the proposed amendments to the version of Rule 32.1(b) in effect on that date and not the version that went into effect on December 10. We are concerned that the promulgation of the amendment as it appears in the October 28 transmittal might lead to the conclusion that the Supreme Court was amending the amendment recently made by Congress. I suggest, therefore, that the transmittal to Congress be modified to reflect that the proposed gender-neutralizing amendments are being made to Rule 32.1(b), as amended by Public Law 99-696. A comparison of the October 28 transmittal of Rule 32.1(b) and the suggested transmittal of that rule is enclosed for your information. If you approve of this procedure we will make such adjustment at the time we prepare the order of the Supreme Court transmitting the proposed amendments to Congress.

Sincerely,

  
Edward T. Gignoux

Enclosure

cc: Honorable Leland C. Nielsen  
Mr. Joseph F. Spaniol, Jr.  
Professor Stephen A. Saltzburg  
Advisory Committee Members

Federal Rule of Criminal Procedure 32.1(b)  
Gender-Neutralizing Amendments

(New matter is underlined; matter to be  
omitted is lined through)

October 28 Transmittal

(b) MODIFICATION OF PROBATION. A hearing and assistance of counsel are required before the terms or conditions of probation can be modified, unless the relief granted to the probationer upon his the probationer's request or the court's own motion is favorable to him the probationer.

Proposed Transmittal  
(with congressional amendments  
effective December 10)

(b) MODIFICATION OF PROBATION. A hearing and assistance of counsel are required before the terms or conditions of probation can be modified, unless the relief to be granted to the probationer upon his the probationer's request or the court's own motion is favorable to him the probationer, and the attorney for the government, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of the term of probation is not favorable to the probationer for the purposes of this rule.

**EXCERPT FROM THE  
REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON  
RULES OF PRACTICE AND PROCEDURE**

**TO THE CHIEF JUSTICE OF THE UNITED STATES, CHAIRMAN, AND  
MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES**

**III. Federal Rules of Criminal Procedure**

The Advisory Committee on the Federal Rules of Criminal Procedure has submitted to your Committee proposed amendments to Criminal Rules 6(a) and 30. The proposed amendments are set out in Appendix C and are accompanied by Committee Notes explaining their purpose and intent. A separate report from the Chairman of the Advisory Committee summarizes the Advisory Committee's work.

Your Committee recommends that the proposed amendments to Criminal Rules 6(a) and 30 be approved by the Conference and transmitted to the Supreme Court for its consideration, with a recommendation that they be approved by the Court and transmitted to the Congress pursuant to law.

IV. The Advisory Committee on Criminal Rules has submitted to your Committee proposed amendments to the Criminal Rules eliminating all gender-specific language from the Criminal Rules. These proposed amendments are set out in Appendix E and are accompanied by Committee Notes explaining their purpose and intent.

Your Committee recommends that the proposed gender-neutralizing amendments to the Criminal Rules be approved by the Conference and transmitted to the Supreme Court for its consideration with a recommendation that they be approved by the Court and transmitted to the Congress pursuant to law.

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

**TO THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE:**

On behalf of the Advisory Committee on Criminal Rules, I transmit herewith proposals to amend Rules 6(a) and 30 of the Federal Rules of Criminal Procedure. These proposed amendments were circulated to the bench and bar in August, 1983. Public hearings were held in Washington, D. C. and San Francisco, California on February 14, 1984.

**I. PROPOSALS RECOMMENDED FOR APPROVAL**

**Rule 6(a)**

The amendment to Rule 6(a) would add a paragraph covering impanelling of alternate grand jurors. Several comments from the bar were received, and all were supportive of the proposed amendment. These included comments by the American College of Trial Lawyers, the California Bar Federal Courts Committee, the Wisconsin Judicial Council and the Los Angeles County Bar Association. Although other organizations—the ABA Criminal Justice Section, the Federal Bar Association Litigation Section, and Division 18 (Litigation) of the District of Columbia Bar—also approved the change, they expressed some concern over bringing new jurors into an ongoing investigation. In light of the case law holding that it is not absolutely necessary for all jurors joining in an indictment to have been present and to have heard all of the evidence—e.g., United States v. Leverage Funding Systems, Inc., 637 F.2d 645 (9th Cir. 1980)—the Advisory Committee saw no need to add complicated procedures to the rule. It is well established that the judge who impanels an alternate may direct that the juror be informed of relevant material previously presented to the grand jury.

The Advisory Committee originally decided that the proposed amendment to Rule 6 was not necessary, but upon reconsideration determined that it might be useful in some districts. In light of the strong public support for the proposed amendment, the Advisory Committee forwarded it to the Standing Committee in June, 1985. Recirculation was deemed unnecessary, since no change in the amendment was made following the 1983 public circulation.

**Rule 30**

As circulated to the bar, the amendment to Rule 30 provided that the judge may instruct the jury before or after argument. The proposed change received strong public support from the ABA Criminal Justice Section, the California Bar Federal Courts Committee, the Wisconsin

Judicial Council, the Federal Bar Association, the Federal Litigation Section, the Conference of Chief Justices, the Los Angeles Bar Association, and the Illinois State Bar Association.

There was some opposition expressed by the New York Legal Aid Society, the Association of the Bar of the City of New York Committees on Federal Courts and Criminal Law, and the American College of Trial Lawyers. The Legal Aid Society expressed concern about lack of uniformity in federal courts, and all three groups indicated that they worried about the prosecutor abusing the opportunity to have the last word if the trial judge instructs before argument.

As approved by the Advisory Committee and sent to the Standing Committee, the amendment to Rule 30 permits the judge to instruct before argument, after argument, or at both times. The Advisory Committee believes that the discretion given to the judge to instruct at both times resolves the major problem identified by the few groups who opposed the rule. The Advisory Committee did not believe that giving the trial judge flexibility unduly interfered with the desired uniform handling of federal criminal cases. Rather, the flexibility increases the trial judge's ability to adequately inform a jury of the law it must use in deciding a case.

Although the amendment approved by the Advisory Committee makes a small change (permitting instruction both before and after argument) in the language circulated for public comment, the Committee does not believe that recirculation is needed. The small change actually responds to other public comments that were received in opposition to the amendment. Moreover, Federal Rule of Civil Procedure 51 as subsequently circulated for comment, and the Civil and Criminal Rules Committees have had the benefit of two sets of reactions to amendments that address the timing of instructions. The Advisory Committee is confident that the bench and bar have had substantial opportunity for comment, and the comments received indicate broad support for the amendment.

## II. STYLISTIC CHANGES

The Advisory Committee was requested to remove gender-specific language from the Criminal Rules. These proposed amendments do not effect substantive changes and are accompanied by Committee Notes explaining their purpose and intent.

Respectfully submitted,

Leland C. Nielsen  
Chairman, Advisory Committee  
on Criminal Rules

July 31, 1986

RULES OF CRIMINAL PROCEDURE FOR THE  
UNITED STATES DISTRICT COURTS\*

Rule 4. Arrest Warrant or Summons Upon Complaint

\* \* \* \* \*

1 (c) FORM.

2 (1) Warrant. The warrant shall be signed by the  
3 magistrate and shall contain the name of the defendant or, if  
4 ~~his~~ the defendant's name is unknown, any name or description  
5 by which ~~he~~ the defendant can be identified with reasonable  
6 certainty. It shall describe the offense charged in the  
7 complaint. It shall command that the defendant be arrested  
8 and brought before the nearest available magistrate.

\* \* \* \* \*

9 (d) EXECUTION OR SERVICE; AND RETURN.

\* \* \* \* \*

10 (3) Manner. The warrant shall be executed by the  
11 arrest of the defendant. The officer need not have the  
12 warrant ~~in his possession~~ at the time of the arrest, but upon  
13 request he shall show the warrant to the defendant as soon as  
14 possible. If the officer does not have the warrant ~~in his~~  
15 ~~possession~~ at the time of the arrest, ~~he~~ the officer shall then

---

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

## RULES OF CRIMINAL PROCEDURE

16 inform the defendant of the offense charged and of the fact  
17 that a warrant has been issued. The summons shall be served  
18 upon a defendant by delivering a copy to ~~him~~ the defendant  
19 personally, or by leaving it at ~~his~~ the defendant's dwelling  
20 house or usual place of abode with some person of suitable  
21 age and discretion then residing therein and by mailing a copy  
22 of the summons to the defendant's last known address.

23 (4) Return. The officer executing a warrant shall  
24 make return thereof to the magistrate or other officer before  
25 whom the defendant is brought pursuant to Rule 5. At the  
26 request of the attorney for the government any unexecuted  
27 warrant shall be returned to and canceled by the magistrate  
28 by whom it was issued, ~~and shall be cancelled by him~~. On or  
29 before the return day the person to whom a summons was  
30 delivered for service shall make return thereof to the  
31 magistrate before whom the summons is returnable. At the  
32 request of the attorney for the government made at any time  
33 while the complaint is pending, a warrant returned  
34 unexecuted and not canceled or a summons returned unserved  
35 or a duplicate thereof may be delivered by the magistrate to  
36 the marshal or other authorized person for execution or  
37 service.

## COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

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

\* \* \* \* \*

1           (c) OFFENSES NOT TRIABLE BY THE UNITED STATES  
2           MAGISTRATE. If the charge against the defendant is not triable by  
3           the United States magistrate, the defendant shall not be called upon  
4           to plead. The magistrate shall inform the defendant of the  
5           complaint against ~~him~~ the defendant and of any affidavit filed  
6           therewith, of ~~his~~ the defendant's right to retain counsel, ~~of his or~~  
7           ~~right~~ to request the assignment of counsel if ~~he~~ the defendant is  
8           unable to obtain counsel, and of the general circumstances under  
9           which ~~he~~ the defendant may secure pretrial release. ~~He~~ The  
10          magistrate shall inform the defendant that ~~he~~ the defendant is not  
11          required to make a statement and that any statement made by ~~him~~  
12          the defendant may be used against ~~him~~ the defendant. The  
13          magistrate shall also inform the defendant of ~~his~~ the right to a  
14          preliminary examination. ~~He~~ The magistrate shall allow the  
15          defendant reasonable time and opportunity to consult counsel and  
16          shall detain or conditionally release the defendant as provided by  
17          statute or in these rules.

18                A defendant is entitled to a preliminary examination, unless  
19                waived, when charged with any offense, other than a petty offense,  
20                which is to be tried by a judge of the district court. If the defendant  
21                waives preliminary examination, the magistrate shall forthwith hold  
22                ~~him~~ the defendant to answer in the district court. If the defendant



## RULES OF CRIMINAL PROCEDURE

23 does not waive the preliminary examination, the magistrate shall  
24 schedule a preliminary examination. Such examination shall be held  
25 within a reasonable time but in any event not later than 10 days  
26 following the initial appearance if the defendant is in custody and no  
27 later than 20 days if he the defendant is not in custody, provided,  
28 however, that the preliminary examination shall not be held if the  
29 defendant is indicted or if an information against the defendant is  
30 filed in district court before the date set for the preliminary  
31 examination. With the consent of the defendant and upon a showing  
32 of good cause, taking into account the public interest in the prompt  
33 disposition of criminal cases, time limits specified in this subdivision  
34 may be extended one or more times by a federal magistrate. In the  
35 absence of such consent by the defendant, time limits may be  
36 extended by a judge of the United States only upon a showing that  
37 extraordinary circumstances exist and that delay is indispensable to  
38 the interests of justice.

## COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

**Rule 5.1. Preliminary Examination**

1 (a) PROBABLE CAUSE FINDING. If from the evidence it  
2 appears that there is probable cause to believe that an offense has  
3 been committed and that the defendant committed it, the federal  
4 magistrate shall forthwith hold ~~him~~ the defendant to answer in

## RULES OF CRIMINAL PROCEDURE

5 district court. The finding of probable cause may be based upon  
6 hearsay evidence in whole or in part. The defendant may cross-  
7 examine adverse witnesses ~~against him~~ and may introduce evidence  
8 ~~in his own behalf~~. Objections to evidence on the ground that it was  
9 acquired by unlawful means are not properly made at the  
10 preliminary examination. Motions to suppress must be made to the  
11 trial court as provided in Rule 12.

\* \* \* \* \*

12 (c) RECORDS. After concluding the proceeding the federal  
13 magistrate shall transmit forthwith to the clerk of the district court  
14 all papers in the proceeding. The magistrate shall promptly make or  
15 cause to be made a record or summary of such proceeding.

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

24 (2) On application of a defendant addressed to the  
25 court or any judge thereof, an order may issue that the  
26 federal magistrate make available a copy of the transcript, or  
27 of a portion thereof, to defense counsel. Such order shall  
28 provide for prepayment of costs of such transcript by the

## RULES OF CRIMINAL PROCEDURE

29 defendant unless the defendant makes a sufficient affidavit  
30 that he the defendant is unable to pay or to give security  
31 therefor, in which case the expense shall be paid by the  
32 Director of the Administrative Office of the United States  
33 Courts from available appropriated funds. Counsel for the  
34 government may move also that a copy of the transcript, in  
35 whole or in part, be made available to it, for good cause  
36 shown, and an order may be entered granting such motion in  
37 whole or in part, on appropriate terms, except that the  
38 government need not prepay costs nor furnish security  
39 therefor.

## COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

**Rule 6. The Grand Jury**

1 (a) SUMMONING GRAND JURIES.

2 (1) Generally. The court shall order one or more  
3 grand juries to be summoned at such time as the public  
4 interest requires. The grand jury shall consist of not less than  
5 16 nor more than 23 members. The court shall direct that a  
6 sufficient number of legally qualified persons be summoned to  
7 meet this requirement.

8 (2) Alternate Jurors. The court may direct that  
9 alternate jurors may be designated at the time a grand jury is

## RULES OF CRIMINAL PROCEDURE

7

10           selected. Alternate jurors in the order in which they were  
11           designated may thereafter be impanelled as provided in  
12           subdivision (g) of this rule. Alternate jurors shall be drawn in  
13           the same manner and shall have the same qualifications as  
14           the regular jurors, and if impanelled shall be subject to the  
15           same challenges, shall take the same oath and shall have the  
16           same functions, powers, facilities and privileges as the  
17           regular jurors.

\*\*\*\*\*

## COMMITTEE NOTE

New subdivision (a)(2) gives express recognition to a practice now followed in some district courts, namely, that of designating alternate grand jurors at the time the grand jury is selected. (A person so designated does not attend court and is not paid the jury attendance fees and expenses authorized by 28 U.S.C. § 1871 unless subsequently impanelled pursuant to Rule 6(g).) Because such designation may be a more efficient procedure than election of additional grand jurors later as need arises under subdivision (g), the amendment makes it clear that it is a permissible step in the grand jury selection process.

This amendment is not intended to work any change in subdivision (g). In particular, the fact that one or more alternate jurors either have or have not been previously designated does not limit the district court's discretion under subdivision (g) to decide whether, if a juror is excused temporarily or permanently, another person should replace him to assure the continuity of the grand jury and its ability to obtain a quorum in order to complete its business.

\*\*\*\*\*

1           (c) FØREMAN FOREPERSON AND DEPUTY FØREMAN  
2           FOREPERSON. The court shall appoint one of the jurors to be  
3           foreman foreperson and another to be deputy foreman foreperson.  
4           The foreman foreperson shall have power to administer oaths and

## RULES OF CRIMINAL PROCEDURE

5 affirmations and shall sign all indictments. He The foreperson or  
 6 another juror designated by him the foreperson shall keep a record  
 7 of the number of jurors concurring in the finding of every indictment  
 8 and shall file the record with the clerk of the court, but the record  
 9 shall not be made public except on order of the court. During the  
 10 absence of the ~~foreman~~ foreperson, the deputy ~~foreman~~ foreperson  
 11 shall act as ~~foreman~~ foreperson.

\* \* \* \* \*

12 (f) FINDING AND RETURN OF INDICTMENT. An indictment  
 13 may be found only upon the concurrence of 12 or more jurors. The  
 14 indictment shall be returned by the grand jury to a federal  
 15 magistrate in open court. If a complaint or information is pending  
 16 against the defendant and 12 jurors do not concur in finding an  
 17 indictment, the ~~foreman~~ foreperson shall so report to a federal  
 18 magistrate in writing forthwith.

\* \* \* \* \*

## COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

**Rule 7. The Indictment and the Information**

\* \* \* \* \*

1 (b) WAIVER OF INDICTMENT. An offense which may be  
 2 punished by imprisonment for a term exceeding one year or at hard  
 3 labor may be prosecuted by information if the defendant, after he  
 4 has having been advised of the nature of the charge and of ~~his~~ the  
 5 rights of the defendant, waives in open court prosecution by  
 6 indictment.

## RULES OF CRIMINAL PROCEDURE

## 7 (c) NATURE AND CONTENTS.

8 (1) In General. The indictment or the information  
9 shall be a plain, concise and definite written statement of  
10 the essential facts constituting the offense charged. It shall  
11 be signed by the attorney for the government. It need not  
12 contain a formal commencement, a formal conclusion or any  
13 other matter not necessary to such statement. Allegations  
14 made in one count may be incorporated by reference in  
15 another count. It may be alleged in a single count that the  
16 means by which the defendant committed the offense are  
17 unknown or that he the defendant committed it by one or  
18 more specified means. The indictment or information shall  
19 state for each count the official or customary citation of the  
20 statute, rule, regulation or other provision of law which the  
21 defendant is alleged therein to have violated.

\* \* \* \* \*

22 (3) Harmless Error. Error in the citation or its  
23 omission shall not be ground for dismissal of the indictment  
24 or information or for reversal of a conviction if the error or  
25 omission did not mislead the defendant to ~~his~~ the defendant's  
26 prejudice.

\* \* \* \* \*

## COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

**Rule 10. Arraignment**

1 Arraignment shall be conducted in open court and shall  
 2 consist of reading the indictment or information to the defendant or  
 3 stating to ~~him~~ the defendant the substance of the charge and calling  
 4 on ~~him~~ the defendant to plead thereto. He The defendant shall be  
 5 given a copy of the indictment or information before he ~~is~~ being  
 6 called upon to plead.

## COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

**Rule 11. Pleas**

1 (a) ALTERNATIVES.

\* \* \* \* \*

2 (2) Conditional Pleas. With the approval of the court  
 3 and the consent of the government, a defendant may enter a  
 4 conditional plea of guilty or nolo contendere, reserving in  
 5 writing the right, on appeal from the judgment, to review of  
 6 the adverse determination of any specified pretrial motion.  
 7 If the A defendant who prevails on appeal he shall be allowed  
 8 to withdraw ~~his~~ the plea.

\* \* \* \* \*

9 (c) ADVICE TO DEFENDANT. Before accepting a plea of  
 10 guilty or nolo contendere, the court must address the defendant  
 11 personally in open court and inform ~~him~~ the defendant of, and  
 12 determine that he the defendant understands, the following:

\* \* \* \* \*

## RULES OF CRIMINAL PROCEDURE

11

13 (2) if the defendant is not represented by an attorney,  
14 that he the defendant has the right to be represented by an  
15 attorney at every stage of the proceeding ~~against him~~ and, if  
16 necessary, one will be appointed to represent ~~him~~ the  
17 defendant; and

18 (3) that he the defendant has the right to plead not  
19 guilty or to persist in that plea if it has already been made,  
20 ~~and that he has~~ the right to be tried by a jury and at that trial  
21 has the right to the assistance of counsel, the right to  
22 confront and cross-examine adverse witnesses ~~against him~~,  
23 and the right ~~not to be compelled to incriminate himself~~  
24 against compelled self-incrimination; and

25 (4) that if ~~his~~ a plea of guilty or nolo contendere is  
26 accepted by the court there will not be a further trial of any  
27 kind, so that by pleading guilty or nolo contendere he the  
28 defendant waives the right to a trial; and

29 (5) if the court intends to question the defendant  
30 under oath, on the record, and in the presence of counsel  
31 about the offense to which he the defendant has pleaded, that  
32 ~~his~~ the defendant's answers may later be used ~~against him~~ the  
33 defendant in a prosecution for perjury or false statement.

34 (d) INSURING THAT THE PLEA IS VOLUNTARY. The court  
35 shall not accept a plea of guilty or nolo contendere without first, by  
36 addressing the defendant personally in open court, determining that  
37 the plea is voluntary and not the result of force or threats or of



38 promises apart from a plea agreement. The court shall also inquire  
39 as to whether the defendant's willingness to plead guilty or nolo  
40 contendere results from prior discussions between the attorney for  
41 the government and the defendant or ~~his~~ the defendant's attorney.

42 (e) PLEA AGREEMENT PROCEDURE.

\* \* \* \* \*

43 (2) Notice of Such Agreement. If a plea agreement  
44 has been reached by the parties, the court shall, on the  
45 record, require the disclosure of the agreement in open court  
46 or, on a showing of good cause, in camera, at the time the  
47 plea is offered. If the agreement is of the type specified in  
48 subdivision (e)(1)(A) or (C), the court may accept or reject the  
49 agreement, or may defer its decision as to the acceptance or  
50 rejection until there has been an opportunity to consider the  
51 presentence report. If the agreement is of the type specified  
52 in subdivision (e)(1)(B), the court shall advise the defendant  
53 that if the court does not accept the recommendation or  
54 request the defendant nevertheless has no right to withdraw  
55 ~~his~~ the plea.

\* \* \* \* \*

56 (4) Rejection of a Plea Agreement. If the court  
57 rejects the plea agreement, the court shall, on the record,  
58 inform the parties of this fact, advise the defendant  
59 personally in open court or, on a showing of good cause, in  
60 camera, that the court is not bound by the plea agreement,

## RULES OF CRIMINAL PROCEDURE

13

61           afford the defendant the opportunity to then withdraw his the  
62           plea, and advise the defendant that if he the defendant  
63           persists in his a guilty plea or plea of nolo contendere the  
64           disposition of the case may be less favorable to the defendant  
65           than that contemplated by the plea agreement.

\* \* \* \* \*

## COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

**Rule 12. Pleadings and Motions Before Trial; Defenses and Objections**

\* \* \* \* \*

1           (h) EFFECT OF DETERMINATION. If the court grants a  
2           motion based on a defect in the institution of the prosecution or in  
3           the indictment or information, it may also order that the defendant  
4           be continued in custody or that his bail be continued for a specified  
5           time pending the filing of a new indictment or information. Nothing  
6           in this rule shall be deemed to affect the provisions of any Act of  
7           Congress relating to periods of limitations.

\* \* \* \* \*

## COMMITTEE NOTE

The amendment is technical. No substantive change is intended.

**Rule 12.1. Notice of Alibi**

1           (a) NOTICE BY DEFENDANT. Upon written demand of the  
2 attorney for the government stating the time, date, and place at  
3 which the alleged offense was committed, the defendant shall serve  
4 within ten days, or at such different time as the court may direct,  
5 upon the attorney for the government a written notice of ~~his~~ the  
6 defendant's intention to offer a defense of alibi. Such notice by the  
7 defendant shall state the specific place or places at which the  
8 defendant claims to have been at the time of the alleged offense and  
9 the names and addresses of the witnesses upon whom ~~he~~ the  
10 defendant intends to rely to establish such alibi.

11           (b) DISCLOSURE OF INFORMATION AND WITNESS. Within  
12 ten days thereafter, but in no event less than ten days before trial,  
13 unless the court otherwise directs, the attorney for the government  
14 shall serve upon the defendant or ~~his~~ the defendant's attorney a  
15 written notice stating the names and addresses of the witnesses upon  
16 whom the government intends to rely to establish the defendant's  
17 presence at the scene of the alleged offense and any other witnesses  
18 to be relied on to rebut testimony of any of the defendant's alibi  
19 witnesses.

20           (c) CONTINUING DUTY TO DISCLOSE. If prior to or during  
21 trial, a party learns of an additional witness whose identity, if  
22 known, should have been included in the information furnished under  
23 subdivision (a) or (b), the party shall promptly notify the other party

24 or ~~his~~ the other party's attorney of the existence and identity of  
25 such additional witness.

26 (d) FAILURE TO COMPLY. Upon the failure of either party  
27 to comply with the requirements of this rule, the court may exclude  
28 the testimony of any undisclosed witness offered by such party as to  
29 the defendant's absence from or presence at, the scene of the  
30 alleged offense. This rule shall not limit the right of the defendant  
31 to testify. ~~in his own behalf.~~

\* \* \* \* \*

#### COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

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

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

11 (b) EXPERT TESTIMONY OF DEFENDANT'S MENTAL  
12 CONDITION. If a defendant intends to introduce expert testimony

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13 relating to a mental disease or defect or any other mental condition  
 14 of the defendant bearing upon the issue of ~~his~~ the defendant  
 15 shall, within the time provided for the filing of pretrial motions or  
 16 at such later time as the court may direct, notify the attorney for  
 17 the government in writing of such intention and file a copy of such  
 18 notice with the clerk. The court may for cause shown allow late  
 19 filing of the notice or grant additional time to the parties to prepare  
 20 for trial or make such other order as may be appropriate.

\* \* \* \* \*

21 (d) FAILURE TO COMPLY. If there is a failure to give  
 22 notice when required by subdivision (b) of this rule or to submit to an  
 23 examination when ordered under subdivision (c) of this rule, the  
 24 court may exclude the testimony of any expert witness offered by  
 25 the defendant on the issue of ~~his~~ the defendant's guilt.

\* \* \* \* \*

## COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

**Rule 15. Depositions**

1 (a) WHEN TAKEN. Whenever due to exceptional  
 2 circumstances of the case it is in the interest of justice that the  
 3 testimony of a prospective witness of a party be taken and preserved  
 4 for use at trial, the court may upon motion of such party and notice  
 5 to the parties order that testimony of such witness be taken by  
 6 deposition and that any designated book, paper, document, record,

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7 recording, or other material not privileged, be produced at the same  
8 time and place. If a witness is detained pursuant to section 3144 of  
9 title 18, United States Code, the court on written motion of the  
10 witness and upon notice to the parties may direct that ~~his~~ the  
11 witness' deposition be taken. After the deposition has been  
12 subscribed the court may discharge the witness.

13 (b) NOTICE OF TAKING. The party at whose instance a  
14 deposition is to be taken shall give to every party reasonable written  
15 notice of the time and place for taking the deposition. The notice  
16 shall state the name and address of each person to be examined. On  
17 motion of a party upon whom the notice is served, the court for  
18 cause shown may extend or shorten the time or change the place for  
19 taking the deposition. The officer having custody of a defendant  
20 shall be notified of the time and place set for the examination and  
21 shall, unless the defendant waives in writing the right to be present,  
22 produce ~~him~~ the defendant at the examination and keep ~~him~~ the  
23 defendant in the presence of the witness during the examination,  
24 unless, after being warned by the court that disruptive conduct will  
25 cause ~~him to be removed~~ the defendant's removal from the place of  
26 the taking of the deposition, ~~he~~ the defendant persists in conduct  
27 which is such as to justify ~~his being excluded~~ exclusion from that  
28 place. A defendant not in custody shall have the right to be present  
29 at the examination upon request subject to such terms as may be  
30 fixed by the court, but ~~his~~ a failure, absent good cause shown, to  
31 appear after notice and tender of expenses in accordance with

37 subdivision (c) of this rule shall constitute a waiver of that right and  
38 of any objection to the taking and use of the deposition based upon  
39 that right.

40 (c) PAYMENT OF EXPENSES. Whenever a deposition is  
41 taken at the instance of the government, or whenever a deposition is  
42 taken at the instance of a defendant who is unable to bear the  
43 expenses of the taking of the deposition, the court may direct that  
44 the expense of travel and subsistence of the defendant and ~~his~~ the  
45 defendant's attorney for attendance at the examination and the cost  
46 of the transcript of the deposition shall be paid by the government.

47 (d) HOW TAKEN. Subject to such additional conditions as the  
48 court shall provide, a deposition shall be taken and filed in the  
49 manner provided in civil actions except as otherwise provided in  
50 these rules, provided that (1) in no event shall a deposition be taken  
51 of a party defendant without ~~his~~ that defendant's consent, and (2)  
52 the scope and manner of examination and cross-examination shall be  
53 such as would be allowed in the trial itself. The government shall  
54 make available to the defendant or ~~his~~ the defendant's counsel for  
55 examination and use at the taking of the deposition any statement of  
56 the witness being deposed which is in the possession of the  
57 government and to which the defendant would be entitled at the  
58 trial.

59 (e) USE. At the trial or upon any hearing, a part or all of a  
60 deposition, so far as otherwise admissible under the rules of  
61 evidence, may be used as substantive evidence if the witness is

## RULES OF CRIMINAL PROCEDURE

32 unavailable, as unavailability is defined in Rule 804(a) of the Federal  
 33 Rules of Evidence, or the witness gives testimony at the trial or  
 34 hearing inconsistent with ~~his~~ that witness' deposition. Any  
 35 deposition may also be used by any party for the purpose of  
 36 contradicting or impeaching the testimony of the deponent as a  
 37 witness. If only a part of a deposition is offered in evidence by a  
 38 party, an adverse party may require ~~him to offer~~ the offering of all  
 39 of it which is relevant to the part offered and any party may offer  
 40 other parts.

\* \* \* \* \*

## COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

**Rule 16. Discovery and Inspection**

1 (a) DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.

2 (1) Information Subject to Disclosure.

3 (A) STATEMENT OF DEFENDANT. Upon  
 4 request of a defendant the government shall permit  
 5 the defendant to inspect and copy or photograph: any  
 6 relevant written or recorded statements made by the  
 7 defendant, or copies thereof, within the possession,  
 8 custody or control of the government, the existence of  
 9 which is known, or by the exercise of due diligence  
 10 may become known, to the attorney for the  
 11 government; the substance of any oral statement



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12 which the government intends to offer in evidence at  
13 the trial made by the defendant whether before or  
14 after arrest in response to interrogation by any person  
15 then known to the defendant to be a government  
16 agent; and recorded testimony of the defendant before  
17 a grand jury which relates to the offense charged.  
18 Where the defendant is a corporation, partnership,  
19 association or labor union, the court may grant the  
20 defendant, upon its motion, discovery of relevant  
21 recorded testimony of any witness before a grand jury  
22 who (1) was, at the time of ~~his~~ that testimony, so  
23 situated as an officer or employee as to have been able  
24 legally to bind the defendant in respect to conduct  
25 constituting the offense, or (2) was, at the time of the  
26 offense, personally involved in the alleged conduct  
27 constituting the offense and so situated as an officer  
28 or employee as to have been able legally to bind the  
29 defendant in respect to that alleged conduct in which  
30 ~~he~~ the witness was involved.

31 (B) DEFENDANT'S PRIOR RECORD. Upon  
32 request of the defendant, the government shall furnish  
33 to the defendant such copy of ~~his~~ the defendant's prior  
34 criminal record, if any, as is within the possession,  
35 custody, or control of the government, the existence  
36 of which is known, or by the exercise of due diligence

62 may become known, to the attorney for the  
63 government.

64 (C) DOCUMENTS AND TANGIBLE OBJECTS.  
65 Upon request of the defendant the government shall  
66 permit the defendant to inspect and copy or  
67 photograph books, papers, documents, photographs,  
68 tangible objects, buildings or places, or copies or  
69 portions thereof, which are within the possession,  
70 custody or control of the government, and which are  
71 material to the preparation of his the defendant's  
72 defense or are intended for use by the government as  
73 evidence in chief at the trial, or were obtained from or  
74 belong to the defendant.

\* \* \* \* \*

75 (b) DISCLOSURE OF EVIDENCE BY THE DEFENDANT.

76 (1) Information Subject to Disclosure.

\* \* \* \* \*

77 (B) REPORTS OF EXAMINATIONS AND TESTS. If  
78 the defendant requests disclosure under subdivision  
79 (a)(1)(C) or (D) of this rule, upon compliance with such  
80 request by the government, the defendant, on request  
81 of the government, shall permit the government to  
82 inspect and copy or photograph any results or reports  
83 of physical or mental examinations and of scientific  
84 tests or experiments made in connection with the

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85 particular case, or copies thereof, within the  
86 possession or control of the defendant, which the  
87 defendant intends to introduce as evidence in chief at  
88 the trial or which were prepared by a witness whom  
89 the defendant intends to call at the trial when the  
90 results or reports relate to ~~his~~ that witness' testimony.

91 (2) Information Not Subject To Disclosure. Except as  
92 to scientific or medical reports, this subdivision does not  
93 authorize the discovery or inspection of reports, memoranda,  
94 or other internal defense documents made by the defendant,  
95 or ~~his~~ the defendant's attorneys or agents in connection with  
96 the investigation or defense of the case, or of statements  
97 made by the defendant, or by government or defense  
98 witnesses, or by prospective government or defense  
99 witnesses, to the defendant, ~~his~~ the defendant's agents or  
100 attorneys.

\* \* \* \* \*

101 (c) CONTINUING DUTY TO DISCLOSE. If, prior to or during  
102 trial, a party discovers additional evidence or material previously  
103 requested or ordered, which is subject to discovery or inspection  
104 under this rule, ~~he~~ such party shall promptly notify the other party  
105 or ~~his~~ that other party's attorney or the court of the existence of the  
106 additional evidence or material.

\* \* \* \* \*

## COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

**Rule 17. Subpoena**

1 (a) FOR ATTENDANCE OF WITNESSES; FORM; ISSUANCE.

2 A subpoena shall be issued by the clerk under the seal of the court.

3 It shall state the name of the court and the title, if any, of the

4 proceeding, and shall command each person to whom it is directed to

5 attend and give testimony at the time and place specified therein.

6 The clerk shall issue a subpoena, signed and sealed but otherwise in

7 blank to a party requesting it, who shall fill in the blanks before it is

8 served. A subpoena shall be issued by a United States magistrate in

9 a proceeding before him that magistrate, but it need not be under

10 the seal of the court.

\* \* \* \* \*

11 (d) SERVICE. A subpoena may be served by the marshal, by

12 his deputy a deputy marshal or by any other person who is not a

13 party and who is not less than 18 years of age. Service of a

14 subpoena shall be made by delivering a copy thereof to the person

15 named and by tendering to him that person the fee for 1 day's

16 attendance and the mileage allowed by law. Fees and mileage need

17 not be tendered to the witness upon service of a subpoena issued in

18 behalf of the United States or an officer or agency thereof.

\* \* \* \* \*

19 (g) CONTEMPT. Failure by any person without adequate

20 excuse to obey a subpoena served upon him that person may be

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21 deemed a contempt of the court from which the subpoena issued or  
 22 of the court for the district in which it issued if it was issued by a  
 23 United States magistrate.

\* \* \* \* \*

## COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

**Rule 17.1. Pretrial Conference**

1 At any time after the filing of the indictment or information  
 2 the court upon motion of any party or upon its own motion may  
 3 order one or more conferences to consider such matters as will  
 4 promote a fair and expeditious trial. At the conclusion of a  
 5 conference the court shall prepare and file a memorandum of the  
 6 matters agreed upon. No admissions made by the defendant or ~~his~~  
 7 the defendant's attorney at the conference shall be used against the  
 8 defendant unless the admissions are reduced to writing and signed by  
 9 the defendant and ~~his~~ the defendant's attorney. This rule shall not  
 10 be invoked in the case of a defendant who is not represented by  
 11 counsel.

## COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

**Rule 20. Transfer from the District for Plea and Sentence**

1 (a) INDICTMENT OR INFORMATION PENDING. A defendant  
 2 arrested, held, or present in a district other than that in which an

3 indictment or information is pending against ~~him~~ that defendant may  
4 state in writing ~~that he wishes~~ a wish to plead guilty or nolo  
5 contendere, to waive trial in the district in which the indictment or  
6 information is pending, and to consent to disposition of the case in  
7 the district in which ~~he~~ that defendant was arrested, held, or  
8 present, subject to the approval of the United States attorney for  
9 each district. Upon receipt of the defendant's statement and of the  
10 written approval of the United States attorneys, the clerk of the  
11 court in which the indictment or information is pending shall  
12 transmit the papers in the proceeding or certified copies thereof to  
13 the clerk of the court for the district in which the defendant is  
14 arrested, held, or present, and the prosecution shall continue in that  
15 district.

16 (b) INDICTMENT OR INFORMATION NOT PENDING. A  
17 defendant arrested, held, or present, in a district other than the  
18 district in which a complaint is pending against ~~him~~ that defendant  
19 may state in writing ~~that he wishes~~ a wish to plead guilty or nolo  
20 contendere, to waive venue and trial in the district in which the  
21 warrant was issued, and to consent to disposition of the case in the  
22 district in which ~~he~~ that defendant was arrested, held, or present,  
23 subject to the approval of the United States attorney for each  
24 district. Upon filing the written waiver of venue in the district in  
25 which the defendant is present, the prosecution may proceed as if  
26 venue were in such district.

## RULES OF CRIMINAL PROCEDURE

27 (c) EFFECT OF NOT GUILTY PLEA. If after the proceeding  
28 has been transferred pursuant to subdivision (a) or (b) of this rule the  
29 defendant pleads not guilty, the clerk shall return the papers to the  
30 court in which the prosecution was commenced, and the proceeding  
31 shall be restored to the docket of that court. The defendant's  
32 statement that he the defendant wishes to plead guilty or nolo  
33 contendere shall not be used against him that defendant.

34 (d) JUVENILES. A juvenile (as defined in 18 U.S.C. § 5031)  
35 who is arrested, held, or present in a district other than that in  
36 which he the juvenile is alleged to have committed an act in  
37 violation of a law of the United States not punishable by death or  
38 life imprisonment may, after he has having been advised by counsel  
39 and with the approval of the court and the United States attorney  
40 for each district, consent to be proceeded against as a juvenile  
41 delinquent in the district in which he the juvenile is arrested, held,  
42 or present. The consent shall be given in writing before the court  
43 but only after the court has apprised the juvenile of his the juvenile's  
44 rights, including the right to be returned to the district in which he  
45 the juvenile is alleged to have committed the act, and of the  
46 consequences of such consent.

## COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

**Rule 21. Transfer From the District for Trial**

1           (a) FOR PREJUDICE IN THE DISTRICT. The court upon  
2 motion of the defendant shall transfer the proceeding as to ~~him~~ that  
3 defendant to another district whether or not such district is  
4 specified in the defendant's motion if the court is satisfied that  
5 there exists in the district where the prosecution is pending so great  
6 a prejudice against the defendant that ~~he~~ the defendant cannot  
7 obtain a fair and impartial trial at any place fixed by law for holding  
8 court in that district.

9           (b) TRANSFER IN OTHER CASES. For the convenience of  
10 parties and witnesses, and in the interest of justice, the court upon  
11 motion of the defendant may transfer the proceeding as to ~~him~~ that  
12 defendant or any one or more of the counts thereof to another  
13 district.

\* \* \* \* \*

**COMMITTEE NOTE**

The amendments are technical. No substantive change is intended.

**Rule 24. Trial Jurors**

1           (a) EXAMINATION. The court may permit the defendant or  
2 ~~his~~ the defendant's attorney and the attorney for the government to  
3 conduct the examination of prospective jurors or may itself conduct  
4 the examination. In the latter event the court shall permit the  
5 defendant or ~~his~~ the defendant's attorney and the attorney for the  
6 government to supplement the examination by such further inquiry



7 as it deems proper or shall itself submit to the prospective jurors  
8 such additional questions by the parties or their attorneys as it  
9 deems proper.

\* \* \* \* \*

#### COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

#### Rule 25. Judge; Disability

1 (a) DURING TRIAL. If by reason of death, sickness or other  
2 disability the judge before whom a jury trial has commenced is  
3 unable to proceed with the trial, any other judge regularly sitting in  
4 or assigned to the court, upon certifying ~~that he has familiarized~~  
5 himself familiarity with the record of the trial, may proceed with  
6 and finish the trial.

7 (b) AFTER VERDICT OR FINDING OF GUILT. If by reason  
8 of absence, death, sickness or other disability the judge before whom  
9 the defendant has been tried is unable to perform the duties to be  
10 performed by the court after a verdict or finding of guilt, any other  
11 judge regularly sitting in or assigned to the court may perform those  
12 duties; but if ~~such other~~ that judge is satisfied that he a judge who  
13 did not preside at the trial cannot perform those duties ~~because he~~  
14 did not preside at the trial or that it is appropriate for any other  
15 reason, he that judge may in his discretion grant a new trial.

## COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

**Rule 26.2. Production of Statements of Witnesses**

1           (a) MOTION FOR PRODUCTION. After a witness other than  
2 the defendant has testified on direct examination, the court, on  
3 motion of a party who did not call the witness, shall order the  
4 attorney for the government or the defendant and ~~his~~ the  
5 defendant's attorney, as the case may be, to produce, for the  
6 examination and use of the moving party, any statement of the  
7 witness that is in their possession and that relates to the subject  
8 matter concerning which the witness has testified.

\* \* \* \* \*

9           (c) PRODUCTION OF EXCISED STATEMENT. If the other  
10 party claims that the statement contains matter that does not relate  
11 to the subject matter concerning which the witness has testified, the  
12 court shall order that it be delivered to the court in camera. Upon  
13 inspection, the court shall excise the portions of the statement that  
14 do not relate to the subject matter concerning which the witness has  
15 testified, and shall order that the statement, with such material  
16 excised, be delivered to the moving party. Any portion of the  
17 statement that is withheld from the defendant over ~~his~~ the  
18 defendant's objection shall be preserved by the attorney for the  
19 government, and, in the event of a conviction and an appeal by the  
20 defendant, shall be made available to the appellate court for the

## RULES OF CRIMINAL PROCEDURE

21 purpose of determining the correctness of the decision to excise the  
22 portion of the statement.

\* \* \* \* \*

23 (f) DEFINITION. As used in this rule, a "statement" of a  
24 witness means:

25 (1) a written statement made by the witness that is  
26 signed or otherwise adopted or approved by ~~him~~ the witness;

\* \* \* \* \*

## COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

**Rule 30. Instructions**

1 At the close of the evidence or at such earlier time as the  
2 court reasonably directs, any party may file written requests that  
3 the court instruct the jury on the law as set forth in the requests.  
4 At the same time copies of such requests shall be furnished to  
5 ~~adverse~~ all parties. The court shall inform counsel of its proposed  
6 action upon the requests prior to their arguments to the jury, ~~but~~ †  
7 The court shall may instruct the jury before or after the arguments  
8 are completed or at both times. No party may assign as error any  
9 portion of the charge or omission therefrom unless he that party  
10 objects thereto before the jury retires to consider its verdict,  
11 stating distinctly the matter to which he that party objects and the  
12 grounds of ~~his~~ the objection. Opportunity shall be given to make the

- 13 objection out of the hearing of the jury and, on request of any party,  
14 out of the presence of the jury.

#### COMMITTEE NOTE

In its current form, Rule 30 requires that the court instruct the jury after the arguments of counsel. In some districts, usually where the state practice is otherwise, the parties prefer to stipulate to instruction before closing arguments. The purpose of the amendment is to give the court discretion to instruct the jury before or after closing arguments, or at both times. The amendment will permit courts to continue instructing the jury after arguments as Rule 30 had previously required. It will also permit courts to instruct before arguments in order to give the parties an opportunity to argue to the jury in light of the exact language used by the court. See generally Raymond, Merits and Demerits of the Missouri System in Instructing Juries, 5 St. Louis U. L. J. 317 (1959). Finally, the amendment plainly indicates that the court may instruct both before and after arguments, which assures that the court retains power to remedy omissions in pre-argument instructions or to add instructions necessitated by the arguments.

#### Rule 32. Sentence and Judgment

1 (a) SENTENCE.

2 (1) Imposition of Sentence. Sentence shall be imposed  
3 without unreasonable delay. Before imposing sentence the  
4 court shall

5 (A) determine that the defendant and his the  
6 defendant's counsel have had the opportunity to read  
7 and discuss the presentence investigation report made  
8 available pursuant to subdivision (c)(3)(A) or summary  
9 thereof made available pursuant to subdivision  
10 (c)(3)(B);

11 (B) afford counsel an opportunity to speak on behalf  
12 of the defendant; and

## RULES OF CRIMINAL PROCEDURE

13 (C) address the defendant personally and ask ~~him~~  
14 the defendant if ~~he~~ the defendant wishes to make a  
15 statement in ~~his~~ the defendant's own behalf and to  
16 present any information in mitigation of punishment.

17 The attorney for the government shall have an equivalent  
18 opportunity to speak to the court.

19 (2) Notification of Right to Appeal. After imposing  
20 sentence in a case which has gone to trial on a plea of not  
21 guilty, the court shall advise the defendant of ~~his~~ the  
22 defendant's right to appeal, and of the right of a person who  
23 is unable to pay the cost of an appeal to apply for leave to  
24 appeal in forma pauperis. There shall be no duty on the court  
25 to advise the defendant of any right of appeal after sentence  
26 is imposed following a plea of guilty or nolo contendere. If  
27 the defendant so requests, the clerk of the court shall prepare  
28 and file forthwith a notice of appeal on behalf of the  
29 defendant.

\* \* \* \* \*

30 (c) PRESENTENCE INVESTIGATION.

\* \* \* \* \*

31 (3) Disclosure.

32 (A) At a reasonable time before imposing sentence  
33 the court shall permit the defendant and ~~his~~ the  
34 defendant's counsel to read the report of the  
35 presentence investigation exclusive of any

36 recommendation as to sentence, but not to the extent  
37 that in the opinion of the court the report contains  
38 diagnostic opinions which, if disclosed, might seriously  
39 disrupt a program of rehabilitation; or sources of  
40 information obtained upon a promise of  
41 confidentiality; or any other information which, if  
42 disclosed, might result in harm, physical or otherwise,  
43 to the defendant or other persons. The court shall  
44 afford the defendant and ~~his~~ the defendant's counsel an  
45 opportunity to comment on the report and, in the  
46 discretion of the court, to introduce testimony or  
47 other information relating to any alleged factual  
48 inaccuracy contained in it.

49 (B) If the court is of the view that there is  
50 information in the presentence report which should not  
51 be disclosed under subdivision (c)(3)(A) of this rule, the  
52 court in lieu of making the report or part thereof  
53 available shall state orally or in writing a summary of  
54 the factual information contained therein to be relied  
55 on in determining sentence, and shall give the  
56 defendant and ~~his~~ the defendant's counsel an  
57 opportunity to comment thereon. The statement may  
58 be made to the parties in camera.

59 (C) Any material which may be disclosed to the  
60 defendant and ~~his~~ the defendant's counsel shall be  
61 disclosed to the attorney for the government.

## RULES OF CRIMINAL PROCEDURE

62 (D) If the comments of the defendant and his the  
63 defendant's counsel or testimony or other information  
64 introduced by them allege any factual inaccuracy in  
65 the presentence investigation report or the summary  
66 of the report or part thereof, the court shall, as to  
67 each matter controverted, make (i) a finding as to the  
68 allegation, or (ii) a determination that no such finding  
69 is necessary because the matter controverted will not  
70 be taken into account in sentencing. A written record  
71 of such findings and determinations shall be appended  
72 to and accompany any copy of the presentence  
73 investigation report thereafter made available to the  
74 Bureau of Prisons or the Parole Commission.

75 (E) Any copies of the presentence investigation  
76 report made available to the defendant and his the  
77 defendant's counsel and the attorney for the  
78 government shall be returned to the probation officer  
79 immediately following the imposition of sentence or  
80 the granting of probation, unless the court, in its  
81 discretion otherwise directs.

\* \* \* \* \*

## COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

**Rule 32.1. Revocation or Modification of Probation**

## 1 (a) REVOCATION OF PROBATION.

2 (1) Preliminary Hearing. Whenever a probationer is  
3 held in custody on the ground that he the probationer has  
4 violated a condition of his probation, ~~he~~ the probationer shall  
5 be afforded a prompt hearing before any judge, or a United  
6 States magistrate who has been given authority pursuant to  
7 28 U.S.C. § 636 to conduct such hearings, in order to  
8 determine whether there is probable cause to hold the  
9 probationer for a revocation hearing. The probationer shall  
10 be given

11 (A) notice of the preliminary hearing and its purpose  
12 and of the alleged violation of probation;

13 (B) an opportunity to appear at the hearing and  
14 present evidence in ~~his~~ the probationer's own behalf;

15 (C) upon request, the opportunity to question  
16 witnesses against ~~him~~ the probationer unless, for good  
17 cause, the federal magistrate decides that justice does  
18 not require the appearance of the witness; and

19 (D) notice of ~~his~~ the probationer's right to be repre-  
20 sented by counsel.

21 The proceedings shall be recorded stenographically or by an  
22 electronic recording device. If probable cause is found to  
23 exist, the probationer shall be held for a revocation hearing.



## RULES OF CRIMINAL PROCEDURE

24 The probationer may be released pursuant to Rule 46(c)  
25 pending the revocation hearing. If probable cause is not  
26 found to exist, the proceeding shall be dismissed.

27 (2) Revocation Hearing. The revocation hearing,  
28 unless waived by the probationer, shall be held within a  
29 reasonable time in the district of probation jurisdiction. The  
30 probationer shall be given

31 (A) written notice of the alleged violation of  
32 probation;

33 (B) disclosure of the evidence against him the  
34 probationer;

35 (C) an opportunity to appear and to present  
36 evidence in his the probationer's own behalf;

37 (D) the opportunity to question adverse witnesses  
38 against him; and

39 (E) notice of his the probationer's right to be  
40 represented by counsel.

41 (b) MODIFICATION OF PROBATION. A hearing and  
42 assistance of counsel are required before the terms or conditions of  
43 probation can be modified, unless the relief granted to the  
44 probationer upon his the probationer's request or the court's own  
45 motion is favorable to him the probationer.

## COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

**Rule 32. New Trial**

1           The court on motion of a defendant may grant a new trial to  
2 him that defendant if required in the interest of justice. If trial was  
3 by the court without a jury the court on motion of a defendant for a  
4 new trial may vacate the judgment if entered, take additional  
5 testimony and direct the entry of a new judgment. A motion for a  
6 new trial based on the ground of newly discovered evidence may be  
7 made only before or within two years after final judgment, but if an  
8 appeal is pending the court may grant the motion only on remand of  
9 the case. A motion for a new trial based on any other grounds shall  
10 be made within 7 days after verdict or finding of guilty or within  
11 such further time as the court may fix during the 7-day period.

**COMMITTEE NOTE**

The amendment is technical. No substantive change is intended.

**Rule 38. Stay of Execution, and Relief Pending Review**

1           (a) STAY OF EXECUTION.

\* \* \* \* \*

2           (2) IMPRISONMENT. A sentence of imprisonment  
3 shall be stayed if an appeal is taken and the defendant is  
4 released pending disposition of the appeal pursuant to Rule  
5 9(b) of the Federal Rules of Appellate Procedure. If not  
6 stayed, the court may recommend to the Attorney General  
7 that the defendant be retained at, or transferred to, a place  
8 of confinement near the place of trial or the place where his  
9 an appeal is to be heard, for a period reasonably necessary to

10 permit the defendant to assist in the preparation of his an  
11 appeal to the court of appeals.

12 (3) FINE. A sentence to pay a fine or a fine and costs,  
13 if an appeal is taken, may be stayed by the district court or  
14 by the court of appeals upon such terms as the court deems  
15 proper. The court may require the defendant pending appeal  
16 to deposit the whole or any part of the fine and costs in the  
17 registry of the district court, or to give bond for the payment  
18 thereof, or to submit to an examination of assets, and it may  
19 make any appropriate order to restrain the defendant from  
20 dissipating his such defendant's assets.

\* \* \* \* \*

#### COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

#### **Rule 40. Commitment to Another District**

1 (a) APPEARANCE BEFORE FEDERAL MAGISTRATE. If a  
2 person is arrested in a district other than that in which the offense  
3 is alleged to have been committed, he that person shall be taken  
4 without unnecessary delay before the nearest available federal  
5 magistrate. Preliminary proceedings concerning the defendant shall  
6 be conducted in accordance with Rules 5 and 5.1, except that if no  
7 preliminary examination is held because an indictment has been  
8 returned or an information filed or because the defendant elects to  
9 have the preliminary examination conducted in the district in which  
10 the prosecution is pending, the person shall be held to answer upon a

## RULES OF CRIMINAL PROCEDURE

11 finding that he such person is the person named in the indictment,  
12 information or warrant. If the defendant is held to answer, he the  
13 defendant shall be held to answer in the district court in which the  
14 prosecution is pending, provided that a warrant is issued in that  
15 district if the arrest was made without a warrant, upon production  
16 of the warrant or a certified copy thereof.

\* \* \* \* \*

17 (d) ARREST OF PROBATIONER. If a person is arrested for a  
18 violation of his probation in a district other than the district having  
19 probation jurisdiction, he such person shall be taken without  
20 unnecessary delay before the nearest available federal magistrate.  
21 The federal magistrate shall:

\* \* \* \* \*

22 (3) Otherwise order the probationer held to answer in  
23 the district court of the district having probation jurisdiction  
24 upon production of certified copies of the probation order,  
25 the warrant, and the application for the warrant, and upon a  
26 finding that the person before him the magistrate is the  
27 person named in the warrant.

28 (e) ARREST FOR FAILURE TO APPEAR. If a person is  
29 arrested on a warrant in a district other than that in which the  
30 warrant was issued, and the warrant was issued because of the  
31 failure of the person named therein to appear as required pursuant  
32 to a subpoena or the terms of his that person's release, the person  
33 arrested shall be taken without unnecessary delay before the nearest  
34 available federal magistrate. Upon production of the warrant or a

## RULES OF CRIMINAL PROCEDURE

35 certified copy thereof and upon a finding that the person before him  
36 the magistrate is the person named in the warrant, the federal  
37 magistrate shall hold the person to answer in the district in which  
38 the warrant was issued.

39 (f) RELEASE OR DETENTION. If a person was previously  
40 detained or conditionally released, pursuant to chapter 207 of title  
41 18, United States Code, in another district where a warrant,  
42 information, or indictment issued, the federal magistrate shall take  
43 into account the decision previously made and the reasons set forth  
44 therefor, if any, but will not be bound by that decision. If the  
45 federal magistrate amends the release or detention decision or  
46 alters the conditions of release, he the magistrate shall set forth the  
47 reasons for ~~his~~ therefor action in writing.

## COMMITTEE NOTE

The amendments are technical. No substantive change is intended

**Rule 41. Search and Seizure**

\* \* \* \* \*

1 (c) ISSUANCE AND CONTENTS.

2 (1) Warrant Upon Affidavit. A warrant other than a  
3 warrant upon oral testimony under paragraph (2) of  
4 this subdivision shall issue only on an affidavit or  
5 affidavits sworn to before the federal magistrate or  
6 state judge and establishing the grounds for issuing the  
7 warrant. If the federal magistrate or state judge is  
8 satisfied that grounds for the application exist or that

9           there is probable cause to believe that they exist, he  
10           that magistrate or state judge shall issue a warrant  
11           identifying the property or person to be seized and  
12           naming or describing the person or place to be  
13           searched. The finding of probable cause may be based  
14           upon hearsay evidence in whole or in part. Before  
15           ruling on a request for a warrant the federal  
16           magistrate or state judge may require the affiant to  
17           appear personally and may examine under oath the  
18           affiant and any witnesses he the affiant may produce,  
19           provided that such proceeding shall be taken down by a  
20           court reporter or recording equipment and made part  
21           of the affidavit. The warrant shall be directed to a  
22           civil officer of the United States authorized to enforce  
23           or assist in enforcing any law thereof or to a person so  
24           authorized by the President of the United States. It  
25           shall command the officer to search, within a specified  
26           period of time not to exceed 10 days, the person or  
27           place named for the property or person specified. The  
28           warrant shall be served in the daytime, unless the  
29           issuing authority, by appropriate provision in the  
30           warrant, and for reasonable cause shown, authorizes  
31           its execution at times other than daytime. It shall  
32           designate a federal magistrate to whom it shall be  
33           returned.

\* \* \* \* \*

## RULES OF CRIMINAL PROCEDURE

34 (e) MOTION FOR RETURN OF PROPERTY. A person  
35 aggrieved by an unlawful search and seizure may move the district  
36 court for the district in which the property was seized for the return  
37 of the property on the ground that he such person is entitled to  
38 lawful possession of the property which was illegally seized. The  
39 judge shall receive evidence on any issue of fact necessary to the  
40 decision of the motion. If the motion is granted the property shall  
41 be restored and it shall not be admissible in evidence at any hearing  
42 or trial. If a motion for return of property is made or comes on for  
43 hearing in the district of trial after an indictment or information is  
44 filed, it shall be treated also as a motion to suppress under Rule 12.

\* \* \* \* \*

## COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

**Rule 42. Criminal Contempt**

1 (a) SUMMARY DISPOSITION. A criminal contempt may be  
2 punished summarily if the judge certifies that he the judge saw or  
3 heard the conduct constituting the contempt and that it was  
4 committed in the actual presence of the court. The order of  
5 contempt shall recite the facts and shall be signed by the judge and  
6 entered of record.

7 (b) DISPOSITION UPON NOTICE AND HEARING. A criminal  
8 contempt except as provided in subdivision (a) of this rule shall be  
9 prosecuted on notice. The notice shall state the time and place of  
10 hearing, allowing a reasonable time for the preparation of the

11 defense, and shall state the essential facts constituting the criminal  
 12 contempt charged and describe it as such. The notice shall be given  
 13 orally by the judge in open court in the presence of the defendant or,  
 14 on application of the United States attorney or of an attorney  
 15 appointed by the court for that purpose, by an order to show cause  
 16 or an order of arrest. The defendant is entitled to a trial by jury in  
 17 any case in which an act of Congress so provides. ~~He~~ The defendant  
 18 is entitled to admission to bail as provided in these rules. If the  
 19 contempt charged involves disrespect to or criticism of a judge, that  
 20 judge is disqualified from presiding at the trial or hearing except  
 21 with the defendant's consent. Upon a verdict or finding of guilt the  
 22 court shall enter an order fixing the punishment.

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

**Rule 43. Presence of the Defendant**

\* \* \* \* \*

1 (b) CONTINUED PRESENCE NOT REQUIRED. The further  
 2 progress of the trial to and including the return of the verdict shall  
 3 not be prevented and the defendant shall be considered to have  
 4 waived ~~his~~ the right to be present whenever a defendant, initially  
 5 present,

6 (1) ~~is voluntarily absents himself~~ absent after the trial  
 7 has commenced (whether or not he the defendant has been  
 8 informed by the court of ~~his~~ the obligation to remain during  
 9 the trial), or



## RULES OF CRIMINAL PROCEDURE

12                   (2) after being warned by the court that disruptive  
 13                   conduct will cause him ~~to be removed~~ the removal of the  
 14                   defendant from the courtroom, persists in conduct which is  
 15                   such as to justify ~~his being excluded~~ exclusion from the  
 16                   courtroom.

\* \* \* \* \*

## COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

**Rule 44. Right to and Assignment of Counsel**

1                   (a) RIGHT TO ASSIGNED COUNSEL. Every defendant who is  
 2                   unable to obtain counsel shall be entitled to have counsel assigned to  
 3                   represent him that defendant at every stage of the proceedings from  
 4                   his initial appearance before the federal magistrate or the court  
 5                   through appeal, unless he that defendant waives such appointment.

\* \* \* \* \*

6                   (c) <sup>s</sup> JOINT REPRESENTATION. Whenever two or more  
 7                   defendants have been jointly charged pursuant to Rule 8(b) or have  
 8                   been joined for trial pursuant to Rule 13, and are represented by the  
 9                   same retained or assigned counsel or by retained or assigned counsel  
 10                  who are associated in the practice of law, the court shall promptly  
 11                  inquire with respect to such joint representation and shall personally  
 12                  advise each defendant of his the right to the effective assistance of  
 13                  counsel, including separate representation. Unless it appears that  
 14                  there is good cause to believe no conflict of interest is likely to

15 arise, the court shall take such measures as may be appropriate to  
16 protect each defendant's right to counsel.

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

**Rule 45. Time**

\* \* \* \* \*

1 (e) ADDITIONAL TIME AFTER SERVICE BY MAIL. Whenever  
2 a party has the right or is required to do an act within a prescribed  
3 period after the service of a notice or other paper upon ~~him~~ that  
4 party and the notice or other paper is served upon ~~him~~ by mail, 3  
5 days shall be added to the prescribed period.

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

**Rule 46. Release From Custody**

\* \* \* \* \*

1 (b) RELEASE DURING TRIAL. A person released before trial  
2 shall continue on release during trial under the same terms and  
3 conditions as were previously imposed unless the court determines  
4 that other terms and conditions or termination of release are  
5 necessary to assure ~~his~~ such person's presence during the trial or to  
6 assure that ~~his~~ such person's conduct will not obstruct the orderly  
7 and expeditious progress of the trial.

\* \* \* \* \*

## RULES OF CRIMINAL PROCEDURE

8 (d) JUSTIFICATION OF SURETIES. Every surety, except a  
9 corporate surety which is approved as provided by law, shall justify  
10 by affidavit and may be required to describe in the affidavit the  
11 property by which he the surety proposes to justify and the  
12 encumbrances thereon, the number and amount of other bonds and  
13 undertakings for bail entered into by ~~him~~ the surety and remaining  
14 undischarged and all ~~his~~ the other liabilities of the surety. No bond  
15 shall be approved unless the surety thereon appears to be qualified.

\* \* \* \* \*

16 (g) SUPERVISION OF DETENTION PENDING TRIAL. The  
17 court shall exercise supervision over the detention of defendants and  
18 witnesses within the district pending trial for the purpose of  
19 eliminating all unnecessary detention. The attorney for the  
20 government shall make a biweekly report to the court listing each  
21 defendant and witness who has been held in custody pending  
22 indictment, arraignment or trial for a period in excess of ten days.  
23 As to each witness so listed the attorney for the government shall  
24 make a statement of the reasons why such witness should not be  
25 released with or without the taking of ~~his~~ a deposition pursuant to  
26 Rule 15(a). As to each defendant so listed the attorney for the  
27 government shall make a statement of the reasons why the  
28 defendant is still held in custody.

\* \* \* \* \*

## COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

**Rule 49. Service and Filing of Papers**

\*\*\*\*\*

1           (b) SERVICE: HOW MADE. Whenever under these rules or by  
2           an order of the court service is required or permitted to be made  
3           upon a party represented by an attorney, the service shall be made  
4           upon the attorney unless service upon the party himself personally is  
5           ordered by the court. Service upon the attorney or upon a party  
6           shall be made in the manner provided in civil actions.

\*\*\*\*\*

## COMMITTEE NOTE

The amendment is technical. No substantive change is intended.

**Rule 51. Exceptions Unnecessary**

1           Exceptions to rulings or orders of the court are unnecessary  
2           and for all purposes for which an exception has heretofore been  
3           necessary it is sufficient that a party, at the time the ruling or order  
4           of the court is made or sought, makes known to the court the action  
5           which he that party desires the court to take or his that party's  
6           objection to the action of the court and the grounds therefor; but if  
7           a party has no opportunity to object to a ruling or order, the absence  
8           of an objection does not thereafter prejudice him that party.

## COMMITTEE NOTE

The amendments are technical. No substantive change is intended.