100th Congress, 1st Session - - - - - - - - - - House Document 100-47

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE OF THE SUPREME COURT

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE 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

---

U.S. GOVERNMENT PRINTING OFFICE

70-164 WASHINGTON : 1987

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,

William H. Rehnquist

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

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

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

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.

* * * * *

(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

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.

* * * * *

(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

* * * * *

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

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

(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

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

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.

* * * * *

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

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

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.

* * * * *

(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

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.

* * * * *

(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

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. S 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.

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

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

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

January 12, 1987

CHAIRMEN OF ADVISORY COMMITTEES
PIERCE LIVELY
APPELLATE RULES
JOSEPH F. WEIS, JR.
CIVIL RULES
LELAND C. NIELSEN
CRIMINAL RULES
LLOYD D. GEORGE
BANKRUPTCY RULES

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 transmittted 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

* * * * *

(c) FORM.

(1) Warrant. The warrant shall be signed by the magistrate and shall contain the name of the defendant or, if ~~his~~ the defendant's name is unknown, any name or description by which ~~he~~ 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 ~~in his possession~~ at the time of the arrest, but upon request ~~he~~ shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant ~~in his possession~~ at the time of the arrest, ~~he~~ the officer shall then

---

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

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 ~~him~~ the defendant personally, or by leaving it at ~~his~~ the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein and by mailing a copy of the summons to the defendant's last known address.

(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. ~~and shall be cancelled by him~~. 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.

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

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 ~~him~~ the defendant and of any affidavit filed therewith, of ~~his~~ the defendant's right to retain counsel~~,~~ ~~of his~~ or ~~right~~ to request the assignment of counsel if ~~he~~ the defendant is unable to obtain counsel, and of the general circumstances under which ~~he~~ the defendant may secure pretrial release. ~~He~~ The magistrate shall inform the defendant that ~~he~~ the defendant is not required to make a statement and that any statement made by ~~him~~ the defendant may be used against ~~him~~ the defendant. The magistrate shall also inform the defendant of ~~his~~ the right to a preliminary examination. ~~He~~ 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 ~~him~~ 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 ~~he~~ the defendant is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate. 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.

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

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 ~~him~~ 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 ~~against him~~ and may introduce evidence ~~in his own behalf~~. 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.

* * * * *

(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 ~~for his information~~ to that attorney in connection with any further hearing or ~~in connection with his~~ 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 he the defendant is unable to pay or to give security therefor, in which case the expense shall be paid by the Director of the Administrative Office of the United States Courts from available appropriated funds. Counsel for the government may move also that a copy of the transcript, in whole or in part, be made available to it, for good cause shown, and an order may be entered granting such motion in whole or in part, on appropriate terms, except that the government need not prepay costs nor furnish security therefor.

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

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.

* * * * *

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.

* * * * *

(c) ~~FOREMAN~~ FOREPERSON AND DEPUTY ~~FOREMAN~~ FOREPERSON. The court shall appoint one of the jurors to be ~~foreman~~ foreperson and another to be deputy ~~foreman~~ foreperson. The ~~foreman~~ foreperson shall have power to administer oaths and

affirmations and shall sign all indictments. ~~He~~ The foreperson or another juror designated by ~~him~~ 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 ~~foreman~~ foreperson, the deputy ~~foreman~~ foreperson shall act as ~~foreman~~ 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 ~~foreman~~ foreperson shall so report to a federal magistrate in writing forthwith.

* * * * *

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

Rule 7. The Indictment and the Information

* * * * *

(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 ~~he has~~ having been advised of the nature of the charge and of ~~his~~ 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 ~~he~~ 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 ~~his~~ the defendant's prejudice.

* * * * *

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

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 ~~him~~ the defendant the substance of the charge and calling on ~~him~~ the defendant to plead thereto. ~~He~~ The defendant shall be given a copy of the indictment or information before ~~he is~~ being called upon to plead.

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

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. ~~If the~~ A defendant who prevails on appeal ~~he~~ shall be allowed to withdraw ~~his~~ 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 ~~him~~ the defendant of, and determine that ~~he~~ the defendant understands, the following:

* * * * *

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

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

(4) that if ~~his~~ 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 ~~he~~ 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 ~~he~~ the defendant has pleaded, that ~~his~~ the defendant's answers may later be used against ~~him~~ 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 ~~his~~ 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 ~~his~~ 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 ~~his~~ the plea, and advise the defendant that if ~~he~~ the defendant persists in ~~his~~ a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

* * * * *

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

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 ~~his~~ 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.

* * * * *

COMMITTEE NOTE

The amendment is technical. No substantive change is intended.

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 ~~his~~ 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 ~~he~~ 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 ~~his~~ 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 ~~his~~ 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. ~~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

(a) DEFENSE OF INSANITY. If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, ~~he~~ 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 ~~his~~ guilt, ~~he~~ 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 ~~his~~ the defendant's guilt.

* * * * *

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

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 ~~his~~ 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 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 ~~him~~ the defendant at the examination and keep ~~him~~ the defendant in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause ~~him to be removed~~ the defendant's removal from the place of the taking of the deposition, ~~he~~ the defendant persists in conduct which is such as to justify ~~his being excluded~~ 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 ~~his~~ 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 ~~his~~ 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 ~~his~~ 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 ~~his~~ 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 ~~his~~ 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 ~~him to offer~~ the offering of all of it which is relevant to the part offered and any party may offer other parts.

* * * * *

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

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 ~~his~~ 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 ~~he~~ the witness was involved.

(B) DEFENDANT'S PRIOR RECORD. Upon request of the defendant, the government shall furnish to the defendant such copy of ~~his~~ 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 ~~his~~ the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

* * * * *

(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 ~~his~~ 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 ~~his~~ 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, ~~his~~ 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, ~~he~~ such party shall promptly notify the other party or ~~his~~ that other party's attorney or the court of the existence of the additional evidence or material.

* * * * *

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

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 ~~him~~ that magistrate, but it need not be under the seal of the court.

* * * * *

(d) SERVICE. A subpoena may be served by the marshal, by ~~his deputy~~ 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 ~~him~~ 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 ~~him~~ 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.

* * * * *

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

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

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

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

(c) EFFECT OF NOT GUILTY PLEA. If after the proceeding has been transferred pursuant to subdivision (a) or (b) of this rule the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced, and the proceeding shall be restored to the docket of that court. The defendant's statement that ~~he~~ the defendant wishes to plead guilty or nolo contendere shall not be used against ~~him~~ 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 ~~he~~ 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 ~~he has~~ 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 ~~he~~ 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 ~~his~~ the juvenile's rights, including the right to be returned to the district in which ~~he~~ the juvenile is alleged to have committed the act, and of the consequences of such consent.

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

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 ~~him~~ 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 ~~he~~ 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 ~~him~~ that defendant or any one or more of the counts thereof to another district.

* * * * *

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

Rule 24. Trial Jurors

(a) EXAMINATION. The court may permit the defendant or ~~his~~ 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 ~~his~~ 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.

* * * * *

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

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 ~~that he has familiarized himself~~ 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 ~~such other~~ that judge is satisfied that ~~he~~ a judge who did not preside at the trial cannot perform those duties ~~because he did not preside at the trial~~ or that it is appropriate for any other 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

(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 ~~his~~ 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 ~~his~~ 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 ~~him~~ the witness;

* * * * *

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

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 ~~adverse~~ all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury., ~~but t~~ The court ~~shall~~ 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 ~~he~~ that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which ~~he~~ that party objects and the grounds of ~~his~~ 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.

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

(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 ~~his~~ 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 ~~him~~ the defendant if ~~he~~ the defendant wishes to make a statement in ~~his~~ 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 ~~his~~ 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.

* * * * *

(3) Disclosure.

(A) At a reasonable time before imposing sentence the court shall permit the defendant and ~~his~~ 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 ~~his~~ 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 ~~his~~ 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 ~~his~~ the defendant's counsel shall be disclosed to the attorney for the government.

(D) If the comments of the defendant and ~~his~~ 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 ~~his~~ the defendant's counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs.

* * * * *

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

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 ~~he~~ the probationer has violated a condition of ~~his~~ probation, ~~he~~ 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 ~~his~~ the probationer's own behalf;

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

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

The proceedings shall be recorded stenographically or by an electronic recording device. If probable cause is found to exist, the 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 ~~him~~ the probationer;

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

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

(E) notice of ~~his~~ 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 granted to the probationer upon ~~his~~ the probationer's request or the court's own motion is favorable to ~~him~~ the probationer.

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

Rule 32. New Trial

The court on motion of a defendant may grant a new trial to ~~him~~ 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.

COMMITTEE NOTE

The amendment is technical. No substantive change is intended.

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 ~~his~~ an appeal is to be heard, for a period reasonably necessary to

permit the defendant to assist in the preparation of ~~his~~ 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 ~~his~~ such defendant's assets.

* * * * *

COMMITTEE NOTE

The amendments are technical. No sustantive change is intended.

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, ~~he~~ 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 ~~he~~ such person is the person named in the indictment, information or warrant. If ~~the defendant is~~ held to answer, ~~he~~ 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 ~~his~~ probation in a district other than the district having probation jurisdiction, ~~he~~ 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 ~~him~~ 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 ~~his~~ 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 ~~him~~ 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, ~~he~~ the magistrate shall set forth the reasons ~~for his~~ therefor ~~action~~ in writing.

COMMITTEE NOTE

The amendments are technical. No substantive change is intended

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, he that 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 he 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 ~~he~~ 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.

* * * * *

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

Rule 42. Criminal Contempt

(a) SUMMARY DISPOSITION. A criminal contempt may be punished summarily if the judge certifies that ~~he~~ 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. ~~He~~ 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.

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

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 ~~his~~ the right to be present whenever a defendant, initially present,

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

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

* * * * *

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

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 ~~him~~ that defendant at every stage of the proceedings from ~~his~~ initial appearance before the federal magistrate or the court through appeal, unless ~~he~~ 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 ~~his~~ 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.

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

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

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

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 ~~his~~ such person's presence during the trial or to assure that ~~his~~ 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 ~~he~~ the surety proposes to justify and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by ~~him~~ the surety and remaining undischarged and all ~~his~~ 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 ~~his~~ 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.

* * * * *

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

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 ~~himself~~ personally is ordered by the court. Service upon the attorney or upon a party 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

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 ~~he~~ that party desires the court to take or ~~his~~ 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 ~~him~~ that party.

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.