Appendix A

Rule 1. Scope.

These rules govern the procedure in *all criminal proceedings in* the courts of the United States, *as defined in rule 54(a);* and, ~~before United States commissioners in all criminal proceedings, with the exceptions stated in Rule 54~~ *whenever specifically provided in one of the rules, to preliminary, supplementary, and special proceedings before United States magistrates and at proceedings before state and local judicial officers.*

3-20-72

Rule 1. Scope.

Advisory Committee Note

The rule is amended to make clear that the rules are applicable to courts of the United States and, where the rule so provides, to proceedings before United States magistrates and state or local judicial officers.

Primarily these rules are intended to govern proceedings in criminal cases triable in the United States District Court. Special rules have been promulgated, pursuant to the authority set forth in 28 U.S.C. § 636(c), for the trial of "minor offenses" before United States magistrates. (See ~~Federal Rules of Procedure for United States Magistrates, 46 F.R.D. 487 (1969).~~) Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates (January 27, 1971).)

However, there is inevitably some overlap between the two sets of rules. The Rules of Criminal Procedure for the United States District Courts deal with preliminary, supplementary, and special proceedings which will often be conducted before United States magistrates. This is true, for example, with regard to rule 3—The Complaint; rule 4—Arrest Warrant or Summons Upon Complaint; rule 5—Initial Appearance Before the Magistrate; and rule 5.1—Preliminary Examination. It is also true, for example, of supplementary and special proceedings such as rule 40—Commitment to Another District, Removal; rule 41—Search and Seizure; and rule 46—Release from Custody. Other of these rules, where applicable, also apply to proceedings before United States magistrates. See ~~Federal Rules of Procedure for United States Magistrates, rule 2—Applicability of District Court Rules~~: Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates, rule 1—Scope

These rules govern the procedure and practice for the trial of minor offenses (including petty offenses) before United States magistrates under Title 18, U.S.C. § 3401, and for appeals in such cases to judges of the district courts. To the extent that pretrial and trial procedure and practice are not specifically covered by these rules, the Federal Rules of Criminal Procedure apply as to minor offenses other than petty offenses. All other proceedings in criminal matters, other than petty offenses, before United States magistrates are governed by the Federal Rules of Criminal Procedure.

State and local judicial officers are governed by these rules, but only when the rule specifically so provides. This is the case of rule 3—The Complaint; rule 4—Arrest Warrant or Summons Upon Complaint; and rule 5—Initial Appearance Before the Magistrate. These rules confer authority upon the "magistrate," a term which is defined in new rule 54 as follows:

> "Magistrate" includes a United States magistrate as defined in 28 U.S.C. §§ 631–639, a judge of the United States, another judge or judicial officer specifically empowered by statute in force in any territory or possession, the commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates, and a state or local judicial officer, authorized by 18 U.S.C. § 3041 to perform the functions prescribed in rules 3, 4, and 5.

Rule 41 provides that a search warrant may be issued by "a judge of a state court of record" and thus confers that authority upon appropriate state judicial officers.

The scope of rules 1 and 54 is discussed in C. Wright, Federal Practice and Procedure: Criminal §§ 21, 871–874 (1969, Supp. 1971), and 8 and 8A J. Moore, Federal Practice chapters 1 and 54 (2d ed. Cipes 1970, Supp. 1971).

Rule 3. The Complaint

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a ~~commissioner or other officer empowered to commit persons charged with offenses against the United States~~ *magistrate.*

Advisory Committee Note

The amendment deletes the reference to "commissioner or other officer empowered to commit persons charged with offenses against the United States" and substitutes therefor "magistrate."

The change is editorial in nature to conform the language of the rule to the recently enacted Federal Magistrates Act. The term "magistrate" is defined in rule 54.

Rule 4. Arrest Warrant or Summons Upon Complaint.

(a) ISSUANCE OF A SUMMONS. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, ~~a-warrant-for-the-arrest-of the-defendant-shall-issue-to-any-officer-authorized-by law-to-execute-it~~ the magistrate shall issue a summons for the appearance of the defendant except as provided in subdivision (b)(2). ~~Upon-the-request-of-the-attorney for-the-government-a-summons-instead-of-a-warrant-shall issue. If-a-defendant-fails-to-appear-in-response-to the-summons,-a-warrant-shall-issue.~~

(b) ISSUANCE OF AN ARREST WARRANT. A warrant shall issue whenever:

(1) a defendant fails to appear in response to a summons; or

(2) a valid reason is shown for the issuance of an arrest warrant rather than a summons; or

(3) a summons having issued, a valid reason is shown for the issuance of an arrest warrant. This showing may be made to a magistrate either in the district in which the summons was issued or in the district in which the defendant is found.

(c) PROBABLE CAUSE. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a summons or warrant, the magistrate may require the complainant to appear personally and may examine under oath the complainant and any witnesses he may produce. The magistrate shall promptly make or cause to be made a record or summary of such proceeding. More than one warrant or summons may issue on the same complaint or for the same defendant.

(d) ~~(b)~~ FORM.

(1) Warrant. The warrant shall be signed by the ~~commissioner~~ magistrate and shall contain the name of the defendant or, if his name is unknown, any name or description by which he 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 ~~commissioner~~ magistrate.

(2) Summons. The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a ~~commissioner~~ magistrate at a stated time and place.

(e) ~~(e)~~ EXECUTION OR SERVICE; AND RETURN.

(1) By Whom. The warrant shall be executed by a marshal or by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action.

(2) Territorial Limits. The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.

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

(4) Return. The officer executing a warrant shall make return thereof to the ~~commissioner or other officer~~ *magistrate* before whom the defendant is brought pursuant to ~~Rule~~ rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to the ~~commissioner~~ *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 ~~commissioner~~ *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 cancelled or a summons returned unserved or a duplicate thereof may be delivered by the ~~commissioner~~ *magistrate* to the marshal or other authorized person for execution or service.

Rule 4. Arrest Warrant or Summons Upon Complaint.

Advisory Committee Note

The amendments are designed to achieve several objectives: (1) to conform the language of the rule to the Federal Magistrates Act; (2) to make explicit the fact that the determination of probable cause may be based upon hearsay evidence; (3) to make clear that probable cause is a prerequisite to the issuance of a summons; and (4) to give priority to the issuance of a summons rather than a warrant.

Throughout the rule the term "magistrate" is substituted for the term "commissioner." Magistrate is defined in rule 54 to include a judge of the United States, a United States magistrate, and those state and local judicial officers specified in 18 U.S.C. § 3041.

Subdivision (a) makes clear that the normal situation is to issue a summons.

Subdivision (b) provides for the issuance of an arrest warrant in lieu of or in addition to the issuance of a summons.

Subdivision (b)(1) restates the provision of the old rule mandating the issuance of a warrant when a defendant fails to appear in response to a summons.

Subdivision (b)(2) provides for the issuance of an arrest warrant rather than a summons whenever "a valid reason is shown" for the issuance of a warrant. The reason may be apparent from the face of the complaint or may be provided by the federal law enforcement officer or attorney for the government. See comparable provision in rule 9.

Subdivision (b)(3) deals with the situation in which conditions change after a summons has issued. It affords the government an opportunity to demonstrate the need for an arrest warrant. This may be done in the district in which the defendant is located if this is the convenient place to do so.

Subdivision (c) provides that a warrant or summons may issue on the basis of hearsay evidence. What constitutes probable cause is left to be dealt with on a case-to-case basis, taking account of the unlimited variations in source of information and in the opportunity of the informant to perceive accurately the factual data which he furnishes. See, *e.g.*, *Giordenello* v. *United States*, 357 U.S. 480 (1958); *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *United States* v. *Ventresca*, 380 U.S. 102 (1965), *Jaben* v. *United States*, 381 U.S. 214 (1965); *McCray* v. *Illinois*, 386 U.S. 300 (1967); *Spinelli* v. *United States*, 393 U.S. 410 (1969); United States v. Harris, 403 U.S. 573 (1971); Note, The Informer's Tip as Probable Cause for Search or Arrest, 54 Cornell L. Rev. 958 (1969); C. Wright, Federal Practice and Procedure: Criminal §52 (1969, Supp. 1971); 8 J. Moore, Federal Practice ¶4.03 (2d ed. Cipes 1970, Supp. 1971)

Rule 5. ~~Proceedings~~ *Initial Appearance* Before the ~~Commissioner~~ *Magistrate.*

(a) *In General.* ~~Appearance Before the Commissioner.~~ An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available ~~commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States~~ federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. §3041. ~~When~~ If a person arrested without a warrant is brought before a ~~commissioner or other officer~~ magistrate, a complaint shall be filed forthwith which shall comply with the requirements of rule 4 (a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.

(b) MINOR OFFENSES. If the charge against the defendant is a minor offense triable by a United States magistrate under 18 U.S.C. §3401, the United States magistrate shall proceed in accordance with the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates

(c) OFFENSES NOT TRIABLE BY THE UNITED STATES MAGISTRATE. ~~STATEMENT BY THE COMMISSIONER.~~ If the charge against the defendant is not triable by the United States magistrate, the defendant shall not be called upon to plead. The ~~commissioner~~ magistrate shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and

of the general circumstances under which he may secure pretrial release. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall also inform the defendant of his right to a preliminary examination. ~~The commissioner~~ He shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided by statute or in these rules.

~~Preliminary Examination. The defendant shall not be called upon to plead.~~ 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 ~~commissioner~~ magistrate shall forthwith hold him to answer in the district court. If the defendant does not waive the preliminary examination, the ~~commissioner~~ magistrate ~~shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him.~~ 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 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. ~~Proceedings~~ Initial Appearance Before the ~~Commissioner~~ Magistrate.

Advisory Committee Note

There are a number of changes made in rule 5 which are designed to improve the editorial clarity of the rule; to conform the rule to the Federal Magistrates Act; and to deal explicitly in the rule with issues as to which the rule is now silent and the law uncertain.

The principal editorial change is to deal separately with the initial appearance before the magistrate and the preliminary examination. They are dealt with together in old rule 5. They are separated in order to prevent confusion as to whether they constitute a single or two separate proceedings. Although the preliminary examination can be held at the time of the initial appearance, in practice this ordinarily does not occur. Usually counsel need time to prepare for the preliminary examination, and as a consequence a separate date is typically set for the preliminary examination.

Because federal magistrates are reasonably available to conduct initial appearances, the rule is drafted on the assumption that the initial appearance is before a federal magistrate. If experience under the act indicates that there must be frequent appearances before state or local judicial officers it may be desirable to draft an additional rule, such as the following, detailing the procedure for an initial appearance before a state or local judicial officer:

Initial Appearance Before a State or Local Judicial Officer. If a United States magistrate is not reasonably available under rule 5(a), the arrested person shall be brought before a state or local judicial officer authorized by 18 U.S.C. § 3041, and such officer shall inform the person of the rights specified in rule 5 (c) and shall authorize the release of the arrested person under the terms provided for by these rules and by 18 U.S.C. § 3146. The judicial officer shall immediately transmit any written order of release and any papers filed before him to the appropriate United States magistrate of the district and order the arrested person to appear before such United States magistrate within three days if not in custody or at the next regular hour of business of the United States magistrate if the arrested person is retained in custody. Upon his appearance before the United States magistrate, the procedure shall be that prescribed in rule 5.

Several changes are made to conform the language of the rule to the Federal Magistrates Act.

(1) The term "magistrate," which is defined in new rule 54, is substituted for the term "commissioner." As defined, "magistrate" includes those state and local judicial officers specified in 18 U.S.C. § 3041, and thus the initial appearance may be before a state or local judicial officer when a federal

magistrate is not reasonably available. This is made explicit in subdivision (a).

(2) Subdivision (b) conforms the rule to the procedure prescribed in the Federal Magistrate Act when a defendant appears before a magistrate charged with a "minor offense" as defined in 18 U.S.C. § 3401(f):

"misdemeanors punishable under the laws of the United States, the penalty for which does not exceed imprisonment for a period of one year, or a fine of not more than $1,000, or both, except that such term does not include . . . [specified exceptions]."

If the "minor offense" is tried before a United States magistrate, the procedure must be in accordance with the ~~Federal Rules of Procedure for United States Magistrates, 46 F.R.D. 487 (1969).~~ Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates, (January 27, 1971).

(3) Subdivision (d) makes clear that a defendant is not entitled to a preliminary examination if he has been indicted by a grand jury prior to the date set for the preliminary examination or, in appropriate cases, if any information is filed in the district court prior to that date. See C. Wright, Federal Practice and Procedure: Criminal § 80, pp. 137–140 (1969, Supp.1971). This is also provided in the Federal Magistrates Act, 18 U.S.C. § 3060(c).

Rule 5 is also amended to deal with several issues not dealt with in old rule 5:

Subdivision (a) is amended to make clear that a complaint, complying with the requirements of rule 4 (a), must be filed whenever a person has been arrested without a warrant. This means that the complaint, or an affidavit or affidavits filed with the complaint, must show probable cause. As provided in rule 4 (a) the showing of probable cause "may be based upon hearsay evidence in whole or in part."

Subdivision (c) provides that defendant should be notified of the general circumstances under which he is entitled to pretrial release under the Bail Reform Act of 1966 (18 U.S.C. §§ 3141-3152). Defendants often do not in fact have counsel at the initial appearance and thus, unless told by the magistrate, may be unaware of their right to pretrial release. See C. Wright, Federal Practice and Procedure: Criminal § 78 N. 61 (1969).

Subdivision (c) makes clear that a defendant who does not waive his right to trial before a judge of the district court is entitled to a preliminary examination to determine probable cause for any offense except a petty offense. It also, by necessary implication, makes clear that a defendant is not entitled to a preliminary examination if he consents to be tried on the issue of guilt or innocence by the United States magistrate, even though the offense may be one not heretofore triable by the United States commissioner and therefore one as to which the defendant had a right to a preliminary examination. The rationale is that the preliminary examination serves only to justify holding the defendant in custody or on bail during the period of time it takes to bind the defendant over to the district court for trial. See *State* v. *Solomon*, 158 Wis. 146, 147 N.W. 640 (1914). A similar conclusion is reached in the New York Proposed Criminal Procedure Law. See McKinney's Session Law News, April 10, 1969, at p. A-119.

Subdivision (c) also contains time limits within which the preliminary examination must be held. These are taken from 18 U.S.C. §3060. The provisions for the extension of the prescribed time limits are the same as the provisions of 18 U.S.C. §3060 with two exceptions: The new language allows delay consented to by the defendant only if there is "a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases." This reflects the view of the Advisory Committee that delay, whether prosecution or defense induced, ought to be avoided whenever possible. The second difference between the new rule and 18 U.S.C. § 3060 is that the rule allows the decision to grant a continuance to be made by a United States magistrate as well as by a judge of the United States. This reflects the view of the Advisory Committee that the United States magistrate should have sufficient judicial competence to make decisions such as that contemplated in subdivision (c).

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 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 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.

(*b*) *Discharge of Defendant. If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.*

(*c*) *Records. After concluding the proceeding the federal magistrate 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 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 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.

3/20/72

Rule 5.1. Preliminary Examination.

Advisory Committee Note

Rule 5.1 is, for the most part, a clarification of old rule 5(c).

Under the new rule, the preliminary examination must be conducted before a "federal magistrate" as defined in rule 54. Giving state or local judicial officers authority to conduct a preliminary examination does not seem necessary. There are not likely to be situations in which a "federal magistrate" is not "reasonably available" to conduct the preliminary examination, which is usually not held until several days after the initial appearance provided for in rule 5.

Subdivision (a) makes clear that a finding of probable cause may be based on "hearsay evidence in whole or in part." The propriety of relying upon hearsay at the preliminary examination has been a matter of some uncertainty in the federal system. See C. Wright, Federal Practice and Procedure: Criminal § 80 (1969, Supp.1971); 8 J. Moore, Federal Practice ¶504[4] (2d ed. Cipes 1970, Supp.1971); Washington v. Clemmer,

339 F. 2d 715, 719 (D.C. Cir. 1964); *Washington* v. *Clemmer*, 339 F. 2d 725, 728 (D.C. Cir. 1964); *Ross* v. *Sirica*, 380 F. 2d 557, 565 (D.C. Cir. 1967); *Howard* v. *United States*, 389 F. 2d 287, 292 (D.C. Cir. 1967); Weinberg and Weinberg, The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968, 67 Mich. L. Rev. 1361, especially n. 92 at 1383 (1969); D. Wright, The Rules of Evidence Applicable to Hearings in Probable Cause, 37 Conn. B.J. 561 (1963); Comment, Preliminary Examination—Evidence and Due Process, 15 Kan. L. Rev. 374, 379-381 (1967).

A grand jury indictment may properly be based upon hearsay evidence. *Costello* v. *United States*, 350 U.S. 359 (1956); 8 J. Moore, Federal Practice ¶ 6.03 [2] (2d ed. Cipes 1970, Supp.1971). This being so, there is practical advantage in making the evidentiary requirements for the preliminary examination as flexible as they are for the grand jury. Otherwise there will be increased pressure upon United States Attorneys to abandon the preliminary examination in favor of the grand jury indictment. See C. Wright, Federal Practice and Procedure: Criminal § 80 at p. 143 (1969). New York State, which also utilizes both the preliminary examination and the grand jury, has under consideration a new Code of Criminal Procedure which would allow the use of hearsay at the preliminary examination. See McKinney's Session Law News, April 10, 1969, pp. A119-A120.

For the same reason, subdivision (a) also provides that the preliminary examination is not the proper place to raise the issue of illegally obtained evidence. This is current law. In *Giordenello* v. *United States*, 357 U.S. 480, 484 (1958), the Supreme Court said:

> [T]he Commissioner here had no authority to adjudicate the admissibility at petitioner's later trial of the heroin taken from his person. That issue was for the trial court. This is specifically recognized by Rule 41(e) of the Criminal Rules, which provides that a defendant aggrieved by an unlawful search and seizure may " * * * move the district court * * * to suppress for use as evidence anything so obtained on the ground that * * * " the arrest warrant was defective on any of several grounds.

Dicta in *Costello* v. *United States*, 350 U.S. 359, 363-364 (1956), and *United States* v. *Blue*, 384 U.S. 251, 255 (1966), also support the proposed rule. In *United States ex rel. Almeida* v. *Rundle*, 383 F. 2d 421, 424 (3d Cir. 1967), the court, in considering the adequacy of an indictment, said:

> On this score, it is settled law that (1) "[an] indictment returned by a legally constituted nonbiased grand jury, * * * is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment.", Lawn v. United States, 355 U.S. 339, 349, 78 S. Ct. 311, 317, 2 L.Ed. 2d 321 (1958); (2) an indictment cannot be challenged "on the ground that there was inadequate or incompetent evidence before the grand jury", Costello v. United States, 350 U.S. 359, 363, 76 S.Ct. 406, 408, 100 L.Ed. 397 (1956); and (3) a prosecution is not abated, nor barred, even where "tainted evidence" has been submitted to a grand jury, United States v. Blue, 384 U.S. 251, 86 S.Ct. 1416, 16 L.Ed. 2d 510 (1966).

See also C. Wright, Federal Practice and Procedure: Criminal §80 at 143 n.5 (1969, Supp.1971) 8 J. Moore, Federal Practice ¶6.03 [3] (2d ed. Cipes 1970, Supp.1971). The Manual for United States Commissioners (Administrative Office of United States Courts, 1948) provides at pp. 24-25: "Motions for this purpose [to suppress illegally obtained evidence] may be made and heard only before a district judge. Commissioners are not empowered to consider or act upon such motions."

It has been urged that the rules of evidence at the preliminary examination should be those applicable at the trial because the purpose of the preliminary examination should be, not to review the propriety of the arrest or prior detention, but

rather to determine whether there is evidence sufficient to justify subjecting the defendant to the expense and inconvenience of trial. See Weinberg and Weinberg; The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968, 67 Mich. L. Rev. 1361, 1396–1399 (1969). The rule rejects this view for reasons largely of administrative necessity and the efficient administration of justice. The Congress has decided that a preliminary examination shall not be required when there is a grand jury indictment (18 U.S.C. §3060). Increasing the procedural and evidentiary requirements applicable to the preliminary examination will therefore add to the administrative pressure to avoid the preliminary examination. Allowing objections to evidence on the ground that evidence has been illegally obtained would require two determinations of admissibility, one before the United States magistrate and one in the district court. The objective is to reduce, not increase, the number of preliminary motions.

To provide that a probable cause finding may be based upon hearsay does not preclude the magistrate from requiring a showing that admissible evidence will be available at the time of trial. See Comment, Criminal Procedure—Grand Jury—Validity of Indictment Based Solely on Hearsay Questioned When Direct Testimony Is Readily Available, 43 N.Y.U. L. Rev. 578 (1968); *United States* v. *Umans*, 368 F. 2d 725 (2d Cir. 1966), cert. dismissed as improvidently granted 389 U.S. 80 (1967); *United States* v. *Andrews*, 381 F. 2d 377, 378 (2d Cir. 1967); *United States* v. *Messina*, 388 F. 2d 393, 394 n. 1 (2d Cir. 1968); *United States* v. *Beltram*, 388 F. 2d 449 (2d Cir. 1968); and *United States* v. *Arcuri*, 282 F. Supp. 347 (E.D.N.Y. 1968). The fact that a defendant is not entitled to object to evidence alleged to have been illegally obtained does not deprive him of an opportunity for a pretrial determination of the admissibility of evidence. He can raise such an objection prior to trial in accordance with the provisions of rule 12.

Subdivision (b) makes it clear that the United States magistrate may not only discharge the defendant but may also dismiss the complaint. Current federal law authorizes the magistrate to discharge the defendant but he must await authorization from the United States Attorney before he can close his records on the case by dismissing the complaint. Making dismissal of the complaint a separate procedure accomplishes no worthwhile objective, and the new rule makes it clear that the magistrate can both discharge the defendant and file the record with the clerk.

Subdivision (b) also deals with the legal effect of a discharge of a defendant at a preliminary examination. This issue is not dealt with explicitly in the old rule. Existing federal case law is limited. What cases there are seem to support the right of the government to issue a new complaint and start over. See, *e.g.*, *Collins* v. *Loisel*, 262 U.S. 426 (1923); *Morse* v. *United States*, 267 U.S. 80 (1925). State law is similar. See *People* v. *Dillon*, 197 N.Y. 254, 90 N.E. 820 (1910); *Tell* v. *Wolke*, 21 Wis. 2d 613, 124 N.W. 2d 655 (1963). In the *Tell* case the Wisconsin court stated the common rationale for allowing the prosecutor to issue a new complaint and start over:

> "The state has no appeal from errors of law committed by a magistrate upon preliminary examination and the discharge on a preliminary would operate as an unchallengeable acquittal. * * * The only way an error of law committed on the preliminary examination prejudicial to the state may be challenged or corrected is by a preliminary examination on a second complaint. (21 Wis.2d at 619-620.)

Subdivision (c) is based upon old rule 5 (c) and upon the Federal Magistrates Act, 18 U.S.C. § 3060(f). It provides methods for making available to counsel the record of the preliminary examination. See C. Wright, Federal Practice and Procedure: Criminal § 82 (1969, Supp.1971). The new rule is designed to eliminate delay and expense occasioned by preparation of transcripts where listening to the tape recording would be sufficient. Ordinarily the recording should be made available pursuant to subdivision (c)(1). A written transcript may be provided under subdivision (c)(2) at the discretion of the court, a discretion which must be exercised in accordance with Britt v. North Carolina, --- U.S. ----, 30 L.Ed.2d 400, 405 (1971):

> A defendant who claims the right to a free transcript does not, under our cases, bear the burden of proving inadequate such alternatives as may be suggested by the State or conjured up by a court in hindsight. In this case, however, petitioner has conceded that he had available an informal alternative which appears to be substantially equivalent to a transcript. Accordingly, we cannot conclude that the court below was in error in rejecting his claim.

Rule 6. The Grand Jury.

(b) OBJECTIONS TO GRAND JURY AND TO GRAND JURORS.

(1) Challenges. The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(2) Motion to Dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. <u>It shall be made in the manner prescribed in 28 U.S.C. §1867 (e) and shall be granted under the conditions prescribed in that statute.</u> An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

3/20/72

Rule 6. The Grand Jury

ADVISORY COMMITTEE NOTE

Subdivision (b)(2) is amended to incorporate by express reference the provisions of the Jury Selection and Service Act of 1968. That act provides in part:

> The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime [or] the Attorney General of the United States * * * may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title. [28 U.S.C. § 1867 (e)]

Under rule 12 (e) the judge shall decide the motion before trial or order it deferred until after verdict. The authority which the judge has to delay his ruling until after verdict gives him an option which can be exercised to prevent the unnecessary delay of a trial in the event that a motion attacking a grand jury is made on the eve of the trial. In addition, rule 12 (c) gives the judge authority to fix the time at which pretrial motions must be made. Failure to make a pretrial motion at the appropriate time may constitute a waiver under rule 12 (f).

Rule 7. The Indictment and the Information.

(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 committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

(2) Criminal Forfeiture. When an offense charged may result in a criminal forfeiture, the indictment or the information shall allege the extent of the interest or property subject to forfeiture.

(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 prejudice.

3/20/72

Rule 7 (c)

Advisory Committee Note

Subdivision (c)(2) is new. It is intended to provide procedural implementation of the recently enacted criminal forfeiture provision of the Organized Crime Control Act of 1970, Title IX, §1963, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II, §408 (a)(2).

The Congress viewed the provisions of the Organized Crime Control Act of 1970 as reestablishing a limited common law criminal forfeiture. S. Rep. No. 91-617, 91st Cong., 1st Sess, 79-80 (1969). The legislative history of the Comprehensive Drug Abuse Prevention and Control Act of 1970 indicates a congressional purpose to have similar procedures apply to the forfeiture of profits or interests under that act. H. Rep. No. 91-1444 (part I), 91st Cong., 2d Sess. 81-85 (1970).

Under the common law, in a criminal forfeiture proceeding the defendant was apparently entitled to notice, trial, and a special jury finding on the factual issues surrounding the declaration of forfeiture which followed his criminal conviction. Subdivision (c)(2)

provides for notice. Changes in rules 31 and 32 provide for a special jury finding and for a judgment authorizing the Attorney General to seize the interest or property forfeited.

Rule 9. Warrant or Summons Upon Indictment or Information.

(a) ISSUANCE. Upon the request of the attorney for the government the ~~court~~ clerk shall issue a ~~warrant~~ summons for each defendant named:

(1) in the information, if it is supported by oath; or

(2) in the indictment.

~~The-clerk-shall-issue-a-summons-instead-of-a-warrant upon-the-request-of-the-attorney-for-the-government-or by-direction-of-the-court.~~ The court shall order issuance of a warrant instead of a summons if the attorney for the government presents a valid reason therefor. ~~Upon like-request-or-direction,-he-shall-issue-more-than-one warrant-or-summons-for-the-same-defendant.--~~He The clerk shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. More than one warrant or summons may be issued on the same information and indictment or for the same defendant. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) FORM.

(1) Warrant. The form of the warrant shall be as provided in rule 4 (b)(1) except that it shall be signed by the clerk, it shall describe the offense charged in the indictment or information and it shall command that the defendant be arrested and brought before the court *or, if the information or indictment charges a minor offense, before a United States magistrate.* The amount of bail may be fixed by the court and endorsed on the warrant.

(2) Summons. The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before the court *or, if the information or indictment charges a minor offense, before a United States magistrate* at a stated time and place.

(c) EXECUTION OR SERVICE; AND RETURN.

(1) Execution or Service. The warrant shall be executed or the summons served as provided in rule 4 (c)(1), (2) and (3). A summons to a corporation shall be served by delivering a copy to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the district or at its principal place of business elsewhere in the United States. The officer executing the warrant shall bring the arrested person promptly before the court or ~~for the purpose of admission to bail,~~ before a ~~commissioner~~ *United States magistrate.*

(2) Return. The officer executing a warrant shall make return thereof to the court *or United States magistrate.* At the request of the attorney for the government any unexecuted warrant shall be returned and cancelled. On or before the return day the person to whom a summons was delivered for service shall make return thereof. At the request of the attorney for the government made at any time while the indictment or information is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the clerk to the marshal or other authorized person for execution or service.

(d) REMAND TO UNITED STATES MAGISTRATE FOR TRIAL OF MINOR OFFENSE. If the information or indictment charges a minor offense and the return is to a judge of the district court, the case may be remanded to a United States magistrate for further proceedings in accordance with the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates.

Rule 9. Warrant or Summons Upon Indictment or Information.

Advisory Committee Note

Rule 9 is revised to give high priority to the issuance of a summons unless a "valid reason" is given for the issuance of an arrest warrant. See a comparable provision in rule 4. Rule 9 is also revised to clarify the function of the United States magistrate.

Under the rule, a summons will issue by the clerk unless the attorney for the government presents a valid reason for the issuance of an arrest warrant. Under the old rule, it has been argued that the court must issue an arrest warrant if one is desired by the attorney for the government. See authorities listed in Frankel, Bench Warrants Upon the Prosecutor's Demand: A View From the Bench, 71 Colum. L. Rev. 403, 410 n.25 (1971). For an expression of the view that this is undesirable policy, see Frankel, supra, pp. 410-415.

A summons may issue if there is an information supported by oath. The indictment itself is sufficient to establish the existence of probable cause. See C. Wright, Federal Practice and Procedure: Criminal §151 (1969); 8 J. Moore, Federal Practice ¶9.02 [2] at p. 9-4 (2d ed. Cipes 1969); Giordenello v. United States, 357 U.S. 480 (1958). This is not necessarily true in

the case of an information. See C. Wright, supra, §151; 8 J. Moore, supra, ¶9.02.

If the government requests a warrant rather than a summons, good practice would obviously require the judge to satisfy himself that there is probable cause. This may appear from the information or from an affidavit filed with the information. Also a defendant can, at a proper time, challenge an information issued without probable cause.

Subdivision (b) is amended to make clear that the person arrested shall be brought before a United States magistrate if the information or indictment charges a "minor offense" triable by the United States magistrate.

Subdivision (c) is amended to reflect the office of United States magistrate.

Subdivision (d) is new. It provides for a remand to the United States magistrate of cases in which the person is charged with a "minor offense." The magistrate can then proceed in accordance with rule 5 to try the case if the right to trial before a judge of the district court is waived.

Rule 11. Pleas

(*a*) *Alternatives.* A defendant may plead not guilty, guilty, or ~~with the consent of the court,~~ nolo contendere. ~~The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.~~ If a defendant refuses to plead ~~or if the court refuses to accept a plea of guilty~~ or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. ~~The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.~~

(*b*) *Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.*

(*c*) *Advice To Defendant. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:*

(*1*) *the nature of the charge to which the plea is offered;*

(*2*) *the mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered;*

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made; *and*

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere *he waives the right to a trial by jury or otherwise and the right to be confronted with the witnesses against him.*

(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 attorney.

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will move for dismissal of other charges, or will recommend or not oppose the imposition of a particular sentence, or will do both. The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty or nolo contendere *in the expecta-*

tion that a specific sentence will be imposed or that other charges before the court will be dismissed, the court shall require the disclosure of the agreement in open court at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until receipt of a presentence report.

(3) Acceptance of Plea. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement or another disposition more favorable to the defendant than that provided for in the plea agreement.

(4) Rejection of Plea. If the court rejects the plea agreement, the court shall inform the parties of this fact, advise the defendant personally in open court that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the *case may be less favorable to the defendant than that contemplated by the plea agreement.*

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Plea Discussions. Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

(*f*) *Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.*

(*g*) *Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.*

Rule 11. Pleas.

Advisory Committee Note

The amendments to rule 11 are designed to achieve two principal objectives:

(1) Subdivision (c) prescribes the advice which the court must give to insure that the defendant who pleads guilty has made an informed plea.

(2) Subdivision (e) provides a plea agreement procedure designed to give recognition to the propriety of plea discussions between counsel; to bring the existence of a plea agreement out into the open in court; and to provide methods for court acceptance or rejection of a plea agreement.

Other less basic changes are also made. The changes are discussed in the order in which they appear in the rule.

Subdivision (b) retains the requirement that the defendant obtain the consent of the court in order to plead nolo contendere. It adds that the court shall, in deciding whether to accept the plea, consider the views of the prosecution and of

the defense and also the larger public interest in the administration of criminal justice.

Although the plea of nolo contendere has long existed in the federal courts, *Hudson* v. *United States*, 272 U.S. 451 (1926), the desirability of the plea has been a subject of disagreement. Compare Lane-Reticker, Nolo Contendere in North Carolina, 34 N.C. L. Rev. 280, 290-291 (1956), with Note, The Nature and Consequences of the Plea of Nolo Contendere, 33 Neb. L. Rev. 428, 434 (1954), favoring the plea. The American Bar Association Project on Standards for Criminal Justice takes the position that "the case for the *nolo* plea is not strong enough to justify a minimum standard supporting its use," but because "use of the plea contributes in some degree to the avoidance of unnecessary trials" it does not proscribe use of the plea. ABA, Standards Relating to Pleas of Guilty § 1.1(a) Commentary at 16 (Approved Draft, 1968).

A plea of nolo contendere is, for purposes of punishment, the same as the plea of guilty. See discussion of the history of the *nolo* plea in *North Carolina* v. *Alford*, 400 U.S. 25, 35-36 n.8 (1970). Note, The Nature and Consequences of the Plea of Nolo Contendere, 33 Neb. L. Rev. 428, 430 (1954). A judgment upon the plea is a conviction and may be used to apply multiple offender statutes. Lenvin and Meyers, Nolo Contendere: Its Nature and Implications, 51 Yale L.J. 1255, 1265 (1942). Unlike a plea of guilty, however, it cannot be used against a defendant as an admission in a subsequent criminal or civil case. 4 Wigmore § 1066(4), at 58 (3d ed. 1940, Supp. 1970); Rules of Evidence for United States Courts and Magistrates, 803(22) (Nov. 1971). See Lenvin and Meyers, Nolo Contendere: Its Nature and Implications, 51 Yale L.J. 1255 (1942); ABA Standards Relating to Pleas of Guilty §§ 1.1 (a) and (b), Commentary at 15-18 (Approved Draft, 1968).

The factors considered relevant by particular courts in determining whether to permit the plea of nolo contendere vary. Compare *United States* v. *Bagliore*, 182 F. Supp. 714, 716 (E.D.N.Y. 1960), where the view is taken that the plea should be rejected unless a compelling reason for

acceptance is established, with *United States* v. *Jones*, 119 F. Supp. 288, 290 (S.D. Cal. 1954), where the view is taken that the plea should be accepted in the absence of a compelling reason to the contrary.

A defendant who desires to plead nolo contendere will commonly want to avoid pleading guilty because the plea of guilty can be introduced as an admission in subsequent civil litigation. The prosecution may oppose the plea of nolo contendere because it wants a definite resolution of the defendant's guilt or innocence either for correctional purposes or for reasons of subsequent litigation. ABA Standards Relating to Pleas of Guilty § 1.1(b) Commentary at 16-18 (Approved Draft, 1968). Under subdivision (b) of the new rule the balancing of the interests is left to the trial judge, who is mandated to take into account the larger public interest in the effective administration of justice.

Subdivision (c) prescribes the advice which the court must give to the defendant as a prerequisite to the acceptance of a plea of guilty. The former rule required that the court determine that the plea was made with "understanding of the nature of the charge and the consequences of the plea." The amendment identifies more specifically what must be explained to the defendant and also codifies, in the rule, the requirements of *Boykin* v. *Alabama*, 395 U.S. 238 (1969), which held that a defendant must be apprised of the fact that he relinquishes certain constitutional rights by pleading guilty.

Subdivision (c) retains the requirement that the court address the defendant personally. See *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969). There is also an amendment to rule 43 to make clear that a defendant must be in court at the time of the plea.

Subdivision (c)(1) retains the current requirement that the court determine that the defendant understands the nature of the charge. This is a common requirement. See ABA, Standards Relating to Pleas of Guilty § 1.4(a) (Approved Draft, 1968); Illinois Supreme Court Rule 402(a)(1) (1970). The method by which the defendant's understanding of the nature of the charge is determined may vary from case to

case, depending on the complexity of the circumstances and the particular defendant. In some cases, a judge may do this by reading the indictment and by explaining the elements of the offense to the defendants. Thompson, The Judge's Responsibility on a Plea of Guilty, 62 W. Va. L. Rev. 213, 220 (1960); Resolution of Judges of U.S. District Court for D.C., June 24, 1959.

Former rule 11 required the court to inform the defendant of the "consequences of the plea." Subdivision (c)(2) changes this and requires instead that the court inform the defendant of and determine that he understands "the mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered." The objective is to insure that a defendant knows what minimum sentence the judge *must* impose and what maximum sentence the judge *may* impose. This information is usually readily ascertainable from the face of the statute defining the crime, and thus it is feasible for the judge to know specifically what to tell the defendant. Giving this advice tells a defendant the shortest mandatory sentence and also the longest possible sentence for the offense to which he is pleading guilty.

It has been suggested that it is desirable to inform a defendant of additional consequences which might follow from his plea of guilty. *Durant* v. *United States*, 410 F. 2d 689 (1st Cir. 1969), held that a defendant must be informed of his ineligibility for parole. *Trujillo* v. *United States*, 377 F. 2d 266 (5th Cir. 1967), cert. denied 389 U.S. 899 (1967), held that advice about eligibility for parole is not required. It has been suggested that a defendant be advised that a jury might find him guilty only of a lesser included offense. C. Wright, Federal Practice and Procedure: Criminal § 173 at 374 (1969). See contra *Dorrough* v. *United States*, 385 F. 2d 887 (5th Cir. 1967). The ABA Standards Relating to Pleas of Guilty § 1.4(c)(iii) (Approved Draft, 1968) recommend that the defendant be informed that he may be subject to additional punishment if the offense charged is one for which a different or additional punishment is authorized by reason of the defendant's previous conviction.

Under the rule the judge is not required to inform a defendant about these matters, though a judge is

free to do so if he feels a consequence of a plea of guilty in a particular case is likely to be of real significance to the defendant. Currently, certain consequences of a plea of guilty, such as parole eligibility, may be so complicated that it is not feasible to expect a judge to clearly advise the defendant. For example, the judge may impose a sentence under 18 U.S.C. § 4202 making the defendant eligible for parole when he has served one third of the judicially imposed maximum; or, under 18 U.S.C. § 4208(a)(1), making parole eligibility after a specified period of time less than one third of the maximum; or, under 18 U.S.C. § 4208(a)(2), leaving eligibility to the discretion of the parole board. At the time the judge is required to advise the defendant of the consequences of his plea, the judge will usually not have seen the presentence report and thus will have no basis for giving a defendant any very realistic advice as to when he might be eligible for parole. Similar complications exist with regard to other, particularly collateral, consequences of a plea of guilty in a given case.

Subdivisions (c) (3) and (4) specify the constitutional rights that the defendant waives by a plea of guilty or nolo contendere. These subdivisions are designed to satisfy the requirements of understanding waiver set forth in *Boykin* v. *Alabama*, 395 U.S. 238 (1969). Subdivision (c)(3) is intended to require that the judge inform the defendant and determine that he understands that he waives his fifth amendment rights. The rule takes the position that the defendant's right not to incriminate himself is best explained in terms of his right to plead not guilty and to persist in that plea if it has already been made. This is language identical to that adopted in Illinois for the same purpose. See Illinois Supreme Court Rule 402(a)(3) (1970).

Subdivision (c)(4) is intended to require that a defendant be advised of his right to have his guilt proved beyond a reasonable doubt and the right to confront his accusers. *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969). The rule provides that this be explained by indicating that the right to trial is waived. Specifying that there will be no future trial of any kind makes this fact clear to those defendants who, though knowing they have waived trial by

jury, are under the mistaken impression that some kind of trial will follow. Illinois has recently adopted similar language. Illinois Supreme Court Rule 402(a)(4) (1970).

Subdivision (d) retains the requirement that the court determine that a plea of guilty or nolo contendere is voluntary before accepting it. It adds the requirement that the court also inquire whether the defendant's willingness to plead guilty or nolo contendere results from prior plea discussions between the attorney for the government and the defendant or his attorney. See Santobello v. New York, U.S. , 92 S. Ct. 495, 498 (1971): "The plea must, of course, be voluntary and knowing, and if it was induced by promises, the essence of those promises must in some way be made known." Subdivisions (d) and (e) afford the court adequate basis for rejecting an improper plea agreement induced by threats or inappropriate promises.

The new rule specifies that the court personally address the defendant in determining the voluntariness of the plea.

> By personally interrogating the defendant, not only will the judge be better able to ascertain the plea's voluntariness, but he will also develop a more complete record to support his determination in a subsequent post-conviction attack.
>
> * * * Both of these goals are undermined in proportion to the degree the district judge resorts to "assumptions" not based upon recorded responses to his inquiries.
>
> *McCarthy* v. *United States*, 394 U.S. 459, 466, 467 (1969)

Subdivision (e) provides a plea agreement procedure. In doing so it gives recognition to the propriety of plea discussions and plea agreements provided that they are disclosed in open court and subject to acceptance or rejection by the trial judge.

Although reliable statistical information is limited, one recent estimate indicated that guilty pleas account for the disposition of as many as 95% of all criminal cases. ABA Standards Relating to Pleas of Guilty, pp. 1-2 (Approved Draft, 1968). A substantial number of these are the result of plea discussions. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 9 (1967); D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 3 (1966); L. Weinreb, Criminal Process 437 (1969); Note, Guilty Plea

Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U. Pa. L. Rev. 865 (1964).

There is increasing acknowledgment of both the inevitability and the propriety of plea agreements. See, e.g., ABA Standards Relating to Pleas of Guilty § 3.1 (Approved Draft, 1968); Illinois Supreme Court Rule 402 (1970).

In Brady v. United States, 397 U.S. 742, 752-753 (1970), the court said:

> Of course, that the prevalence of guilty pleas is explainable does not necessarily validate those pleas or the system which produces them. But we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.

In Santobello v. New York, --- U.S. ---, 92 S. Ct. 495, 498 (1971), the court said: "The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged."

Administratively, the criminal justice system has come to depend upon pleas of guilty and, hence, upon plea discussions. See, e.g., President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 9 (1967); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U. Pa. L. Rev. 865 (1964). But expediency is not the basis for recognizing the propriety of a plea agreement practice. Properly implemented, a plea agreement procedure is consistent with both effective and just administration of the

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criminal law. Santobello v. New York, --- U.S. ---, 92 S. Ct. 495 (1971). This is the conclusion reached in the ABA Standards Relating to Pleas of Guilty §1.8 (Approved Draft, 1968) and the ABA Standards Relating to The Prosecution Function and The Defense Function pp. 243-253 (Approved Draft, 1971). The Supreme Court of California recently recognized the propriety of plea bargaining. See *People* v. *West*, 3 Cal. 3d 595, 477 P. 2d 409, 91 Cal. Rptr. 385 (1970). A plea agreement procedure has recently been instituted in the District of Columbia Court of General Sessions upon the recommendation of the United States Attorney. See 51 F.R.D. 109 (1971).

Where the defendant by his plea aids in insuring prompt and certain application of correctional measures, the proper ends of the criminal justice system are furthered because swift and certain punishment serves the ends of both general

deterrence and the rehabilitation of the individual defendant. Cf. Note, The Influence of the Defendant's Plea on Judicial Determination of Sentence, 66 Yale L.J. 204, 211 (1956). Where the defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct, it has been thought proper to recognize this in sentencing. See also ALI, Model Penal Code § 7.01 (P.O.D. 1962); NPPA Guides for Sentencing (1957). Granting a charge reduction in return for a plea of guilty may give the sentencing judge needed discretion, particularly where the facts of a case do not warrant the harsh consequences of a long mandatory sentence or collateral consequences which are unduly severe. A plea of guilty avoids the necessity of a public trial and may protect the innocent victim of a crime against the trauma of direct and cross-examination.

Finally, a plea agreement may also contribute to the successful prosecution of other more serious offenders. See D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial, chs. 2 and 3 (1966); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U. Pa. L. Rev. 865, 881 (1964).

Where plea discussions and agreements are viewed as proper, it is generally agreed that it is preferable that the fact of the plea agreement be disclosed in open court and its propriety be reviewed by the trial judge.

We have previously recognized plea bargaining as an ineradicable fact. Failure to recognize it tends not to destroy it but to drive it underground. We reiterate what we have said before: that when plea bargaining occurs it ought to be spread on the record [4] and publicly disclosed. United States v. Williams, 407 F. 2d 940 (4th Cir. 1969). * * * In the future we think that the district judges should not only make the general inquiry under Rule 11 as to whether the plea of guilty has been coerced or induced by promises, but should specifically inquire of counsel whether plea bargaining has occurred. Logically the general inquiry should elicit information about plea bargaining, but it seldom has in the past.

[4] The Bench Book prepared by the Federal Judicial Center for use by United States District Judges now suggests that the defendant be asked by the court "if he believes there is any understanding or if any predictions have been made to him concerning the sentence he will receive." Bench Book for United States District Judges, Federal Judicial Center (1969) at 1.05.3.

Raines v. United States, 423 F. 2d 526 530 (4th Cir. 1970)

In the past, plea discussions and agreements have occurred in an informal and largely invisible manner. Enker, Perspectives on Plea Bargaining, in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 108, 115 (1967). There has often been a ritual of denial that any promises have been made, a ritual in which judges, prosecutors, and defense counsel have participated. ABA Standards Relating to Pleas of Guilty § 3.1, Commentary at 60-69 (Approved Draft 1968); Task Force Report: The Courts 9. Consequently, there has been a lack of effective judicial review of the propriety of the agreements, thus increasing the risk of real or apparent unfairness. See ABA Standards Relating to Pleas of Guilty § 3.1, Commentary at 60 et seq.; Task Force Report: The Courts 9-13.

The procedure described in subdivision (e) is designed to prevent abuse of plea discussions and agreements by providing appropriate and adequate safeguards.

Subdivision (e)(1) specifies that the "attorney for the government and the attorney for the defendant may" participate in plea discussions. It is desirable that an attorney for the government not enter plea discussions with a defendant personally. If necessary, counsel should be appointed for purposes of plea discussions. (This is not inconsistent with subdivision (d) which makes it mandatory that the court inquire of the defendant whether his plea is the result of plea discussions between him and the attorney for the government, which is intended to enable the court to reject an agreement reached by an unrepresented defendant unless the court is satisfied that acceptance of the agreement adequately protects the rights of the defendant and the interests of justice.) This is substantially the position of the ABA Standards Relating to Pleas of Guilty § 3.1(a), Commentary at 65-66 (Approved Draft, 1968). Apparently, it is the practice of most prosecuting attorneys to enter plea discussions only with defendant's counsel. Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U. Pa. L. Rev. 865, 904 (1964). Discussions without benefit of counsel increase the likelihood that such discussions may be unfair. Some courts have indicated that plea discussions in the absence of defendant's attorney may be constitutionally prohibited. See *Andersen* v. *North Carolina*, 221 F. Supp. 930,

935 (W.D.N.C. 1963); *Shupe* v. *Sigler*, 230 F. Supp. 601, 606 (D. Neb. 1964).

Subdivision (e)(1) makes clear that there are three possible concessions that may be made in a plea agreement. First, the charge may be reduced to a lesser or related offense. Second, the attorney for the government may promise to move for dismissal of other charges. Third, the attorney for the government may agree to recommend or not oppose the imposition of a particular sentence. These concessions are the ones typically used by prosecutors and are the alternatives proposed by the ABA Standards Relating to Pleas of Guilty § 3.1, Commentary at 66 (Approved Draft, 1968). See also Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U. Pa. L. Rev. 865, 898 (1964). The draft recognizes all three as proper; circumstances will indicate which is appropriate in a particular case.

Subdivision (e)(1) prohibits the court from participating in plea discussions. This is the position of the ABA Standards Relating to Pleas of Guilty § 3.3(a) (Approved Draft, 1968).

It has been stated that it is common practice for a judge to participate in plea discussions. See D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 32–52, 78–104 (1966); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U. Pa. L. Rev. 865, 891, 905 (1964).

There are valid reasons for a judge to avoid involvement in plea discussions. It might lead the defendant to believe that he would not receive a fair trial, were there a trial before the same judge. The risk of not going along with the disposition apparently desired by the judge might induce the defendant to plead guilty, even if innocent. Such involvement makes it difficult for a judge to objectively assess the voluntariness of the plea. See ABA Standards Relating to Pleas of Guilty § 3.3(a), Commentary at 72–74 (Approved Draft, 1968); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U. Pa. L. Rev. 865, 891–892 (1964); Comment, Official Inducements to Plead Guilty: Suggested Morals for a Marketplace, 32 U. Chi. L. Rev. 167, 180–183 (1964); Informal Opinion No. 779 ABA Professional Ethics Committee ("A judge should not be a party to advance arrangements for the determination of

sentence, whether as a result of a guilty plea or a finding of guilt based on proof."), 51 A.B.A.J. 444 (1965). As has been recently pointed out:

> The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence.
>
> *United States ex rel. Elksnis* v. *Gilligan*, 256 F. Supp. 244, 254 (S.D.N.Y 1966)

On the other hand, one commentator has taken the position that the judge may be involved in discussions either after the agreement is reached or to help elicit facts and an agreement. Enker, Perspectives on Plea Bargaining, in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 108, 117-118 (1967).

The amendment makes clear that the judge should not participate in plea discussions leading to a plea agreement. It is contemplated that the judge may participate in such discussions as may occur when the plea agreement is disclosed in open court. This is the position of the recently adopted Illinois Supreme Court Rule 402 (d)(1) (1970). As to what may constitute "participation," contrast *People* v. *Earegood*, 12 Mich. App. 256, 268-269, 162 N.W. 2d 802, 809-810 (1968), with *Kruse* v. *State*, 47 Wis. 2d 460, 177 N.W. 2d 322 (1970).

Subdivision (e)(2) provides that the judge shall require the disclosure of any plea agreement in open court. In *People* v. *West*, 3 Cal. 3d 595, 477 P. 2d 409, 91 Cal. Rptr. 385 (1970), the court said

> [T]he basis of the bargain should be disclosed to the court and incorporated in the record. * * *
>
> Without limiting that court to those we set forth, we note four possible methods of incorporation: (1) the bargain could be stated orally and recorded by the court reporter, whose notes then must be preserved or transcribed; (2) the bargain could be set forth by the clerk in the minutes of the court; (3) the parties could file a written stipulation stating the terms of the bargain; (4) finally, counsel or the court itself may find it useful to prepare and utilize forms for the recordation of plea bargains.
>
> 477 P. 2d at 417, 418

The District of Columbia Court of General Sessions is using a "Sentence-Recommendation Agreement" form.

Upon notice of the plea agreement, the court is given the option to accept or reject the agreement or defer its decision until receipt of the presentence report.

The judge may, and often should, defer his decision until he examines the presentence report. This is made possible by rule 32 which allows a judge, with the defendant's consent, to inspect a presentence report to determine whether a plea agreement should be accepted. For a discussion of the use of conditional plea acceptance, see ABA Standards Relating to Pleas of Guilty § 3.3(b), Commentary at 74–76, and Supplement, Proposed Revisions § 3.3(b) at 2–3 (Approved Draft, 1968); Illinois Supreme Court Rule 402(d)(2) (1970).

The plea agreement procedure does not attempt to define criteria for the acceptance or rejection of a plea agreement. Such a decision is left to the discretion of the individual trial judge.

Subdivision (c)(3) makes it mandatory, if the court decides to accept the plea agreement, that it inform the defendant that it will embody in the judgment and sentence the disposition provided in the plea agreement, or one more favorable to the defendant. This serves the purpose of informing the defendant immediately that the agreement will be implemented.

Subdivision (c)(4) requires the court, if it rejects the plea agreement, to inform the defendant of this fact and to advise the defendant personally, in open court, that the court is not bound by the plea agreement. The defendant must be afforded an opportunity to withdraw his plea and must be advised that if he persists in his guilty plea or plea of nolo contendere, the disposition of the case may be less favorable to him than that contemplated by the plea agreement. That the defendant should have the opportunity to withdraw his plea if the court rejects the plea agreement is the position taken in ABA Standards Relating to Pleas of Guilty, Supplement, Proposed Revisions § 2.1(a)(ii)(5) (Approved Draft, 1968). Such a rule has been adopted in Illinois. Illinois Supreme Court Rule 402(d)(2) (1970).

If the court rejects the plea agreement and affords the defendant the opportunity to withdraw the plea, the court is not precluded from accepting a guilty plea from the same defendant at a later time, when such plea conforms to the requirements of rule 11.

Subdivision (e)(5) makes it mandatory that, except for good cause shown, the court be notified of the existence of a plea agreement at the arraignment or at another time prior to trial fixed by the court. Having a plea entered at this stage provides a reasonable time for the defendant to consult with counsel and for counsel to complete any plea discussions with the attorney for the government. ABA Standards Relating to Pleas of Guilty § 1.3 (Approved Draft, 1968). The objective of the provision is to make clear that the court has authority to require a plea agreement to be disclosed sufficiently in advance of trial so as not to interfere with the efficient scheduling of criminal cases.

Subdivision (e)(6) is taken from rule 410, Rules of Evidence for United States Courts and Magistrates (Nov. 1971). See Advisory Committee Note thereto. See also the ABA Standards Relating to Pleas of Guilty §2.2 (Approved Draft, 1968); Illinois Supreme Court Rule 402 (f) (1970).

Subdivision (f) retains the requirement of old rule 11 that the court should not enter judgment upon a plea of guilty without making such an inquiry as will satisfy it that there is a factual basis for the plea. The draft does not specify that any particular type of inquiry be made. See Santobello v. New York, --- U.S. ---, 92 S. Ct. 495, 498 (1971): "Rule 11, Fed. Rule Crim. Proc., governing pleas in federal courts, now makes clear that the sentencing judge must develop, on the record, the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge." An inquiry might be made of the defendant, of the attorneys

for the government and the defense, of the presentence report when one is available, or by whatever means is appropriate in a specific case. This is the position of the ABA Standards Relating to Pleas of Guilty § 1.6 (Approved Draft, 1968). With regard to a determination that there is a factual basis for a plea of guilty to a "lesser or related offense," compare ABA Standards Relating to Pleas of Guilty § 3.1(b)(ii), Commentary at 67-68 (Approved Draft, 1968), with ALI, Model Penal Code § 1.07(5) (P.O.D. 1962). The rule does not speak directly to the issue of whether a judge may accept a plea of guilty where there is a factual basis for the plea but the defendant asserts his innocence. *North Carolina* v. *Alford*, 400 U.S. 25 (1970). The procedure in such case would seem to be to deal with this as a plea of nolo contendere, the acceptance of which would depend upon the judge's decision as to whether acceptance of the plea is consistent with "the interest of the public in the effective administration of justice" [new rule 11(b)]. The defendant who asserts his innocence while pleading guilty or nolo contendere is often difficult to deal with in a correctional setting, and it may therefore be preferable to resolve the issue of guilt or innocence at the trial stage rather than leaving that issue unresolved, thus complicating subsequent correctional decisions. The rule is intended to make clear that a judge may reject a plea of nolo contendere and require the defendant either to plead not guilty or to plead guilty under circumstances in which the judge is able to determine that the defendant is in fact guilty of the crime to which he is pleading guilty.

Subdivision (g) requires that a verbatim record be kept of the proceedings. If there is a plea of guilty or nolo contendere, the record must include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea and the plea agreement, and the inquiry into the accuracy of the plea. Such a record is important in the event of a postconviction attack. ABA Standards Relating to Pleas of Guilty § 1.7 (Approved Draft, 1968). A similar requirement was adopted in Illinois. Illinois Supreme Court Rule 402(c) (1970).

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

(a) PLEADINGS AND MOTIONS. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

~~(b) THE MOTION RAISING DEFENSES AND OBJECTIONS.~~

~~(1) Defenses and Objections Which May Be Raised.~~

(b) *PRETRIAL MOTIONS.* Any defense, ~~or~~ objection, *or request* which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. ~~(2) Defenses and Objections Which Must Be Raised.~~ *The following must be raised prior to trial:*

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) *Defenses and objections based on defects* in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense ~~may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense~~ *which objections* shall be noticed by the court at any time during the pendency of the proceeding; *or*

(3) *Motions to suppress evidence; or*

(4) *Requests for discovery under rule 16; or*

(5) *Requests for a severance of charges or defendants under rule 14.*

~~(c) Time of Making Motion. The motion shall be made before the plea is entered, but~~

~~the court may permit it to be made within a reasonable time thereafter.~~

(c) *Motion Date. Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable,* set a time for the making of pretrial motions or requests and, if required, a later date for hearing.

(d) *Notice by the Government of the Intention to Use Evidence.*

(1) *At the Discretion of the Government. At the arraignment or as soon thereafter as is practicable, the government may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3)* of this rule.

(2) *At the Request of the Defendant. At the arraignment or as soon thereafter as is practicable the defendant may, in order to afford an opportunity to* move to suppress evidence under subdivision (b)(3) of this rule, request notice of the government's intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under rule 16 subject to any relevant limitations prescribed in rule 16.

~~(1) Hearing on Motion.~~

(e) *Ruling on Motion.* A motion made before trial ~~raising defenses or objections~~ shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue *or until after verdict.* ~~An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.~~ *Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.*

(f) *Effect of Failure to Raise Defenses or Objections. Failure by* a party *to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c),*

or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

(g) Records. A verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally.

~~(5)~~ *(h) Effect of Determination.* ~~If a motion is determined adversely to the defendant he shall be permitted to plead if he had not previously pleaded. A plea previously entered shall stand.~~ 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 held 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.

3/20/72

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

ADVISORY COMMITTEE NOTE

Subdivision (a) remains as it was in the old rule. It "speaks only of defenses and objections that prior to the rules could have been raised by a plea, demurrer, or motion to quash" (C. Wright, Federal Practice and Procedure: Criminal § 191 at p. 397 (1969)), and this might be interpreted as limiting the scope of the rule. However, some courts have assumed that old rule 12 does apply to pretrial motions generally, and the amendments to subsequent subdivisions of the rule should make clear that the rule is applicable to pretrial motion practice generally. (See, *e.g.*, rule 12 (b)(3), (4), (5) and rule 41 (e).)

Subdivision (b) is changed to provide for some additional motions and requests which *must* be made prior to trial. Subdivisions (b)(1) and (2) are restatements of the old rule.

Subdivision (b)(3) makes clear that objections to evidence on the ground that it was illegally obtained must be raised prior to trial. This is the current rule with regard to evidence obtained as a result of an illegal search. See rule 41 (e); C. Wright, Federal Practice and Procedure: Criminal § 673 (1969, Supp. 1971). It is also the practice with regard to other forms of illegality such as the use of unconstitutional means to obtain a confession. See C. Wright, Federal Practice and Procedure: Criminal § 673 at p. 108 (1969). It seems apparent that the same principle should apply whatever the claimed basis for the application of the exclusionary rule of evidence may be. This is consistent with the court's statement in *Jones* v. *United States*, 362 U.S. 257, 264 (1960):

> This provision of Rule 41 (e), requiring the motion to suppress to be made before trial, is a crystallization of decisions of this Court requiring that procedure, and is designed to *eliminate from the trial disputes over police conduct not immediately relevant to the question of guilt.* (Emphasis added.)

Subdivision (b)(4) provides for a pretrial request for discovery by either the defendant or the government to the extent to which such discovery is authorized by rule 16.

Subdivision (b)(5) provides for a pretrial request for a severance as authorized in rule 14.

Subdivision (c) provides that a time for the making of motions shall be fixed at the time of the arraignment or as soon thereafter as practicable by court rule or direction of a judge. The rule leaves to the individual judge whether the motions may be oral or written. This and other amendments to rule 12 are designed to make possible and to encourage the making of motions prior to trial, whenever possible, and in a single hearing rather than in a series of hearings. This is the recommendation of the American Bar Association's Committee on Standards Relating to Discovery and Procedure Before Trial ~~(1969)~~, see especially §§ 5.2 and 5.3. It also is the procedure followed in those jurisdictions which have used the so-called "omnibus hearing" originated by Judge James Carter in the Southern District of California. See 4 Defender Newsletter 44 (1967); Miller, The Omnibus Hearing—An Experiment in Federal Criminal Discovery, 5 San Diego L. Rev. 293 (1968); American Bar Association, Standards Relating to Discovery and Procedure Before Trial, Appendices B, C, and D ~~(1969)~~. The omnibus hearing is also being used, on an experimental basis, in several other district courts. Although the Advisory Committee is of the view that it would be premature to write the omnibus hearing procedure into the rules, it is of the view that the single pretrial hearing should be made possible and its use encouraged by the rules.

(Approved Draft, 1970);

(Approved Draft, 1970)

There is a similar trend in state practice. See, *e.g.*, *State ex rel. Goodchild* v. *Burke*, 27 Wis. 2d 244, 133 N.W. 2d 753 (1965); *State ex rel. Rasmussen* v. *Tahash*, 272 Minn. 539, 141 N.W. 2d 3 (1965).

The rule provides that the motion date be set at "the arraignment or as soon thereafter as practicable." This is the practice in some federal courts including those using the omnibus hearing. (In order to obtain the advantage of the omnibus hearing, counsel routinely plead not guilty at the initial arraignment on the information or indictment and then may indicate a desire to change the plea to guilty following the omnibus hearing. This practice builds a more adequate record in guilty plea cases.) The rule further

provides that the date may be set before the arraignment if local rules of court so provide.

Subdivision (d) provides a mechanism for insuring that a defendant knows of the government's intention to use evidence to which the defendant may want to object. On some occasions the resolution of the admissibility issue prior to trial may be advantageous to the government. In these situations the attorney for the government can make effective defendant's obligation to make his motion to suppress prior to trial by giving defendant notice of the government's intention to use certain evidence. For example, in *United States v. Desist*, 384 F. 2d 889, 897 (2d Cir. 1967), the court said:

> Early in the pre-trial proceedings, the Government commendably informed both the court and defense counsel that an electronic listening device had been used in investigating the case, and suggested a hearing be held as to its legality.

See also the "Omnibus Crime Control and Safe Streets Act of 1968," 18 U.S.C. § 2518 (9):

> The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved.

In cases in which defendant wishes to know what types of evidence the government intends to use so that he can make his motion to suppress prior to trial, he can request the government to give notice of its intention to use specified evidence which the defendant is entitled to discover under rule 16. Although the defendant is already entitled to discovery of such evidence prior to trial under rule 16, rule 12 makes it possible for him to avoid the necessity of moving to suppress evidence which the government does not intend to use. No sanction is provided for the government's failure to comply with the court's order because the committee believes that attorneys for the government will in fact comply and that judges have ways of insuring compliance. An automatic exclusion of such evidence, particularly where the failure to give notice was not

deliberate, seems to create too heavy a burden upon the exclusionary rule of evidence, especially when defendant has opportunity for broad discovery under rule 16. Compare ABA Project on Standards for Criminal Justice, Standards Relating to Electronic Surveillance ~~(1968)~~ (Approved Draft, 1971) at p. 116:

> A failure to comply with the duty of giving notice could lead to the suppression of evidence. Nevertheless, the standards make it explicit that the rule is intended to be a matter of procedure which need not under appropriate circumstances automatically dictate that evidence otherwise admissible be suppressed.

Pretrial notice by the prosecution of its intention to use evidence which may be subject to a motion to suppress is increasingly being encouraged in state practice. See, *e.g.*, *State ex rel. Goodchild* v. *Burke*, 27 Wis. 2d 244, 264, 133 N.W. 2d 753, 763 (1965):

> In the interest of better administration of criminal justice we suggest that wherever practicable the prosecutor should within a reasonable time before trial notify the defense as to whether any alleged confession or admission will be offered in evidence at the trial. We also suggest, in cases where such notice is given by the prosecution, that the defense, if it intends to attack the confession or admission as involuntary, notify the prosecutor of a desire by the defense for a special determination on such issue.

See also *State ex rel. Rasmussen* v. *Tahash*, 272 Minn. 539, 553–556, 141 N.W. 2d 3, 13–15 (1965):

> At the time of arraignment when a defendant pleads not guilty, or as soon as possible thereafter, the state will advise the court as to whether its case against the defendant will include evidence obtained as the result of a search and seizure; evidence discovered because of a confession or statements in the nature of a confession obtained from the defendant; or confessions or statements in the nature of confessions.
>
> Upon being so informed, the court will formally advise the attorney for the defendant (or the defendant himself if he refuses legal counsel) that he may, if he chooses, move the court to suppress the evidence so secured or the confession so obtained if his contention is that such evidence was secured or confession obtained in violation of defendant's constitutional rights. * * *
>
> The procedure which we have outlined deals only with evidence obtained as the result of a search and seizure and evidence consisting of or produced by confession on the part of the defendant. However, the steps which have been suggested as a method of dealing with evidence of this type will indicate to counsel and to the trial courts that the pretrial consideration of other evidentiary problems, the resolution of which is needed to assure the integrity of the trial when conducted, will be most useful and that this court encourages the use of such procedures wherever practical.

Subdivision (e) provides that the court shall rule on a pretrial motion before trial unless the court orders that it be decided upon at the trial of the general issue or after verdict. See Advisory Committee Note, rule 6. This is the old rule. The reference to issues which must be tried by the jury is dropped as unnecessary, without any intention of changing current law or practice. The old rule begs the question of when a jury decision is required at the trial, providing only that a jury is necessary if "required by the Constitution or an act of Congress."

Subdivision (f) provides that a failure to raise the objections or make the requests specified in subdivision (b) constitutes a waiver thereof, but the court is allowed to grant relief from the waiver if adequate cause is shown. See C. Wright, Federal Practice and Procedure: Criminal § 192 (1969), where it is pointed out that the old rule is unclear as to whether the waiver results only from a failure to raise the issue *prior to trial* or from the failure to do so at the time fixed by the judge for a hearing. The amendment makes clear that the defendant and, where appropriate, the government have an obligation to raise the issue at the motion date set by the judge pursuant to subdivision (c).

Subdivision (g) requires that a verbatim record be made of pretrial motion proceedings and requires the judge to make a record of his findings of fact and conclusions of law. This is desirable if pretrial rulings are to be subject to post-conviction review on the record. The judge may find and rule orally from the bench, so long as a verbatim record is taken. There is no necessity of a separate written memorandum containing the judge's findings and conclusions.

Subdivision (h) is essentially old rule 12 (b)(5) except for the deletion of the provision that defendant may plead if the motion is determined adversely to him or, if he has already entered a plea, that that plea stands. This language seems unnecessary particularly in light of the experience in some district courts where a pro forma plea of not guilty is entered at the arraignment, pretrial motions are later made, and depending upon the outcome the defendant may then change his plea to guilty or persist in his plea of not guilty.

Rule 12.1. Notice of Alibi.

(a) NOTICE BY DEFENDANT. If a defendant intends to rely upon the defense of alibi, he 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.

(b) DISCLOSURE OF INFORMATION AND WITNESSES. Upon receipt of notice that the defendant intends to rely upon an alibi defense, the attorney for the government may inform the defendant in writing of the specific time, date, and place at which the offense is alleged to have been committed. If the government gives such information, the defendant shall inform the attorney for the government in writing of the specific place at which he claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi. The attorney for the government shall then inform the defendant in writing of the names and addresses of the witnesses upon whom the government intends to rely to establish defendant's presence at the scene of the alleged offense.

(c) TIME OF GIVING INFORMATION. The court may fix the time within which any exchange of information referred to in subdivision (b) shall be accomplished.

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

(e) FAILURE TO COMPLY. Upon the failure of either party to comply with the mandatory requirements of this rule, the court shall 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.

Rule 12.1. Notice of Alibi.

Advisory Committee Note

Rule 12.1 is new. See rule 87 of the United States District Court Rules for the District of Columbia for a somewhat comparable provision.

The Advisory Committee has dealt with the issue of notice of alibi on several occasions over the course of the past three decades. In the Preliminary Draft of the Federal Rules of Criminal Procedure, 1943, and the Second Preliminary Draft, 1944, an alibi-notice rule was proposed. But the Advisory Committee was closely divided upon whether there should be a rule at all and, if there were to be a rule, what the form of the rule should be. Orfield, The Preliminary Draft of the Federal Rules of Criminal Procedure, 22 Texas L. Rev. 37, 57-58 (1943). The principal disagreement was whether the prosecutor or the defendant should initiate the process. The Second Preliminary Draft published in 1944 required the defendant to initiate the process by a motion to require the government to state with greater particularity the time and place it would rely on. Upon receipt of this information, defendant was required to give his notice of alibi. This formulation was "vehemently objected" to by five members of the committee (out of a total of eighteen) and two alternative rule proposals were submitted to the Supreme Court. Both formulations—one requiring the prosecutor to initiate the process, the other requiring the defendant to initiate the process—were rejected by the Court. See Epstein, Advance Notice of Alibi, 55 J. Crim. L., C. & P.S. 29, 30 (1964), in which the view is expressed that the unresolved split over the rule "probably caused" the court to reject an alibi-notice rule.

Rule 12.1 embodies an intermediate position. The initial burden is upon the defendant to raise the defense of alibi, but he need not specify the details of his alibi defense until the government specifies the time, place, and date of alleged offense. Each party must, at the appropriate time, disclose the names and addresses of witnesses.

In 1962 the Advisory Committee drafted an alibi-notice rule and included it in the Preliminary Draft of December 1962, rule 12A at pp. 5–6. This time the Advisory Committee withdrew the rule without submitting it to the Standing Committee on Rules of Practice and Procedure. Wright, Proposed Changes in Federal Civil, Criminal, and Appellate Procedure, 35 F.R.D. 317, 326 (1964). Criticism of the December 1962 alibi-notice rule centered on constitutional questions and questions of general fairness to the defendant. See Everett, Discovery in Criminal Cases—In Search of a Standard, 1964 Duke L.J. 477, 497–499.

Doubts about the constitutionality of a notice-of-alibi rule were to some extent resolved by *Williams* v. *Florida*, 399 U.S. 78 (1970). In that case the court sustained the constitutionality of the Florida notice-of-alibi statute, but left unresolved two important questions.

(1) The court said that it was not holding that a notice-of-alibi requirement was valid under conditions where a defendant does not enjoy "reciprocal discovery against the State." 399 U.S. at 82 n. 11. Under the revision of rule 16

the defendant is entitled to substantially enlarged discovery in federal cases, and it would seem appropriate to conclude that

the rules will comply with the "reciprocal discovery" qualification of the *Williams* decision.

(2) The court said that it did not consider the question of the "validity of the threatened sanction, had petitioner chosen not to comply with the notice-of-alibi rule." 399 U.S. at 83 n.14. This issue remains unresolved. Rule 12.1(d) provides that the court "shall exclude the testimony of any witness" whose name has not been disclosed pursuant to the requirements of the rule. The defendant may, however, testify himself. Prohibiting from testifying a witness whose name was not disclosed is a common pro-

vision in state statutes. See Epstein, supra, at 35. It is generally assumed that the sanction is essential if the notice-of-alibi rule is to have practical significance. See Epstein, supra, at 36.

The Supreme Court of Illinois recently upheld an Illinois statute which requires a defendant to give notice of his alibi witnesses although the prosecution is not required to disclose its alibi rebuttal witnesses. *People* v. *Holiday*, 47 Ill. 2d 300, 265 N.E.2d 634(1970). Because the defense complied with the requirement, the court did not have to consider the propriety of penalizing noncompliance.

The requirement of notice of alibi seems to be an increasingly common requirement of state criminal procedure. State statutes and court rules are cited in 399 U.S. at 82 n.11. See also Epstein, supra.

Subdivision (a) provides that the defendant must give notice of his intention to rely upon the defense of alibi. When this is done, the government has an option under subdivision (b). It may give to the defendant specific information about the time, date, and place of the offense and thereby obtain comparable information from the defendant plus the defendant's alibi witnesses. The government must then disclose its witnesses.

If the government does nothing further upon receiving notice of the intention of the defendant to rely upon alibi, then the government is not entitled to know the identity of the defendant's alibi witnesses.

Rule 12.2. Notice of Insanity.

(a) DEFENSE OF INSANITY. If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, he 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. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense.

(b) MENTAL DISEASE OR DEFECT INCONSISTENT WITH THE MENTAL ELEMENT REQUIRED FOR THE OFFENSE CHARGED. If a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The

court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) PSYCHIATRIC EXAMINATION. In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to a psychiatric examination by a psychiatrist designated for this purpose in the order of the court.

(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 shall exclude the testimony of any expert witness offered by the defendant on the issue of his mental state.

Rule 12.2. Notice of Insanity. 3-20-72

ADVISORY COMMITTEE NOTE

Rule 12.2 is designed to require a defendant to give notice prior to trial of his intention (1) to rely upon the defense of insanity or (2) to introduce expert testimony of mental disease or defect on the theory that such mental condition is inconsistent with the mental state required for the offense charged. This rule does not deal with the issue of mental competency to stand trial.

The objective is to give the government time to prepare to meet the issue, which will usually require reliance upon expert testimony. Failure to give advance notice commonly results in the necessity for a continuance in the middle of a trial, thus unnecessarily delaying the administration of justice.

A requirement that the defendant give notice of his intention to rely upon the defense of insanity was proposed by the Advisory Committee in the Second Preliminary Draft of Proposed Amendments (March 1964), rule 12.1, p. 7. The objective of the 1964 proposal was explained in a brief Advisory Committee Note:

> Under existing procedure although insanity is a defense, once it is raised the burden to prove sanity beyond a reasonable doubt rests with the government. *Davis* v. *United States*, 160 U.S. 469 (1895). This rule requires pretrial notice to the government of an insanity defense, thus permitting it to prepare to meet the issue. Furthermore, in *Lynch* v. *Overholser*, 369 U.S. 705 (1962), the Supreme Court held that, at least in the face of a mandatory commitment statute, the defendant had a right to determine whether or not to raise the issue of insanity. The rule gives the defendant a method of raising the issue and precludes any problem of deciding whether or not the defendant relied on insanity.

The Standing Committee on Rules of Practice and Procedure decided not to recommend the proposed Notice of Insanity rule to the Supreme Court. Reasons were not given.

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Rule 12.2 a.c.m.

Requiring advance notice of the defense of insanity is commonly recommended as a desirable procedure. The Working Papers of the National Commission on Reform of Federal Criminal Laws, Vol. 1, p. 254 (1970), state in part:

> It is recommended that procedural reform provide for advance notice that evidence of mental disease or defect will be relied upon in defense. . . .

Requiring advance notice is proposed also by the American Law Institute's Model Penal Code, § 4.03 (P.O.D. 1962). The commentary in Tentative Draft No. 4 at 193-194 (1955) indicates that, as of that time, six states required pretrial notice and an additional eight states required that the defense of insanity be specially pleaded.

For recent state statutes see N.Y. CPL §250.10 (McKinney,1971) enacted in 1970 which provides that no evidence by a defendant of a mental disease negativing criminal responsibility shall be allowed unless defendant has served notice on the prosecutor of his intention to rely upon such defense. See also New Jersey Penal Code (Final Report of the New Jersey Criminal Law Revision Commission, Oct. 1971) §2c: 4-3; New Jersey Court Rule 3:12; State v. Whitlow, 45 N.J. 3, 22 n.3 (1965), holding the requirement of notice to be both appropriate and not in violation of the privilege against self-incrimination.

Subdivision (a) deals with notice of the "defense of insanity." In this context the term insanity has a well-understood meaning. See, e.g., Tydings, A Federal Verdict of Not Guilty by Reason of Insanity and a Subsequent Commitment Procedure, 27 Md. L. Rev. 131 (1967). Precisely how the defense of insanity is phrased does, however, differ somewhat from circuit to circuit. See Study Draft of a New Federal Criminal Code, § 503 Comment at 37 (USGPO 1970). For a more extensive discussion of present law, see Working Papers of the National Commission on Reform of Federal Criminal Laws, Vol. 1, pp. 229-247 (USGPO 1970). The National Commission recommends the adoption of a single test patterned after the proposal of the American Law Institute's Model Penal Code. The proposed definition provides in part:

> In any prosecution for an offense lack of criminal responsibility by reason of mental disease or defect is a defense.
> [Study Draft of a New Federal Criminal Code § 503 at 36-37.]

Should the proposal of the National Commission be adopted by the Congress, the language of subdivision (a) probably ought to be changed to read "defense of lack of criminal responsibility by reason of mental disease or defect" rather than "defense of insanity."

Subdivision (b) is intended to deal with the issue of expert testimony bearing upon the issue of whether the defendant had the "mental state required for the offense charged."

There is some disagreement as to whether it is proper to

introduce evidence of mental disease or defect bearing not upon the defense of insanity, but rather upon the existence of the mental state required by the offense charged. The American Law Institute's Model Penal Code takes the position that such evidence is admissible [§ 4.02(1) (P.O.D. 1962)]. See also *People* v. *Gorshen*, 51 Cal. 2d 716, 336 P. 2d 492 (1959).

The federal cases reach conflicting conclusions. See *Rhodes* v. *United States*, 282 F. 2d 59, 62 (4th Cir. 1960):

> The proper way would have been to ask the witness to describe the defendant's mental condition and symptoms, his pathological beliefs and motivations, if he was thus afflicted, and to explain how these influenced or could have influenced his behavior, particularly his mental capacity *knowingly* to make the false statement charged, or *knowingly* to forge the signatures * * *.

Compare *Fisher* v. *United States*, 328 U.S. 463 (1946).

Subdivision (b) does not attempt to decide when expert testimony is admissible on the issue of the requisite mental state. It provides only that the defendant must give pretrial notice when he intends to introduce such evidence. The purpose is to prevent the need for a continuance when such evidence is offered without prior notice. The problem of unnecessary delay has arisen in jurisdictions which do not require prior notice of an intention to use expert testimony on the issue of mental state. Referring to this, the California Special Commission on Insanity and Criminal Offenders, First Report 30 (1962) said:

> The abuses of the present system are great. Under a plea of "not guilty" without any notice to the people that the defense of insanity will be relied upon, defendant has been able to raise the defense upon the trial of the issue as to whether he committed the offense charged.

As an example of the delay occasioned by the failure to heretofore require a pretrial notice by the defendant, see United States v. Albright, 388 F. 2d 719 (4th Cir. 1968), where a jury trial was recessed for 23 days to permit a psychiatric examination by the prosecution when the defendant injected a surprise defense of lack of mental competency.

Subdivision (c) gives the court the authority to order the defendant to submit to a psychiatric examination by a psychiatrist designated by the court. A similar provision is found in ALI, Model Penal Code §4.05 (1) (P.O.D. 1962). This is a common provision of state law, the constitutionality of which has been sustained. Authorities are collected in ALI, Model Penal Code, pp. 195-196 (Tent. Draft No. 4, 1955). For a recent proposal, see the New Jersey Penal Code §2c: 4-5 (Final Report of the New Jersey Criminal Law Revision Commission, Oct. 1971) authorizing appointment of "at least one qualified psychiatrist to examine and report upon the mental condition of the defendant." Any issue of self-incrimination which might arise can be dealt with by the court as, for example, by a bifurcated trial which deals separately with the issues of guilt and of mental responsibility.

Subdivision (d) provides for the exclusion of expert testimony in behalf of a defendant who has failed to give notice under subdivision (b) or who refuses to be examined by a court-appointed psychiatrist under subdivision (c). See State v. Whitlow, 45 N.J. 3, 23 (1965), which indicates that it is proper to limit or exclude testimony by a defense psychiatrist whenever defendant refuses to be examined.

Rule 15. Depositions.

(a) WHEN TAKEN. ~~If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice,~~ *Whenever due to special 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 ~~at any time after the filing of an indictment or information~~ may upon motion of ~~a defendant~~ *such party* and notice to the parties order that ~~his~~ testimony *of such witness* be taken by deposition and that any designated ~~books papers, documents or tangible objects,~~ *book, paper, document, record, recording, or other material* not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his 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 ~~other~~ 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 the right to be present, produce him at the examination and keep him in the presence of the witness during the examination. 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 failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(c) ~~DEFENDANT'S COUNSEL AND~~ PAYMENT OF EXPENSES. ~~If a defendant is without counsel the court shall advise him of his right and assign counsel to represent him unless the defendant elects to proceed without counsel or is able to obtain counsel. If it appears that a defendant at whose instance a deposition is to be taken cannot bear the expense thereof,~~ *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 expense of the taking of the deposition,* the court may direct that the expenses of travel and subsistence of the ~~defendant's attorney~~ *defendant and his attorney* for attendance at the examination shall be paid by the government. ~~In that event the marshal shall make payment accordingly.~~

(d) HOW TAKEN. *Subject to such additional conditions as the court shall provide,* ~~A~~ *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 consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The govern-*

ment shall make available to the defendant or his 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. ~~The court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions.~~

(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 ~~it appears: That~~ the witness is ~~dead;or that the witness is out of the United States; unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena~~ *unavailable, as defined in subdivision (g) of this rule, or the witness gives testimony at the trial or hearing inconsistent with his 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 all of it which is relevant to the part offered and any party may offer other parts.

(f) OBJECTIONS TO ~~ADMISSIBILITY~~ *DEPOSITION TESTIMONY.* Objections to ~~receiving in evidence a~~ deposition ~~or part thereof may be made as~~

~~provided in civil actions~~ *testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.*

(g) UNAVAILABILITY. "Unavailable" as a witness includes situations in which the deponent: (1) is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his deposition; or (2) persists in refusing to testify concerning the subject matter of his deposition despite an order of the judge to do so; or (3) testifies to a lack of memory of the subject matter of his deposition; or (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or (5) is absent from the hearing and the proponent of his deposition has been unable to procure his attendance by process or other reasonable means. A deponent is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his deposition for the purpose of preventing the witness from attending or testifying.

(h) Deposition by Agreement Not Precluded. Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court.

Rule 15. Depositions.

Advisory Committee Note

Rule 15 authorizes the taking of depositions by the government. Under former rule 15 only a defendant was authorized to take a deposition.

The revision is similar to Title VI of the Organized Crime Control Act of 1970. The principal difference is that Title VI (18 U.S.C. § 3503) limits the authority of the government to take depositions to cases in which the Attorney General certifies that the "proceeding is against a person who is believed to have participated in an organized criminal activity." This limitation is not contained in rule 15.

Dealing with the issue of government depositions so soon after the enactment of 18 U.S.C. § 3503 is not inconsistent with the congressional purpose. On the floor of the House Congressman Poff, a principal spokesman for the proposal, said that the House version was not designed to "limit the Judicial Conference of the United States in the exercise of its rulemaking authority . . . from addressing itself to other problems in this area or from adopting a broader approach." 116 Cong. Rec. 35293 (1970).

The recently enacted Title VI of the Organized Crime Control Act of 1970 (18 U.S.C. § 3503) is based upon earlier efforts of the Advisory Committee on Criminal Rules which has over the past twenty-five years submitted several proposals authorizing government depositions.

The earlier drafts of the Federal Rules of Criminal Procedure proposed that the government be allowed to take depositions. Orfield, The Federal Rules of Criminal Procedure, 33 Calif. L. Rev. 543, 559 (1945). The Fifth Draft of what became rule 15 (then rule 20) dated June 1942, was submitted to the Supreme Court for comment. The court had a number of unfavorable comments about allowing government depositions. These comments were not published. The only reference to the fact that the court made comments is in 2 Orfield, Criminal Procedure under the Federal Rules § 15:1 (1966), and Orfield, Depositions in Federal Criminal Procedure, 9 S.C.L.Q. 376, 380-381 (1957).

The Advisory Committee, in the 1940's, continued to recommend the adoption of a provision authorizing government depositions. The final draft submitted to the Supreme Court contained a section providing:

> The following additional requirements shall apply if the deposition is taken at the instance of the government or of a witness. The officer having custody of a defendant shall be notified of the time and place set for examination, and shall produce him at the examination and keep him in the presence of the witness during the examination. A defendant not in custody shall be given notice and shall have the right to be present at the examination. The government shall pay in advance to the defendant's attorney and a defendant not in custody expenses of travel and subsistence for attendance at the examination.

See 2 Orfield, Criminal Procedure under the Federal Rules §15:3, pp. 447-448 (1966); Orfield, Depositions in Federal Criminal Procedure, 9 S.C.L.Q. 376, 383 (1957).

The Supreme Court rejected this section in its entirety, thus eliminating, the provision for depositions by the government. These changes were made without comment.

The proposal to allow government depositions was renewed in the amendments to the Federal Rules of Criminal Procedure in the early 1960's. The Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts (December 1962) proposed to amend rule 15 by eliminating the words "of a defendant" from the first sentence of subdivision (a) and adding a subdivision (g) which was practically identical to the subdivision rejected by the Supreme Court in the original draft of the rules.

The Second Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts (March 1964) continued to propose allowing government depositions Subdivision (g) was substantially modified, however.

> The following additional requirements shall apply if the deposition is taken at the instance of the government or a witness. Both the defendant and his attorney shall be given reasonable advance notice of the time and place set for the examination. The officer having custody of a defendant shall be notified of the time and place set for the examination, and shall produce him at the examination and keep him in the presence of the witness during the examination. A defendant not in custody shall have the right to be present at the examination but his failure to appear after notice and tender of expenses shall constitute a waiver of that right. The government shall pay to the defendant's attorney and to a defendant not in custody expenses of travel and subsistence for attendance at the examination. The government shall make available to the defendant for his 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 which the government would be required to make available to the defendant if the witness were testifying at the trial.

The proposal to authorize government depositions was rejected by the Standing Committee on Rules of Practice and Procedure, 4 Barron, Federal Practice and Procedure (Supp. 1965). The Report of the Judicial Conference, submitted to the Supreme Court for approval late in 1965, contained no proposal for an amendment to rule 15. See 39 F.R.D. 69, [illegible] 111 (1966).

When the Organized Crime Control Act of 1970 was originally introduced in the Senate (S. 30) it contained a government deposition provision which was similar to the 1964 proposal of the Criminal Rules Advisory Committee,

except that the original bill (S. 30) failed to provide standards to control the use of depositions at the trial. For an explanation and defense of the original proposal see McClellan, The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties?, 46 Notre Dame Lawyer 55, 100–108 (1970). This omission was remedied, prior to passage, with the addition of what is now 18 U.S.C. § 3503(f) which prescribes the circumstances in which a deposition can be used. The standards are the same as those in former rule 15(e) with the addition of language allowing the use of the deposition when "the witness refuses in the trial or hearing to testify concerning the subject of the deposition or the part offered."

Before the Organized Crime Control Act of 1970 was enacted an additional amendment was added providing that the right of the government to take a deposition is limited to cases in which the Attorney General certifies that the defendant is "believed to have participated in an organized criminal activity" [18 U.S.C. § 3503(a)]. The argument in favor of the amendment was that the whole purpose of the act was to deal with organized crime and therefore its provisions, including that providing for government depositions, should be limited to organized crime type cases.

There is another aspect of Advisory Committee history which is relevant. In January 1970, the Advisory Committee circulated proposed changes in rule 16, one of which gives the government, when it has disclosed the identity of its witnesses, the right to take a deposition and use it "in the event the witness has become unavailable without the fault of the government or if the witness has changed his testimony." [See Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts, rule 16(a)(1)(vi) (January 1970).] This provision is now incorporated within rule 16 (a)(1)(v).

Because neither the court nor the standing committee gave reasons for rejecting the government deposition proposal, it is not possible to know why they were not approved. To the extent that the rejection was based upon doubts as to the constitutionality of such a proposal, those doubts now seem resolved by *California* v. *Green*, 399 U.S. 149 (1970).

On the merits, the proposal to allow the government to

take depositions is consistent with the revision of rule 16 and with section 804(b)(1) of the Rules of Evidence for the United States Courts and Magistrates (November 1971) which provides that the following is not excluded by the hearsay rule if the declarant is unavailable:

> (1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.

Subdivision (a) is revised to provide that the government as well as the defendant is entitled to take a deposition. The phrase "whenever due to special circumstances of the case it is in the interest of justice," is intended to make clear that the decision by the court as to whether to order the taking of a deposition shall be made in the context of the circumstances of the particular case. The principal objective is the preservation of evidence for use at trial. It is not to provide a method of pretrial discovery nor primarily for the purpose of obtaining a basis for later cross-examination of an adverse witness. Discovery is a matter dealt with in rule 16. An obviously important factor is whether a deposition will expedite, rather than delay, the administration of criminal justice. Also important is the presence or absence of factors which determine the use of a deposition at the trial, such as the agreement of the parties to the use of the deposition; the possible unavailability of the witness; or the possibility that coercion may be used upon the witness to induce him to change his testimony or not to testify. See rule 16(a)(1)(v).

Subdivision (a) also makes explicit that only the "testimony of a prospective witness of a party" can be taken. This means the party's own witness and does not authorize a discovery deposition of an adverse witness. The language "for use at trial" is intended to give further emphasis to the importance of the criteria for use specified in subdivision (e).

In subdivision (d) the language "except as otherwise provided in these rules" is meant to make clear that the subpoena provisions of rule 17 control rather than the provisions of the civil rules.

The use of the phrase "and manner" in subdivision (d)(2) is intended to emphasize that the authorization is not to conduct an adverse examination of an opposing witness.

In subdivision (e) the phrase "as substantive evidence" is added to make clear that the deposition can be used as evidence in chief as well as for purposes of impeachment.

Subdivision (e) also makes clear that the deposition can be used as affirmative evidence whenever the witness is available but gives testimony inconsistent with that given in the deposition. A California statute which contained a similar provision was held constitutional in *California* v. Green, 399 U.S. 149 (1970). This is also consistent with section 801(d)(1) of the Rules of Evidence for United States Courts and Magistrates (Nov. 1971).

Subdivision (f) is intended to insure that a record of objections and the grounds for the objections is made at the time the deposition is taken when the witness is available so that the witness can be examined further, if necessary, on the point of the objection so that there will be an adequate record for the court's later ruling upon the objection.

Subdivision (g) uses the "unavailability" definition of the Rules of Evidence for the United States Courts and Magistrates, 804(a) (Nov. 1971).

Subdivision (h) is intended to make clear that the court always has authority to order the taking of a deposition, or to allow the use of a deposition, where there is an agreement of the parties to the taking or to the use.

Rule 16. Discovery and Inspection.

(a) DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.

~~DEFENDANT'S-STATEMENTS;-REPORTS-OF-EXAMINATIONS AND-TESTS;-DEFENDANT'S-GRAND-JURY-TESTIMONY.~~

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon ~~motion~~ request of a defendant ~~the-court-may-order-the attorney-for~~ the government shall ~~to~~ permit the defendant to inspect and copy or photograph: any relevant ~~(1)~~ written or recorded statements ~~or-confessions~~ 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 ~~(3)~~ 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's motion, discovery of relevant records. Testimony of any witness before a grand jury who was, at the time either of the charged acts or of the grand jury proceedings, so situated as an officer or employee as to have been able legally to bind the defendant in respect to the activities involved in the charges.

(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of his prior criminal record, if any, as is then available to the attorney for the government.

~~(b)-OTHER-BOOKS,-PAPERS,-DOCUMENTS,-TANGIBLE OBJECTS-OR-PLACES.-~~

(C) Documents and Tangible Objects. Upon ~~motion-of-a~~ request of the defendant the ~~court may-order-the-attorney-for-the~~ government ~~to~~ 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, ~~upon-a-showing-of-materiality~~ and which are material to the preparation of his defense~~;-and that-the-request-is-reasonable;~~ or are intended for use by the government as evidence at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examinations and Tests. Upon ~~motion~~ request of a defendant the ~~court may-order-the-attorney-for-the~~ government shall ~~be~~ permit the defendant to inspect and copy or photograph any ~~(2)~~ 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, 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.

(E) Government Witnesses. Upon request of the defendant the government shall furnish to the defendant a written list of the names and

addresses of all government witnesses which the attorney for the government intends to call at the trial together with any record of prior felony convictions of any such witness which is within the knowledge of the attorney for the government. When a request for discovery of the names and addresses of witnesses has been made by a defendant, the government shall be allowed to perpetuate the testimony of such witnesses in accordance with the provisions of rule 15.

(2) Information Not Subject to Disclosure. Except as provided in ~~subdivision (a)(2)~~ paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses ~~(other than the defendant)~~ to agents of the government except as provided in 18 U.S.C. §3500.

(3) Grand Jury Transcripts. Except as provided in rule 6 and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

(4) Failure to Call Witness. The fact that a witness' name is on a list furnished under this rule shall not be grounds for comment upon a failure to call the witness.

~~(e) DISCOVERY BY THE GOVERNMENT.~~

(b) DISCLOSURE OF EVIDENCE BY THE DEFENDANT.

(1) Information Subject to Disclosure.

(A) Documents and Tangible Objects. ~~If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may,~~ Upon ~~motion~~ request of the government, ~~condition its order by requiring~~ that the defendant shall permit the government to inspect and copy or photograph ~~scientific or medical reports,~~ books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within ~~his~~ the possession, custody or control of the defendant, ~~upon a showing of materiality to the preparation~~

~~of-the-government's-case-and-that-the-request-is reasonable~~ and which the defendant intends to ~~produce~~ introduce in evidence at the trial.

(B) Reports of Examinations and Tests. Upon ~~motion~~ request of the government, the defendant 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 in evidence 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 testimony.

(C) Defense Witnesses. Upon request of the government, the defendant shall furnish the government a list of the names and addresses of the witnesses he intends to call at the trial. When a request for discovery of the names and addresses of witnesses has been made by the government, the defendant shall be allowed to perpetuate the testimony of such witnesses in accordance with the provisions of rule 15.

(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 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 agents or attorneys.

(3) Failure to Call Witness. The fact that a witness' name is on a list furnished under this rule shall not be grounds for comment upon a failure to call a witness.

(c) ~~(g)~~ CONTINUING DUTY TO DISCLOSE. If, ~~subsequent to compliance with an order issued pursuant to this rule,~~ and 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, or the identity of an additional witness or witnesses, he shall promptly notify the other party or his attorney or the court of the existence of the additional material or witness.

(d) REGULATION OF DISCOVERY.

(1) ~~(e)~~ Protective Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon ~~motion~~ request by ~~the-government~~ a party the court ~~may~~ shall permit ~~the-government~~ the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the ~~court-in camera~~ judge alone. If the court enters an order granting relief following such a showing, ~~in-camera,~~ the entire text of the ~~government's~~ party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal ~~by-the-defendant~~.

(2) Failure to Comply With a Request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, ~~or-with-an-order issued-pursuant-to-this-rule,~~ the court may order such party to permit the discovery or inspection, ~~of materials-not-previously-disclosed,~~ grant a continuance, or prohibit the party from introducing ~~in~~ evidence

~~the-material~~ not disclosed, or it may enter such other order as it deems just under the circumstances.

~~Time,-Place-and-Manner-of-Discovery-and-Inspection.~~ ~~An-order-of-~~ The court ~~granting-relief-under-this rule-shall~~ may specify the time, place and manner of making the discovery and inspection ~~permitted~~ and may prescribe such terms and conditions as are just.

~~(f)-Time-of-Motions.--A-motion-under-this-rule-may be-made-only-within-10-days-after-arraignment-or-at-such reasonable-later-time-as-the-court-may-permit.--The motion-shall-include-all-relief-sought-under-this-rule. A-subsequent-motion-may-be-made-only-upon-a-showing-of cause-why-such-motion-would-be-in-the-interest-of-justice.~~

ADVISORY COMMITTEE NOTE

Rule 16 is revised to give greater discovery to both the prosecution and the defense. Subdivision (a) deals with disclosure of evidence by the government. Subdivision (b) deals with disclosure of evidence by the defendant. The majority of the Advisory Committee is of the view that the two—prosecution and defense discovery—are related and that the giving of a broader right of discovery to the defense is dependent upon giving also a broader right of discovery to the prosecution.

The draft provides for a right of prosecution discovery independent of any prior request for discovery by the defendant. The Advisory Committee is of the view that this is the most desirable approach to prosecution discovery. See American Bar Association, Standards Relating to Discovery and Procedure Before Trial, pp. 7, 43-46 (Approved Draft, 1970).

The language of the rule is recast from "the court may order" or "the court shall order" to "the government shall permit" or "the defendant shall permit." This is to make clear that discovery should be accomplished by the parties themselves, without the necessity of a court order unless there is dispute as to whether the matter is discoverable or a request for a protective order under subdivision (d)(1). The court, however, has the inherent right to enter an order under this rule.

The rule is intended to prescribe the minimum amount of discovery to which the parties are entitled. It is not intended to limit the judge's discretion to order broader discovery in appropriate cases. For example, subdivision (a)(3) is not intended to deny a judge's discretion to order disclosure of grand jury minutes where circumstances make it appropriate to do so.

Subdivision (a)(1)(A) amends the old rule to provide, upon request of the defendant, the government shall permit discovery if the conditions specified in subdivision (a)(1)(A) exist. Some courts have construed the current language as giving the court discretion as to whether to grant discovery of defendant's statements. See *United States* v. *Kaminsky*, 275 F. Supp. 365 (S.D.N.Y. 1967), denying discovery because the defendant did not demonstrate that his request for discovery was warranted; *United States* v. *Diliberto*, 264 F. Supp. 181 (S.D.N.Y. 1967), holding that there must be a showing of actual need before discovery would be granted; *United States* v. *Louis Carreau, Inc.*, 42 F.R.D. 408 (S.D.N.Y. 1967), holding that in the absence of a showing of good cause the government cannot be required to disclose defendant's prior statements in advance of trial. In *United States* v. Louis Carreau, Inc. at p. 412, the court stated that if rule 16 meant that production of the statements was mandatory, the word "shall" would have been used instead of "may." See also *United States* v. *Wallace*, 272 F. Supp. 838 (S.D.N.Y. 1967); *United States* v. *Wood*, 270 F. Supp. 963 (S.D.N.Y. 1967); *United States* v. *Leighton*, 265 F. Supp. 27 (S.D.N.Y. 1967); *United States* v. *Longarzo*, 43 F.R.D. 395 (S.D.N.Y. 1967); *Loux* v. *United States*, 389 F. 2d 911 (9th Cir. 1968); and the discussion of discovery in Discovery in Criminal Cases, 44 F.R.D. 481 (1968). Other courts have held that even though the current rules make discovery discretionary, the defendant need not show cause when he seeks to discover his own statements. See *United States* v. *Aadal*, 280 F. Supp. 859 (S.D.N.Y. 1967); *United States* v. *Federman*, 41 F.R.D. 339 (S.D.N.Y. 1967); and *United States* v. *Projansky*, 44 F.R.D. 550 (S.D.N.Y. 1968).

The amendment making disclosure mandatory under the circumstances prescribed in subdivision (a)(1) (A) resolves such ambiguity as may currently exist, in the direction of more liberal discovery. See C. Wright, Federal Practice and Procedure: Criminal § 253 (1969, Supp.1971), Rezneck, The New Federal Rules of Criminal Procedure, 54 Geo. L.J. 1276 (1966); Fla. Stat. Ann. § 925.05 (Supp. 1971-1972); N.J. Crim. Prac. Rule 35-11(a) (1967). This is done in the view that broad discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at the trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence. This is the ground upon which the American Bar Association Standards

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has unanimously recommended broader discovery. The United States Supreme Court has said that the pretrial disclosure of a defendant's statements "may be the 'better practice.'" *Cicenia* v. *Lagay*, 357 U.S. 504, 511 (1958). See also *Leland* v. *Oregon*, 343 U.S. 790 (1952); *State* v. *Johnson*, 28 N.J. 133, 145 A.2d 313 (1958).

The requirement that the statement be disclosed prior to trial, rather than waiting until the trial, also contributes to efficiency of administration. It is during the pretrial stage that the defendant usually decides whether to plead guilty. See *United States* v. *Projansky*, *supra*. The pretrial stage is also the time during which many objections to the admissibility of types of evidence ought to be made. Pretrial disclosure ought, therefore, to contribute both to an informed guilty plea practice and to a pretrial resolution of admissibility questions. See ABA, Standards Relating to Discovery and Procedure Before Trial § 1.2 and Commentary pp. 40–43

(Approved Draft, 1970).

The American Bar Association Standards mandate the prosecutor to make the required disclosure even though not requested to do so by the defendant. The proposed draft requires the defendant to request discovery, although obviously the attorney for the government may disclose without waiting for a request, and there are situations in which due process will require the prosecution,

on its own, to disclose evidence "helpful" to the defense. *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Giles* v. *Maryland*, 386 U.S. 66 (1967).

The requirement in subdivision (a)(1)(A) is that the government produce "statements" without further discussion of what "statement" includes. There has been some recent controversy over what "statements" are subject to discovery under the current rule. See Discovery in Criminal Cases, 44 F.R.D. 481 (1968); C. Wright, Federal Practice and Procedure: Criminal § 253, pp. 505–506 (1969, Supp. 1971). The kinds of "statements" which have been held to be within the rule include "substantially verbatim and contemporaneous" statements, *United States* v. *Elife*, 43 F.R.D. 23 (S.D.N.Y. 1967); statements which reproduce the defendant's "exact words," *United States* v. *Armantrout*, 278 F. Supp. 587 (S.D.N.Y. 1968); a memorandum which was not verbatim but included the substance of the defendant's testimony, *United States* v. *Scharf*, 267 F. Supp. 19 (S.D.N.Y. 1967); summaries of the defendant's statements, *United States* v. *Morrison*, 43 F.R.D. 516 (N.D. Ill. 1967); and statements discovered by means of electronic surveillance, *United States* v. *Black*, 282 F. Supp. 35 (D.D.C.

The court in *United States* v. *Jovinelli*, 276 F. Supp. [illegible] (N.D. Ill. 1967), declared that "statements" as [illegible] old rule 16 is not restricted to the "sub- [illegible] verbatim recital of an oral statement" or to [illegible] which are a "recital of past occurrences."

The Jencks Act, defines "statements" of government [illegible] 18 U.S.C. §3500, [illegible] coverable for purposes of cross-examination as: [illegible] "written statement" signed or otherwise approved by a [illegible] (2) "a stenographic, mechanical, electrical, or other [illegible] or a transcription thereof, which is a substantially [illegible] recital of an oral statement made by said witness [illegible] of the government and recorded contempora- [illegible] with the making of such oral statement." 18 U.S.C. [illegible] (e). The language of the Jencks Act has most often [illegible] to a restrictive definition of "statements," confining [illegible] "statements" to the defendant's "own words." See *Hanks* v. *United States*, 388 F.2d 171 (10th Cir. 1968), and *Augenblick* v. *United States*, 377 F.2d 586 (Ct. Cl. 1967).

The American Bar Association's Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) do not [illegible] to define "statements" because of a disagreement [illegible] members of the committee as to what the definition [illegible] The majority rejected the restrictive definition [illegible] "statements" contained in the Jencks Act, 18 U.S.C. [illegible] on the view that the defendant ought to be able [illegible] statement in whatever form it may have been [illegible] to the defendant and to discourage the [illegible] where it exists, of destroying original notes, after [illegible] them into secondary transcriptions, in order to [illegible] cross-examination based upon the original notes. [illegible] v. *United States*, 373 U.S. 487 (1963). The [illegible] a restrictive definition of "statements" in [illegible] the use of other than "verbatim" statements [illegible] witnesses to unfair cross-examination. See [illegible] Bar Association's Standards Relating to Discovery [illegible] Before Trial pp. 61-64 [illegible] Approved Draft, 1970). The draft of [illegible] (A) leaves the matter of the meaning of the [illegible] thus left for development on a case-by-

[illegible] (A) also provides for mandatory dis- [illegible] of any oral statement made by defendant to a gov- [illegible] which the attorney for the government [illegible] evidence. The reasons for permitting the [illegible] to discover his own statements seem obviously [illegible] the substance of any oral statement which the [illegible] intends to use in evidence at the trial. See [illegible] Association Standards Relating to Discovery

and Procedure Before Trial §2.1 (a)(ii) (Approved Draft, 1970). Certainly disclosure will facilitate the raising of objections to admissibility prior to trial. There have been several conflicting

decisions under the current rules as to whether the government must disclose the substance of oral statements of the defendant which it has in its possession. Cf. *United States* v. *Baker*, 262 F. Supp. 657 (D.D.C. 1966); *United States* v. *Curry*, 278 F. Supp. 508 (N.D. Ill. 1967); *United States* v. *Morrison*, 43 F.R.D. 516 (N.D. Ill. 1967); *United States* v. *Reid*, 43 F.R.D. 520 (N.D. Ill. 1967); *United States* v. *Armantrout*, 278 F. Supp. 517 (S.D.N.Y. 1968); and *United States* v. *Elife*, 43 F.R.D. 23 (S.D.N.Y. 1967). There is, however, considerable support for the policy of disclosing the substance of the defendant's oral statement. Many courts have indicated that this is a "better practice" than denying such disclosure. *E.g.*, *United States* v. *Curry*, *supra*; *Loux* v. *United States*, 389 F.2d 911 (9th Cir. 1968); and *United States* v. *Baker*, *supra*.

Subdivision (a)(1)(A) also provides for mandatory disclosure of any "recorded testimony" which defendant gives

before a grand jury if the testimony "relates to the offense charged." The present rule is discretionary and is

applicable only to those of defendant's statements which are "relevant."

The traditional rationale behind grand jury secrecy—protection of witnesses—does not apply when the accused seeks discovery of his own testimony. Cf. *Dennis* v. *United States*, 384 U.S. 855 (1966); and *Allen* v. *United States*, 390 F. 2d 476 (D.C. Cir. 1968). In interpreting the rule many judges have granted defendant discovery without a showing of need or relevance. *United States* v. *Gleason*, 259 F. Supp. 282 (S.D.N.Y. 1966); *United States* v. *Lagarzo*, 43 F.R.D. 395 (S.D.N.Y. 1967); and *United States* v. *United Concrete Pipe Corp.*, 41 F.R.D. 538 (N.D. Tex. 1966).

Making disclosure mandatory without a showing of relevance conforms to the recommendation of the American Bar Association Standards Relating to Discovery and Procedure Before Trial § 2.1 (a)(iii) and Commentary pp. 64-66 (Approved Draft, 1970). Also see Note, Discovery by a Criminal Defendant of His Own Grand-Jury Testimony, 68 Columbia L. Rev. 311 (1968).

In a situation involving a corporate defendant, statements made by present and former officers and employees relating to their employment have been held discoverable

as statements of the defendant. United States v. Hughes, 413 F.2d 1244 (5th Cir. 1969). The rule makes clear that such statements are discoverable if the officer or employee was "able legally to bind the defendant in respect to the activities involved in the charges."

Subdivision (a)(1) (B) allows discovery of the defendant's prior criminal record. A defendant may be uncertain of the precise nature of his prior record and it seems therefore in the interest of efficient and fair administration to make it possible to resolve prior to trial any disputes as to the correctness of the relevant criminal record of the defendant.

Subdivision (a)(1) (C) gives a right of discovery of certain tangible objects under the specified circumstances. Courts have construed the old rule as making disclosure discretionary with the judge. Cf. *United States* v. *Kaminsky*, 275 F. Supp. 365 (S.D.N.Y. 1967); *Gerinson* v. *United States*, 358 F. 2d 761 (5th Cir. 1966), cert. denied, 385 U.S. 823 (1966); and *United States* v. *Tanner*, 279 F. Supp. 457 (N.D. Ill. 1967). The old rule requires a "showing of materiality to the preparation of his defense and that the request is reasonable." The new rule requires disclosure if any one of three situations exists: (a) the defendant shows that disclosure of the document or tangible object is material to the defense, (b) the government intends to use the document or tangible object at the trial, or (c) the document or tangible object was obtained from or belongs to the defendant.

Disclosure of documents and tangible objects which are "material" to the preparation of the defense may be required under the rule of *Brady* v. *Maryland*, 373 U.S. 83 (1963), without an additional showing that the request is "reasonable." In *Brady* the court held that "due process" requires that the prosecution disclose evidence favorable to the accused. Although the Advisory Committee decided not to codify the *Brady* rule, the requirement that the government disclose documents and tangible objects "material to the preparation of his defense" under cores the importance of disclosure of evidence favorable to the defendant.

Limiting the rule to situations in which the defendant can show that the evidence is material seems unwise. It may be difficult for a defendant to make this showing if he does not know what the evidence is. For this reason sub-

division (a)(1)(C) also contains language to compel disclosure if the government intends to use the property as evidence at the trial or if the property was obtained from or belongs to the defendant. See ABA Standards Relating to Discovery and Procedure Before Trial §2.1 (a)(v) and Commentary pp. 68-69 (Approved Draft, 1970). This is probably the result under old rule 16 since the fact that the government intends to use the physical evidence at the trial is probably sufficient proof of "materiality." C. Wright, Federal Practice and Procedure: Criminal § 254 especially n. 70 at p. 513 (1969, Supp.1971). But it seems desirable to make this explicit in the rule itself.

Requiring disclosure of documents and tangible objects which "were obtained from or belong to the defendant" probably is also making explicit in the rule what would otherwise be the interpretation of "materiality." See C. Wright, Federal Practice and Procedure: Criminal §254 at p. 510 especially n. 58 (1969, Supp.1971).

Subdivision (a)(1)(C) is also amended to add the word "photographs" to the objects previously listed. See ABA Standards Relating to Discovery and Procedure Before Trial §2.1 (a)(v) (Approved Draft, 1970).

Subdivision (a)(1)(D) makes disclosure of the reports of examinations and tests mandatory. This is the recommendation of the ABA Standards Relating to Discovery and Procedure Before Trial §2.1 (a)(iv) and Commentary pp. 66-68 (Approved Draft, 1970). The obligation of disclosure applies only to scientific tests or experiments "made in connection with the particular case." So limited, mandatory disclosure seems justified because: (1) it is difficult to test expert testimony at trial without advance notice and preparation; (2) it is not likely that such evidence will be distorted or misused if disclosed prior to trial; and (3) to the extent that a test may be favorable to the defense, its disclosure is mandated under the rule of *Brady* v. *Maryland*, *supra*.

Subdivision (a)(1)(E) is new. It provides for discovery of the names of witnesses to be called by the government and of the prior criminal record of those witnesses. Many states have statutes or rules which require that the accused be notified prior to trial of the witnesses to be called against him. See, *e.g.*, Alaska R. Crim. Proc. 7 (c); Ariz. R. Crim. Proc. 153 (1956); Ark. Stat. Ann. § 43: 1001 (1947); Cal. Pen. Code § 995 (a) (West 1957); Colo. Rev. Stat. Ann. §§ 39-3-6, 39-4-2 (1963); Fla. Stat. Ann. § 906.29 (1944); Idaho Code Ann. § 19-1404 (1948); Ill. Rev. Stat. ch. 38, § 114-9 (1970); Ind. Ann. Stat. § 9-903 (1956); Iowa Code Ann. § 772.3 (1950); Kan. . Stat. Ann. § 62-931 (1964); Ky. R. Crim. Proc. 6.08 (1962); Mich. Stat. Ann. § 28.980 (Supp. 1971); Minn. Stat. Ann. § 628.08 (1947); Mo. Ann. Stat. § 545.070 (1953); Mont. Rev. Codes Ann. § 95-1503 (Supp. 1969); Neb. Rev. Stat. § 29-1602 (1964); Nev. Rev. Stat. § 173.015 (1967); Okla. Stat. tit. 22, § 384 (1951); Ore. Rev. Stat. § 132.580 (1969); Tenn. Code Ann. § 40-1708 (1955); Utah Code Ann. § 77-20-3 (1953). For examples of the ways in which these requirements are implemented, see *State* v. *Mitchell*, 181 Kan. 193, 310 P.2d 1063 (1957); *State* v. *Parr*, 129 Mont. 175, 283 P.2d 1086 (1955); *Phillips* v. *State*, 157 Neb. 419, 59 N.W.2d 598 (1953).

Witnesses' prior statements must be made available to defense counsel after the witness testifies on direct examination for possible impeachment purposes during trial; 18 U.S.C. § 3500.

The American Bar Association's Standards Relating to Discovery and Procedure Before Trial § 2.1 (a)(i) (Approved Draft, 1970) require disclosure of both the names and the statements of prosecution witnesses. Subdivision (a)(1)(E) requires only disclosure, prior to trial, of names, addresses, and prior criminal record. It does not require disclosure of the witnesses' statements although the rule does not preclude the parties from agreeing to disclose statements prior to trial. This is done, for example, in courts using the so-called "omnibus hearing."

Disclosure of the prior criminal record of witnesses places the defense in the same position as the government, which normally has knowledge of the defendant's record and the record of anticipated defense witnesses. In addition, the defendant often lacks means of procuring this information on his own. See American Bar Association Standards Relating

to Discovery and Procedure Before Trial §2.1 (a)(vi) (Approved Draft, 1970).

A principal argument against disclosure of the identity of witnesses prior to trial has been the danger to the witness, his being subjected either to physical harm or to threats designed to make the witness unavailable or to influence him to change his testimony. Discovery in Criminal cases, 44 F.R.D. 481, 499-500 (1968); Ratnoff, The New Criminal Deposition Statute in Ohio--Help or Hindrance to Justice?, 19 Case Western Reserve L. Rev. 279, 284 (1968). See, e.g., United States v. Estep, 151 F. Supp. 668, 672-673 (N.D.Tex. 1957):

> Ninety per cent of the convictions had in the trial court for sale and dissemination of narcotic drugs are linked to the work and the evidence obtained by an informer. If that informer is not to have his life protected there won't be many informers hereafter.

See also the dissenting opinion of Mr. Justice Clark in *Roviaro* v. *United States*, 353 U.S. 53, 66-67 (1957). Threats of market retaliation against witnesses in criminal antitrust cases are another illustration. *Bergen Drug Co.* v. *Parke, Davis & Company*, 307 F.2d 725 (3d Cir. 1962); and *House of Materials, Inc.* v. *Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962). The government has two alternatives when it believes disclosure will create an undue risk of harm to the witness: It can ask for a protective order under subdivision (d)(1). See ABA Standards Relating to Discovery and Procedure Before Trial §2.5 (b) (Approved Draft, 1970). It can also move the court to

> allow the perpetuation of a particular witness's testimony for use at trial if the witness is unavailable or later changes his testimony. The purpose of the latter alternative is to make pretrial disclosure possible and at the same time to minimize any inducement to use improper means to force the witness either to not show up or to change his testimony before a jury. See rule 15.

Subdivision (a)(2) is substantially unchanged. It limits the discovery otherwise allowed by providing that the government need not disclose "reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case" or "statements made by government witnesses or prospective government witnesses to agents of the government." The only proposed change is that the "reports, memoranda, or other internal government documents made by *the attorney for the government*" are included to make clear that the work product of the government attorney is protected. See C. Wright, Federal Practice and Procedure: Criminal §254 n.92 (1969, Supp. 1971); United States v. Rothman, 179 F. Supp. 935 (W.D.Pa. 1959); Note, "Work Product" in Criminal Discovery, 1966 Wash.U. L.Q. 321; American Bar Association, Standards Relating to Discovery and Procedure Before Trial §2.6 (a) (Approved Draft, 1970); cf. Hickman v. Taylor, 329 U.S. 495 (1947). Brady v. Maryland, 373 U.S. 83 (1963), requires the disclosure of evidence favorable to the defendant. This is, of course, not changed by this rule.

Subdivision (a)(3) is included to make clear that recorded proceedings of a grand jury are explicitly dealt with in rule 6 and subdivision (a)(1)(A) of rule 16 and thus are not covered by other provisions such as subdivision (a)(1)(C) which deals generally with discovery of documents in the possession, custody, or control of the government.

Subdivision (a)(4) is designed to insure that the government will not be penalized if it makes a full disclosure of all potential witnesses and then decides not to call one or more of the witnesses listed. This is not, however, intended to abrogate the defendant's right to comment generally upon the government's failure to call witnesses in an appropriate case.

Subdivision (b) deals with the government's right to discovery of defense evidence or, put in other terms, with the extent to which a defendant is required to disclose its evidence to the prosecution prior to trial. Subdivision (b) replaces old subdivision (c).

Subdivision (b) enlarges the right of government discovery in several ways: (1) it gives the government the right to discovery of lists of defense witnesses as well as physical evidence and the results of examinations and tests; (2) it requires disclosure if the defendant has the evidence under his control and intends to use it at trial, without the additional burden, required by the old rule, of having to show, in behalf of the government, that the evidence is material and the request reasonable; and (3) it gives the government the right to discovery without conditioning that right upon the existence of a prior request for discovery by the defendant.

Although the government normally has resources adequate to secure much of the evidence for trial, there are situations in which pretrial disclosure of evidence to the government is in the interest of effective and fair criminal justice administration. For example, the experimental "omnibus hearing" procedure (see discussion in Advisory Committee Note to rule 12) is based upon an assumption that the defendant, as well as the government, will be willing to disclose evidence prior to trial.

Having reached the conclusion that it is desirable to require broader disclosure by the defendant under certain circumstances, the Advisory Committee has taken the view that it is preferable to give the right of discovery to the government independently of a prior request for discovery by the defendant. This is the recommendation of the American Bar Association Standards Relating to Discovery and Procedure Before Trial, Commentary, pp. 43-46 (Approved Draft, 1970). It is sometimes asserted that making the government's right of discovery conditional will minimize the risk that government discovery will be viewed as an infringement of the defendant's constitutional rights. See discussion in C. Wright, Federal Practice and Procedure: Criminal § 256 (1969, Supp. 1971); Moore, Criminal Discovery, 19 Hastings L.J. 865

(1968); Wilder, Prosecution Discovery and the Privilege Against Self-Incrimination, 6 Am. Cr. L.Q. 3 (1967). There are assertions that prosecution discovery, even if conditioned upon the defendant's being granted discovery, is a violation of the privilege. See statements of Mr. Justice Black and Mr. Justice Douglas, 39 F.R.D. 69, 272, 277-278 (1966); C. Wright, Federal Practice and Procedure: Criminal § 256 (1969, Supp.1971). Several states require defense disclosure of an intended defense of alibi and, in some cases, a list of witnesses in support of an alibi defense, without making the requirement conditional upon prior discovery being given to the defense. *E.g.*, Ariz. R. Crim. P. 192 (B) (1956); Ind. Ann. Stat. § 9-1631-33 (1956); Mich. Comp. Laws Ann. §§ 768.20, 768 21 (1968); N.Y. CPL §250.20 (McKinney 1971); and Ohio Rev. Code Ann. § 2945.58 (1954). State courts have refused to hold these statutes violative of the privilege against self-incrimination. See *State* v. *Thayer*, 124 Ohio St. 1, 176 N.E. 656 (1931), and *People* v. *Rakiec*, 260 App. Div. 452, 23 N.Y.S. 2d 607, aff'd, 289 N.Y. 306, 45 N.E. 2d 812 (1942). See also rule 12.1 and Advisory Committee Note thereto.

Some state courts have held that a defendant may be required to disclose, in advance of trial, evidence which he intends to use on his own behalf at trial without violating the privilege against self-incrimination. See *Jones* v. *Superior Court of Nevada County*, 58 Cal. 2d 56, 22 Cal. Rptr. 879, 372 P. 2d 919 (1962); *People* v. *Lopez*, 60 Cal. 2d 223, 32 Cal. Rptr. 424, 384 P. 2d 16 (1963); Comment, The Self-Incrimination Privilege: Barrier to Criminal Discovery?, 51 Calif. L. Rev. 135 (1963); Note, 76 Harv. L. Rev. 838 (1963). The court in *Jones* v. *Superior Court of Nevada County*, *supra*, suggests that if mandatory disclosure applies only to those items which the accused intends to introduce in evidence at trial, neither the incriminatory nor the involuntary aspects of the privilege against self-incrimination are present.

On balance the Advisory Committee is of the view that an independent right of discovery for both the defendant and the government is likely to contribute to both effective and fair administration. See Louisell, Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma, 53

Calif. L. Rev. 89 (1965), for an analysis of the difficulty of weighing the value of broad discovery against the value which inheres in not requiring the defendant to disclose anything which might work to his disadvantage.

Subdivision (b)(1)(A) provides that the court shall order pretrial disclosure of any documents and tangible objects which the defendant has in his possession, custody, or control and which he intends to introduce in evidence at the trial.

Subdivision (b)(1)(B) provides that the court must grant the government discovery of the results of physical or mental examinations and scientific tests or experiments if (a) they were made in connection with a particular case; (b) the defendant has them under his control; and (c) he intends to offer them in evidence at the trial or which were prepared by a defense witness and the results or reports relate to the witness's testimony. In cases where both prosecution and defense have employed experts to conduct tests such as psychiatric examinations, it seems as important for the government to be able to study the results reached by defense experts which are to be called by the defendant as it does for the defendant to study those of government experts. See Schultz, Criminal Discovery by the Prosecution: Frontier Developments and Some Proposals for the Future, 22 N.Y.U. Intra. L. Rev. 268 (1967); American Bar Association, Standards Relating to Discovery and Procedure Before Trial §3.2 (Supp., Approved Draft, 1970).

Subdivision (b)(1)(C) provides for discovery of a list of witnesses the defendant intends to call at trial upon motion of the government. State cases have indicated that disclosure of a list of defense witnesses does not violate the defendant's privilege against self-incrimination. See *Jones* v. *Superior Court of Nevada County*, *supra*, and *People* v. *Lopez*, supra. The defendant has the same option as does the government if it is believed that disclosure of the identity of a witness may subject that witness to harm or a threat of harm. The defendant can ask for a protective order under subdivision (d)(1) or can take a deposition in accordance with the terms of rule 15.

Subdivision (b)(2) is unchanged, appearing as the last sentence of subdivision (c) of old rule 16.

Subdivision (b)(3) provides that the defendant's failure to introduce evidence or call witnesses shall not be admissible in evidence against him. In states which require pretrial disclosure of witnesses' identity, the prosecution is

not allowed to comment upon the defendant's failure to call a listed witness. See *O'Connor* v. *State*, 31 Wis. 2d 684, 143 N.W. 2d 489 (1966); *People* v. *Mancini*, 6 N.Y. 2d 853, 160 N.E. 2d 91 (1959); and *State* v. *Cocco*, 73 Ohio App. 182, 55 N.E. 2d 430 (1943). This is not, however, intended to abrogate the government's right to comment generally upon the defendant's failure to call witnesses in an appropriate case, other than the defendant's failure to testify.

Subdivision (c) is a restatement of part of old rule 16 (g).

Subdivision (d)(1) deals with the protective order. Although the rule does not attempt to indicate when a protective order should be entered, it is obvious that one would be appropriate where there is reason to believe that a witness would be subject to physical or economic harm if his identity is revealed. See Will v. United States, 389 U.S. 90 (1967). The language "by the judge alone" is not meant to be inconsistent with *Alderman* v. *United States*, 394 U.S. 165 (1969). In *Alderman* the court points out that there may be appropriate occasions for the trial judge to decide questions relating to pretrial disclosure. See *Alderman* v. *United States*, 394 U.S. at 182 n.14.

Subdivision (d)(2) is a restatement of part of old rule 16 (g) and (d).

Old subdivision (f) of rule 16 dealing with time of motions is dropped because rule 12(c) provides the judge with authority to set the time for the making of pretrial motions including requests for discovery. Rule 12 also prescribes the consequences which follow from a failure to make a pretrial motion at the time fixed by the court. See rule 12(f).

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 ~~commissioner~~ *United States magistrate* in a proceeding before him, but it need not be under the seal of the court.

* * *

(f)

(2) PLACE. ~~A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person. A non-resident of the district may be required to attend only in the county where he is served with a subpoena or within 40 miles from the place of service or at such other place as is fixed by the court.~~ *The witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the trial court.*

(g) CONTEMPT. Failure by any person without adequate excuse to obey a subpoena served upon him 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 ~~commissioner~~ *United States magistrate.*

Rule 17. Subpoena.

Advisory Committee Note

Subdivisions (a) and (g) are amended to reflect the existence of the "United States magistrate," a phrase defined in rule 54.

Subdivision (f)(2) is amended to provide that the court has discretion over the place at which the deposition is to be taken. Similar authority is conferred by Civil Rule 45(d)(2). See C. Wright, Federal Practice and Procedure: Criminal § 278 (1969).

Ordinarily the deposition should be taken at the place most convenient for the witness but, under certain circumstances, the parties may prefer to arrange for the presence of the witness at a place more convenient to counsel.

Rule 20. Transfer From the District for Plea and Sentence

(a) INDICTMENT OR INFORMATION PENDING. A defendant arrested, ~~or~~ held, *or found* in a district other than that in which ~~the~~ *an* indictment or information is pending against him may state in writing that he wishes 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 was arrested, ~~or is~~ held, *or found*, 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

[illegible]ding or certified copies thereof to the clerk [illegible] court for the district in which the defendant is *arrested*, held, *or found*, and the prosecution shall continue in that district.

[illegible] INDICTMENT OR INFORMATION NOT PENDING. A defendant arrested, ~~on a warrant issued upon a complaint~~ held, or found in a district other than the district in which a complaint is pending against him ~~of arrest~~ may state in writing that he wishes to plead guilty or nolo contendere, to waive trial in the district in which the warrant was issued, and to consent to disposition of the case in the district in which he was arrested, held, or found, 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 and upon filing of an information or the return of an indictment, the clerk of the court for the district in which the warrant was issued shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant was arrested, held, or found, and the prosecution shall continue in that district. [illegible] the defendant is brought before the court to plead to an information filed in the district [illegible] the warrant was issued, he may at that [illegible] waive indictment as provided in ~~Rule~~ *rule* [illegible] the prosecution may continue based upon the information originally filed.

[illegible] EFFECT OF NOT GUILTY PLEA. If after [illegible] proceeding has been transferred pursuant to [illegible] (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 wishes to plead guilty or nolo contendere shall not be used against him.

(d) JUVENILES. A juvenile (as defined in 18 U.S.C. § 5031) who is arrested, ~~or~~ held, *or found* in a district other than that in which he 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 been advised by counsel and with the approval of the court and the United States attorney, consent to be proceeded against as a juvenile delinquent in the district in which he is arrested, ~~or~~ held, *or found*. The consent shall be given in writing before the court but only after the court has apprised the juvenile of his rights, including the right to be returned to the district in which he is alleged to have committed the act, and of the consequences of such consent.

~~(e) SUMMONS. For the purpose of initiating a transfer under this rule a person who appears in response to a summons issued under Rule 4 shall be treated as if he had been arrested on a warrant in the district of such appearance.~~

Rule 20. Transfer From the District for Plea and Sentence

Advisory Committee Note

Rule 20 is amended to provide that a person "found" in a district other than the district in which he is charged with a criminal offense may, subject to the other provisions of rule 20, plead guilty in the district in which he is "found." Under the former rule, practice is to have the district in which the offense occurred issue a bench warrant authorizing the arrest of the defendant in the district in which he is "found". This is a procedural complication which serves no interest of either the government or the defense and therefore can properly be dispensed with.

Making the fact that a defendant is "found" in the district an adequate basis for allowing him to plead guilty there makes it unnecessary to retain subdivision (c) which makes appearance in response to a summons equivalent to an arrest. Dropping (c) will eliminate some minor ambiguity created by that subdivision. See C. Wright, Federal Practice and Procedure: Criminal § 322 n.26, p. 612 (1969, Supp. 1971).

Rule 29.1 Closing Argument.

After the closing of evidence the prosecution shall open the argument. The defense shall be permitted to reply. The prosecution shall then be permitted to reply in rebuttal.

ADVISORY COMMITTEE NOTE

This rule is designed to control the order of closing argument. It reflects the Advisory Committee's view that it is desirable to have a uniform federal practice. The rule is drafted in the view that fair and effective administration of justice is best served if the defendant knows the arguments actually made by the prosecution in behalf of conviction before the defendant is faced with the decision whether to reply and what to reply.

Rule 31. Verdict.

(e) Criminal Forfeiture. If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.

Rule 31 (e)

Advisory Committee Note

Subdivision (e) is new. It is intended to provide procedural implementation of the recently enacted criminal forfeiture provision of the Organized Crime Control Act of 1970, Title IX, §1963, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II, §408 (a)(2).

The assumption of the draft is that the amount of the interest or property subject to criminal forfeiture is an element of the offense to be alleged and proved. See Advisory Committee Note to rule 7 (c)(2).

Although special verdict provisions are rare in criminal cases, they are not unknown. See United States v. Spock, 416 F.2d 165 (1st Cir. 1969), especially footnote 41 where authorities are listed.

Rule 32. Sentence and Judgment.

(a) SENTENCE.

(1) Imposition of Sentence. Sentence shall be imposed without unreasonable delay. ~~Pending sentence the court may commit the defendant or continue or alter the bail.~~ Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.

(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 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.

(b) JUDGMENT.

(1) In General. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(2) Criminal Forfeiture. When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

(c) PRESENTENCE INVESTIGATION.

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation, ~~unless the court otherwise directs~~ *except that the court, at its discretion, may dispense with a presentence report, in the following situations:*

(A) If the maximum penalty is one year or less;

(B) If the defendant has two or more prior felony convictions;

(C) If the defendant refuses to be interviewed by the probation department or requests that disposition be made without a presentence report;

(D) If it is impractical to verify the background of the defendant.

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty, *except that a judge may, with the consent of the defendant, inspect a presentence report to determine whether a plea agreement should be accepted pursuant to rule 11(e)(3).*

(2) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

(3) *Disclosure.*

(A) Before imposing sentence the court ~~may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation~~ shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, unless in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, 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; and the court shall afford the defendant or his counsel an opportunity to comment thereon.

(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 or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

(D) *Any copies of the presentence investigation report made available to the defendant or his 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. Copies of the presentence investigation report shall not be made by the defendant, his counsel, or the attorney for the government.*

(E) *The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons or the Youth Correction Division of the Board of Parole pursuant to 18 U.S.C. 4208(b), 4252, 5010(e), or 5034 shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.*

(d) WITHDRAWAL OF PLEA OF GUILTY. A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(e) PROBATION. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation ~~as provided by law~~ if permitted by law.

(f) REVOCATION OF PROBATION. The court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing.

ADVISORY COMMITTEE NOTE

Subdivision (a)(1) is amended by deleting the reference to commitment or release pending sentencing. This issue is dealt with explicitly in the proposed revision of rule 46 (c).

Subdivision (a)(2) is amended to make clear that there is no duty on the court to advise the defendant of the right to appeal after sentence is imposed following a plea of guilty or nolo contendere.

To require the court to advise the defendant of a right to appeal after a plea of guilty, accepted pursuant to the increasingly stringent requirements of rule 11, is likely to be confusing to the defendant. See American Bar Association Standards Relating to Criminal Appeals § 2.1(b) (Approved Draft, 1970), limiting the court's duty to advise to "contested cases."

The Advisory Committee is of the opinion that such advice, following a sentence imposed after a plea of guilty, will merely tend to build false hopes and encourage frivolous appeals, with the attendant expense to the defendant or the taxpayers.

Former rule 32(a)(2) imposes a duty only upon conviction after "trial on a plea of not guilty." The few federal cases dealing with the question have interpreted rule 32(a)(2) to say that the court has no duty to advise defendant of his right to appeal after conviction following a guilty plea. *Burton* v. *United States*, 307 F. Supp. 448, 450 (D. Ariz. 1970); *Alaway* v. *United States*, 280 F. Supp. 326, 336 (C.D. Calif. 1968); *Crow* v. *United States*, 397 F. 2d 284, 285 (10th Cir. 1968).

Prior to the 1966 amendment of rule 32, the court's duty was even more limited. At that time [rule 37(a)(2)] the court's duty to advise was limited to those situations in which sentence was imposed after trial upon a not guilty plea of a defendant not represented by counsel. 8A J. Moore, Federal Practice ¶ 32.01[3] (2d ed. Cipes 1969); C. Wright, Federal Practice and Procedure: Criminal § 528 (1969); 5 L. Orfield, Criminal Procedure Under the Federal Rules § 32:11 (1967).

Subdivision (b)(2) is new. It is intended to provide procedural implementation of the recently enacted criminal forfeiture provisions of the Organized Crime Control Act of 1970, Title IX, §1963, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II, §408 (a)(2).

18 U.S.C. §1963 (c) provides for property seizure and disposition. In part it states:

> (c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper.

Although not specifically provided for in the Comprehensive Drug Abuse Prevention and Control Act of 1970, the provision of Title II, §408 (a)(2) forfeiting "profits" or "interest" will need to be implemented procedurally, and therefore new rule 32 (b)(2) will be applicable also to that legislation.

For a brief discussion of the procedural implications of a criminal forfeiture, see Advisory Committee Note to rule 7 (c)(2).

Subdivision (c)(1) makes clear that a presentence report is required except when the maximum penalty is a year or less; the defendant has two or more prior felony convictions; the defendant refuses to be interviewed or requests disposition without a presentence report; or it is impractical to verify the background of the defendant. Although not stated, it is obvious that a presentence report is not required if a prior report, still

reasonably current, is available. In these situations the sentencing judge is not required to have a

presentence investigation but *may have one*. For example, there may be cases involving foreigners or instances in which the defendant consents to disposition without a presentence report because he does not want the judge to learn of information which will lead to a more severe sentence. The judge may, and probably will, want to have a presentence investigation in the latter case, if he suspects its existence, and the

rule gives him the authority to do so. Also it seems clear to the Advisory Committee that the presentence report is of great value for correctional purposes and will serve as a valuable aid in reviewing sentences to the extent that sentence review may be authorized by future rule change. For an analysis of the current rule as it relates to the situation in which a presentence investigation is required, see C. Wright, Federal Practice and Procedure: Criminal §522 (1969); 8A J. Moore, Federal Practice ¶32.03 [1] (2d ed. Cipes 1969).

Subdivision (c)(1) is also changed to permit the judge, after obtaining defendant's consent, to see the presentence report in order to decide whether to accept a plea agreement. The change is designed to implement the plea agreement procedure proposed in rule 11.

Former subdivision (c)(1) provided that "The report shall not be submitted to the court * * * unless the defendant has pleaded guilty * * *." This precluded a judge from seeing a presentence report prior to the acceptance of the plea of guilty. L. Orfield, Criminal Procedure Under the Federal Rules § 32:35 (1957); 8A J. Moore, Federal Practice ¶ 32.03[2], p. 32-22 (2d ed. Cipes 1969); C. Wright, Federal Practice and Procedure: Criminal § 523, p. 392 (1969); *Gregg* v. *United States*, 394 U.S. 489 (1969).

Because many plea agreements will deal with the sentence to be imposed, it will be important, under rule 11, for the judge to have access to sentencing information as a basis for deciding whether the plea agreement is an appropriate one.

It has been suggested that the problem be dealt with by allowing the judge to indicate approval of the plea agreement subject to the condition that the information in the presentence report is consistent with what he has been told about the case by counsel. See American Bar Association, Standards Relating to Pleas of Guilty §3.3 (Approved Draft, 1968); President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 136 (1967).

Allowing the judge to see the presentence report prior to his decision as to whether to accept the plea agreement is, in the view of the Advisory Committee, preferable to a conditional acceptance of the plea. See Enker, Perspectives on Plea Bargaining, Appendix A of President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts at 117 (1967). It enables the judge to have all of the information available to him at the time he is called upon to decide whether or not to accept the plea of guilty and thus avoids the necessity of a subsequent appearance whenever the information is such that the judge decides to reject the plea agreement.

There is presently authority to have a presentence report *prepared* prior to the acceptance of the plea of guilty. In *Gregg* v. *United States*, 394 U.S. 489, 491 (1969), the court said that the "language [of rule 32] clearly permits the preparation of a presentence report before guilty plea or conviction [3] * * *." In footnote 3 the court said:

[3] The history of the rule confirms this interpretation. The first Preliminary Draft of the rule would have required the consent of the defendant or his attorney to commence the investigation before the determination of guilt. Advisory Committee on Rules of Criminal Procedure, Fed. Rules Crim. Proc., Preliminary Draft 130, 133 (1943). The Second Preliminary Draft omitted this requirement and imposed no limitation on the time when the report could be made and submitted to the court. Advisory Committee on Rules of Criminal Procedure, Fed. Rules Crim. Proc., Second Preliminary Draft 126-128 (1944). The third and final draft, which was adopted as Rule 32, was evidently a compromise between those who opposed any time limitation, and those who preferred that the entire investigation be conducted before determination of guilt. See 5 L. Orfield, Criminal Procedure Under the Federal Rules § 32.2 (1967).

Where the judge rejects the plea agreement after seeing the presentence report, he should be free to recuse himself from later presiding over the trial of the case. This is left to the discretion of the judge. There are instances involving prior convictions where a judge may have seen a presentence report, yet can properly try a case on a plea of not guilty. Webster v. United States, F. Supp. (1971). Unlike the situation in Gregg v. United States, subdivision

provides for disclosure of the presentence report to the defendant, and this will enable counsel to know whether the information thus made available to the judge is likely to be prejudicial. Presently trial judges who decide pretrial motions to suppress illegally obtained evidence are not, for that reason alone, precluded from presiding at a later trial.

Subdivision (c)(3)(A) requires disclosure of presentence information to the defense, exclusive of any recommendation of sentence. The court is required to disclose the report to defendant or his counsel unless the court is of the opinion that disclosure would seriously interfere with rehabilitation, compromise confidentiality, or create risk of harm to the defendant or others.

Any recommendation as to sentence should not be disclosed as it may impair the effectiveness of the probation officer if the defendant is under supervision on probation or parole.

The issue of disclosure of presentence information to the defense has been the subject of recommendations from the Advisory Committee in 1944, 1962, 1964, and 1966. The history is dealt with in considerable detail in C. Wright, Federal Practice and Procedure: Criminal §524 (1969), and 8A J. Moore, Federal Practice ¶32.03 [4] (2d ed. Cipes 1969).

In recent years, three prestigious organizations have recommended that the report be disclosed to the defense. See American Bar Association, Standards Relating to Sentencing Alternatives and Procedures § 4.4 (Approved Draft, 1968); American Law Institute, Model Penal Code § 7.07 (5) (P.O.D. 1962); National Council on Crime and Delinquency, Model Sentencing Act § 4 (1963). This is the recommendation of the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967) at p. 145:

> [illegible] absence of compelling reasons for nondisclosure of special [illegible] the defendant and his counsel should be permitted to [illegible] the entire presentence report.

The arguments for and against disclosure are well known and effectively set forth in American Bar Association Standards Relating to Sentencing Alternatives and Procedures, § 4.4 Commentary at pp. 214-225 (Approved Draft, 1968). See also Lehrich, The Use and Disclosure of Presentence Reports in the United States, 47 F.R.D. 225 (1969).

A useful account of existing practices in Detroit, Michigan and Milwaukee, Wisconsin is found in R. Dawson, Sentencing (1969).

Most members of the federal judiciary have, in the past, opposed compulsory disclosure. See the view of District Judge Edwin M. Stanley, American Bar Association Standards Relating to Sentencing Alternatives and Procedures, Appendix A. (Appendix A also contains the results of a survey of all federal judges showing that the clear majority opposed disclosure.)

The Advisory Committee is of the view that accuracy of sentencing information is important not only to the defendant but also to effective correctional treatment of a convicted offender. The best way of insuring accuracy is disclosure with an opportunity for the defendant and counsel to point out to the court information thought by the defense to be inaccurate, incomplete, or otherwise misleading. Experience in jurisdictions which require disclosure does not lend support to the argument that disclosure will result in less complete presentence reports or the argument that sentencing procedures will become unnecessarily protracted. It is not intended that the probation officer would be subjected to any rigorous examination by defense counsel, or that he will even be sworn to testify. The proceedings may be very informal in nature unless the court orders a full hearing.

Subdivision (c)(3)(B) provides for situations in which the sentencing judge believes that disclosure should not be made under the criteria set forth in subdivision (c)(3)(A). He may disclose only a summary of that factual information "to be relied on in determining sentence." This is similar to the proposal of the American Bar Association Standards Relating to Sentencing Alternatives and Procedures, §4.4 (b) and Commentary at pp. 216-224.

Subdivision (c)(3)(D) provides for the return of disclosed presentence reports to insure that they do not become available to unauthorized persons. See National Council on Crime and Delinquency, Model Sentencing Act §4 (1963): "Such reports shall be part of the record but shall be sealed and opened only on order of the court."

Subdivision (c)(3)(E) makes clear that diagnostic studies under 18 U.S.C. 4208 (b), 5010 (c), or 5034 are covered by this rule and also that 18 U.S.C. 4252 is included within the disclosure provisions of subdivision (c). Section 4252 provides for the presentence examination of an "eligible offender" who is believed to be an addict to determine whether "he is an addict and is likely to be rehabilitated through treatment."

Both the Organized Crime Control Act of 1970 [§ 3575(b)] and the Comprehensive Drug Abuse Prevention and Control Act of 1970 [§ 409(b)] have special provisions for presentence investigation in the implementation of the dangerous special offender provision. It is, however, unnecessary to incorporate them by reference in rule 32 because each contains a specific provision requiring disclosure of the presentence report. The judge does have authority to withhold some information "in extraordinary cases" provided notice is given the parties and the court's reasons for withholding information are made part of the record.

Subdivision (e) is amended to clarify the meaning.

Rule 38. Stay of Execution, and Relief Pending Review

(a) STAY OF EXECUTION.

(1) Death. A sentence of death shall be stayed if an appeal is taken.

(2) Imprisonment. A sentence of imprisonment shall be stayed if an appeal is taken and the defendant is ~~admitted to bail~~ *released pending disposition of appeal pursuant to rule 9(b) of the Federal Rules of Appellate Procedure.* If *not stayed,* ~~the defendant is not admitted to bail,~~ 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 appeal is to be heard, for a period reasonably necessary to permit the defendant to assist in the preparation of his 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 assets.

(4) Probation. An order placing the defendant on probation *may* ~~shall~~ be stayed if an appeal is taken. *If not stayed, the court shall specify when the term of probation shall commence. If the order is stayed the court shall fix the terms of the stay.*

Rule 38. Stay of Execution, and Relief Pending Review

Advisory Committee Note

Rule 38(a)(2) is amended to reflect rule 9(b), Federal Rules of Appellate Procedure. The criteria for the stay of a sentence of imprisonment pending disposition of an appeal are those specified in rule 9(c) which incorporates 18 U.S.C. §3148 by reference.

The last sentence of subdivision (a)(2) is retained although easy access to the defendant has become less important with the passage of the Criminal Justice Act which provides for compensation to the attorney to travel to the place at which the defendant is confined. Whether the court will recommend confinement near the place of trial or place where the appeal is to be heard will depend upon a balancing of convenience against the possible advantage of confinement at a more remote correctional institution where facilities and program may be more adequate.

The amendment to subdivision (a)(4) gives the court discretion in deciding whether to stay the order placing the defendant on probation. It also makes mandatory the fixing of condition for the stay if a stay is granted. The court cannot release the defendant pending appeal without either placing him on probation or fixing the conditions for the stay under the Bail Reform Act, 18 U.S.C. § 3148. Former rule 38(a)(4) makes mandatory a stay of an order placing the defendant on probation whenever an appeal is noted. The court may or may not impose conditions upon the stay. See rule 46, Federal Rules of Criminal Procedure; and the Bail Reform Act, 18 U.S.C. § 3148.

Having the defendant on probation during the period of appeal may serve the objectives of both community protection and defendant rehabilitation. In current practice, the order of probation is sometimes stayed for an appeal period as long as two years. In a situation where the appeal is unsuccessful, the defendant must start under probation supervision after so long a time that the conditions of probation imposed at the time of initial sentencing may no longer appropriately relate either to the defendant's need for rehabilitation or to the community's need for protection. The purposes of probation are more likely to be served if the judge can exercise discretion, in appropriate cases, to require the defendant to be under probation during the period of appeal. The American Bar Association Project on Standards for Criminal Justice takes the position that prompt imposition of sentence aids in the rehabilitation of defendants, ABA Standards Relating to Pleas of Guilty § 1.8(a)(i), Commentary p. 40 (Approved Draft, 1968). See also Sutherland and Cressey, Principles of Criminology 336 (1966).

Under 18 U.S.C. § 3148 the court now has discretion to impose conditions of release which are necessary to protect the community against danger from the defendant. This is in contrast to release prior to conviction, where the only appropriate criterion is insuring the appearance of the defendant. 18 U.S.C. § 3146. Because the court may impose conditions of release to insure community protection, it seems appropriate to enable the court to do so by ordering the defendant to submit to probation supervision during the period of appeal, thus giving the probation service responsibility for supervision.

A major difference between probation and release under 18 U.S.C. § 3148 exists if the defendant violates the conditions imposed upon his release. In the event that release is under 18 U.S.C. § 3148, the violation of the condition may result in his being placed in custody pending the decision on appeal. If the appeal were unsuccessful, the order placing him on probation presumably would become effective at that time, and he would then be released under probation supervision. If the defendant were placed on probation, his violation of a condition could result in the imposition of a jail or prison sentence. If the appeal were unsuccessful, the jail or prison sentence would continue to be served.

Rule 40. Commitment to Another District; Removal

(a) ARREST IN NEARBY DISTRICT. If a person is arrested on a warrant issued upon a complaint in a district other than the district of the arrest but in the same state, or on a warrant issued upon a complaint in another state but at a place less than 100 miles from the place of arrest, or without a warrant for an offense committed in another district in the same state or in another state but at a place less than 100 miles from the place of the arrest, he shall be taken *without unnecessary delay* before the nearest available ~~commissioner or other nearby officer described in Rule 5 (a)~~ *federal magistrate;* preliminary proceedings shall be conducted in accordance with rules 5 ~~(b) and (c)~~ *and 5.1;* and if held to answer, he shall be held to answer to the district court for the district in which the prosecution is pending, or if the arrest was without a warrant, for the district in which the offense was committed. If such an arrest is made on a warrant issued on an indictment or information, the person arrested shall be taken before the district court in which the prosecution is pending or, for the purpose of admission to bail, before a ~~commissioner~~ *federal magistrate* in the district of the arrest in accordance with provisions of rule 9(c)(1) who shall not be bound by the amount of bail previously fixed.

(b) ARREST IN DISTANT DISTRICT.

(1) Appearance Before ~~Commissioner or Judge~~ *Federal Magistrate.* If a person is arrested upon a warrant issued in another state at a place 100 miles or more from the place of arrest, or without a warrant for an offense committed in another state at a place 100 miles or more from the place of arrest, he shall be taken without unnecessary delay before the nearest available ~~commissioner or a nearby judge of the United States~~ *federal magistrate* in the district in which the arrest was made.

(2) Statement by ~~Commissioner or Judge~~ *Federal Magistrate.* The ~~commissioner or judge~~ *federal magistrate* shall inform the defendant of the ~~charge against him, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and~~ *rights specified in rule 5 (c),* of his right to have a hearing or to waive a hearing by signing a waiver before the ~~commissioner or judge~~ *federal magistrate, of the provisions of rule 20, and shall authorize his release under the terms provided for by these rules and by 18 U.S.C. § 3146 and § 3148* without being bound by the amount of bail previously fixed. ~~The commissioner or judge shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him, shall allow him reasonable opportunity to consult counsel and shall admit him to bail as provided in these rules.~~

(3) Hearing; Warrant of Removal or Discharge. The defendant shall not be called upon to plead. If the defendant waives hearing, ~~the~~ *a* judge *of the United States* shall issue a warrant of removal to the district where the prosecution is pending. If the defendant does not waive hearing, the ~~commissioner or judge~~ *federal magistrate* shall hear the evidence. At the hearing the defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If ~~the commissioner~~ *a United States magistrate* hears the evidence he shall report his findings and recommendations to ~~the~~ *a* judge *of the United States.* If it appears from the ~~commissioner's~~ *United States magistrate's* report or from the evidence adduced before the judge of the United States that sufficient ground has been shown for ordering the removal of the defendant, the judge shall issue a warrant of removal to the district where the prosecution is pending. Otherwise he shall discharge the defendant. *There is "sufficient grounds" for ordering removal under the following circumstances:*

(A) If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment.

(B) If the prosecution is by information or complaint, a warrant of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offense charged.

(C) ~~Hearing and Removal on Arrest without a Warrant.~~ If a person is arrested without a warrant, the hearing may be continued for a reasonable time, upon a showing of probable cause to believe that he is guilty of the offense charged; but he may not be removed as herein provided unless a warrant issued in the district in which the offense ~~was~~ *is alleged to have been* committed is presented.

(4) *Bail.* If a warrant of removal is issued, the defendant shall be admitted to bail for appearance in the district in which the prosecution is pending ~~in accordance with Rule 46~~ *under the terms provided for by these rules and by 18 U.S.C. § 3146 and § 3148* without regard to the amount of bail previously fixed. After a defendant is held for removal or is discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

(5) Authority of United States Magistrate. When authorized by a rule of the district court, adopted in accordance with 28 U.S.C. §636 (b), a United States magistrate may issue a warrant of removal under subdivision (b)(3) of this rule.

Rule 40. Commitment to Another District; Removal.

Advisory Committee Note

Subdivision (a) is amended to make clear that the person shall be taken before the federal magistrate "without unnecessary delay." Although the former rule was silent in this regard, it probably would have been interpreted to require prompt appearance, and there is therefore advantage in making this explicit in the rule itself. See C. Wright, Federal Practice and Procedure: Criminal § 652 (1969, Supp. 1971). Subdivision (a) is amended to also make clear that the person is to be brought before a "federal magistrate" rather than a state or local magistrate authorized by 18 U.S.C. § 3041. The former rules were inconsistent in this regard. Although rule 40(a) provided that the person may be brought before a state or local officer authorized by former rule 5(a), such state or local officer lacks authority to conduct a preliminary examination under rule 5(c), and a principal purpose of the appearance is to hold a preliminary examination where no prior indictment or information has issued. The Federal Magistrates Act should make it possible to bring a person before a federal magistrate. See C. Wright, Federal Practice and Procedure: Criminal § 653, especially n.35 (1969, Supp. 1971).

The reference to the federal magistrate not being bound by bail previously fixed reflects the fact that the magistrate will be better able to fix bail in accordance with the criteria of the Bail Reform Act of 1966. Of course, the magistrate may, in making his decision, consider the amount of bail previously fixed under rule 9 (b)(1) and endorsed on the warrant.

Subdivision (b)(2) is amended to provide that the federal magistrate should inform the defendant of the fact that he may avail himself of the provisions of rule 20 if applicable in the particular case. However, the failure to so notify the defendant should not invalidate the removal procedure. Although the old rule is silent in this respect, it is current practice to so notify the defendant, and it seems desirable, therefore, to make this explicit in the rule itself.

The requirement that an order of removal under subdivision (b)(3) can be made only by a judge of the United States and cannot be made by a United States magisrate is retained. However, subdivision (b)(5) authorizes issuance of the warrant of removal by a United States magistrate if he is authorized to do so by a rule of district court adopted in accordance with 28 U.S.C. § 636(b):

> Any district court * * * by the concurrence of a majority of all the judges * * * may establish rules pursuant to which any full-time United States magistrate * * * may be assigned * * * such additional duties as are not inconsistent with the Constitution and laws of the United States.

Although former rule 40(b)(3) required that the warrant of removal be issued by a judge of the United States, there appears no constitutional or statutory prohibition against conferring this authority upon a United States magistrate in accordance with 28 U.S.C. § 636(b). The background history is dealt with in detail in 8A J. Moore, Federal Practice ¶¶ 40.01 and 40.02 (2d ed. Cipes 1970, Supp.1971).

Subdivision (b)(4) makes explicit reference to provisions of the Bail Reform Act of 1966 by incorporating a cross-reference to 18 U.S.C. § 3146 and § 3148.

Rule 41. Search and Seizure

(a) AUTHORITY TO ISSUE WARRANT. A search warrant authorized by this rule may be issued by a *federal magistrate or a* judge of a state ~~of the United States or~~ ; ~~commonwealth, or territorial~~ court of record ~~or by a United States commissioner~~ within the district wherein the property sought is located, *upon request of a federal law enforcement officer or an attorney for the government.*

(b) ~~GROUNDS FOR ISSUANCE.~~ *Property Which May Be Seized With a Warrant.* A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; ~~stolen or embezzled in violation of the laws of the United States;~~ or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense. ~~possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C., §957.~~

(c) ISSUANCE AND CONTENTS. A warrant shall issue only on *an* affidavit *or affidavits* sworn to before the ~~judge or commissioner~~ *federal magistrate or state judge* and establishing the grounds for issuing the warrant. If the ~~judge or commissioner~~ *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 shall issue a warrant identifying the property 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 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 state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof.~~ It shall command the officer to search, *within a specified period of time not to exceed 10 days,* ~~forthwith~~ the person or place named for the property specified. The warrant shall ~~direct that it~~ be served in the daytime, ~~but if the affidavits are positive that the property is on the person or in the place to be searched,~~

~~the warrant may direct that it be served at any time.~~ 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 ~~the district judge or the commissioner~~ a federal magistrate to whom it shall be returned.

(d) EXECUTION AND RETURN WITH INVENTORY. ~~The warrant may be executed and returned only within 10 days after its date.~~ The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The ~~judge or commissioner~~ *federal magistrate* shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) MOTION FOR RETURN OF PROPERTY. ~~And To Suppress Evidence.~~ 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 ~~and to suppress for the use as evidence anything so obtained~~ on the ground that ~~(1)~~ the ~~property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed~~ *he 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 ~~unless otherwise subject to lawful detention~~ and it shall not be admissible in evidence at any hearing or trial. ~~The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.~~ *If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under rule 12.*

(f) *MOTION TO SUPPRESS. A motion to suppress evidence may be made in the court of the district of trial as provided in rule 12.*

(g) RETURN OF PAPERS TO CLERK. The ~~judge or commissioner who has issued a search warrant~~ *federal magistrate before whom the warrant is returned* shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

(h) SCOPE AND DEFINITION. This rule does not modify any act, inconsistent with it,

regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. *The term "daytime" is used in this rule to mean the hours from 6:00 a.m. to 10:00 p.m. according to local time.* The phrase "federal law enforcement officer" is used in this rule to mean any government agent, other than an attorney for the government as defined in rule 54 (c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.

Rule 41. Search and Seizure.

Advisory Committee Note

Subdivision (a) is amended to provide that a search warrant may be issued only upon the request of a federal law enforcement officer or an attorney for the government. The phrase "federal law enforcement officer" is defined in subdivision (h) in a way which will allow the Attorney General to designate the category of officers who are authorized to make application for a search warrant. The phrase "attorney for the government" is defined in rule 54.

The title to subdivision (b) is changed to make it conform more accurately to the content of the subdivision. Subdivision (b) is also changed to modernize the language used to describe the property which may be seized with a lawfully issued search warrant and to take account of a recent Supreme Court decision (*Warden* v. *Hayden*, 387 U.S. 294 (1967)) and recent congressional action (18 U.S.C. § 3103a) which authorize the issuance of a search warrant to search for items of solely evidential value. 18 U.S.C. § 3103a provides that "a warrant may be issued to search for and seize any property that constitutes evidence of a criminal offense . . . ."

Recent state legislation authorizes the issuance of a search warrant for evidence of crime. See, *e.g.*, Cal. Penal Code § 1524 (4) (West Supp. 1968); Ill. Rev. Stat. ch. 38, § 108-3 (1965); LSA C. Cr. P. art. 161 (1967); N.Y. CPL §690.10 (4) (McKinney, 1971) ; Ore. Rev. Stat. § 141.010 (1969); Wis. Stat §968.13 (2) (1969).

The general weight of recent text and law review comment has been in favor of allowing a search for evidence. 8 Wigmore, Evidence § 2184a (McNaughton rev. 1961); Kamisar, The Wiretapping-Eavesdropping Problem: A Professor's View, 44 Minn. L. Rev. 891 (1960); Kaplan, Search and Seizure: A No-Man's Land in the Criminal Law, 49 Calif. L. Rev. 474 (1961); Comments: 66 Colum. L. Rev. 355 (1966), 45 N.C. L. Rev. 512 (1967), 20 U. Chi. L. Rev. 319 (1953).

There is no intention to limit the protection of the fifth amendment against compulsory self-incrimination, so items which are solely "testimonial" or "communicative" in nature might well be inadmissible on those grounds. *Schmerber* v. *California*, 384 U.S. 757 (1966). The court referred to the possible fifth amendment limitation in *Warden* v. *Hayden*, *supra:*

This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure. [387 U.S. at 303.]

See ALI Model Code of Pre-Arraignment Procedure §551.03 (2) and commentary at pp. 3-5 (April 30, 1971).

It seems preferable to allow the fifth amendment limitation to develop as cases arise rather than attempt to articulate the constitutional doctrine as part of the rule itself.

The amendment to subdivision (c) is intended to make clear that a search warrant may properly be based upon a finding of probable cause based upon hearsay. That a search warrant may properly be issued on the basis of hearsay is current law. See, *e.g.*, *Jones* v. *United States*, 362 U.S. 257 (1960); *Spinelli* v. *United States*, 393 U.S. 410 (1969). See also *State* v. *Beal*, 40 Wis.2d 607, 162 N.W.2d 59 (1968), reversing prior Wisconsin cases which held that a search warrant could not properly issue on the basis of hearsay evidence.

The provision in subdivision (c) that the magistrate may examine the affiant or witnesses under oath is intended to assure him an opportunity to make a careful decision as to whether there is probable cause. It seems desirable to do this an an incident to the issuance of the warrant rather than having the issue raised only later on a motion to suppress the evidence. See L. Tiffany, D McIntyre, and D. Rotenberg, Detection of Crime 118 (1967). If testimony is taken it must be recorded, transcribed, and made part of the affidavit or affidavits. This is to insure an adequate basis for determining the sufficiency of the evidentiary grounds for the issuance of the search warrant if that question should later arise.

The requirement that the warrant itself state the grounds for its issuance and the names of any affiants, is eliminated as unnecessary paper work. There is no comparable requirement for an arrest warrant in rule 4. A person who

wishes to challenge the validity of a search warrant has access to the affidavits upon which the warrant was issued.

The former requirement that the warrant require that the search be conducted "forthwith" is changed to read "within a specified period of time not to exceed 10 days." The former rule contained an inconsistency between subdivision (c) requiring that the search be conducted "forthwith" and subdivision (d) requiring execution "within 10 days after its date." The amendment resolves this ambiguity and confers discretion upon the issuing magistrate to specify the time within which the search may be conducted to meet the needs of the particular case.

The rule is also changed to allow the magistrate to authorize a search at a time other than "daytime," where there is "reasonable cause shown" for doing so. To make clear what "daytime" means, the term is defined in subdivision (h).

Subdivision (d) is amended to conform its language to the Federal Magistrates Act. The language "The warrant may be executed and returned only within 10 days after its date" is omitted as unnecessary. The matter is now covered adequately in new subdivision (c) which gives the issuing officer authority to fix the time within which the warrant is to be executed.

The amendment to subdivision (e) and the addition of subdivision (f) are intended to require the motion to suppress evidence to be made in the trial court rather than in the district in which the evidence was seized as now allowed by the rule. In *DiBella v. United States*, 369 U.S. 121 (1962), the court, in effect, discouraged motions to suppress in the district in which the property was seized:

> There is a decision in the Second Circuit, *United States v. Klapholz*, 230 F. 2d 494 (1956), allowing the Government an appeal from an order granting a post-indictment motion to suppress, apparently for the single reason that the motion was filed in the district of seizure rather than of trial; but the case was soon thereafter taken by a District Court to have counseled declining jurisdiction of such motions for reasons persuasive against allowing the appeal: "This course will avoid a needless duplication of effort by two courts and provide a more expeditious resolution of the controversy besides avoiding the risk of determining prematurely and inadequately the admissibility of evidence at the trial. . . . A piecemeal adjudication such as that

which would necessarily follow from a disposition of the motion here might conceivably result in prejudice either to the Government or the defendants, or both." *United States* v. *Lester*, 21 F.R.D. 30, 31 (D.C.S.D.N.Y. 1957). Rule 41(e), of course, specifically provides for making of the motion in the district of seizure. On a summary hearing, however, the ruling there is likely always to be tentative. We think it accords most satisfactorily with sound administration of the Rules to treat such rulings as interlocutory. [369 U.S. at 132–133.]

As amended, subdivision (e) provides for a return of the property if (1) the person is entitled to lawful possession *and* (2) the seizure was illegal. This means that the judge in the district of seizure does not have to decide the legality of the seizure in cases involving contraband which, even if seized illegally, is not to be returned.

The five grounds for returning the property, listed in the old rule, are dropped for two reasons—(1) substantive grounds for objecting to illegally obtained evidence (*e.g.*, *Miranda*) are not ordinarily codified in the rules and (2) the categories are not entirely accurate. See *United States* v. *Howard*. 138 F. Supp. 376, 380 (D. Md. 1956).

A sentence is added to subdivision (e) to provide that a motion for return of property, made in the district of trial, shall be treated also as a motion to suppress under rule 12. This change is intended to further the objective of rule 12 which is to have all pretrial motions disposed of in a single court appearance rather than to have a series of pretrial motions made on different dates, causing undue delay in administration.

Subdivision (f) is new and reflects the position that it is best to have the motion to suppress made in the court of the district of trial rather than in the court of the district in which the seizure occurred. The motion to suppress in the district of trial should be made in accordance with the provisions of rule 12.

Subdivision (g) is changed to conform to subdivision (c) which requires the return to be made before a federal judicial officer even though the search warrant may have been issued by a nonfederal magistrate.

Subdivision (h) is former rule 41(g) with the addition of a definition of the term "daytime" and the phrase "federal law enforcement officer."

Rule 43. Presence of the Defendant.

(*a*) *Presence Required.* The defendant shall be present at the arraignment, *at the time of the plea*, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by ~~these~~ *this* rules. ~~In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced his presence shall not prevent continuing the trial to and including the return of the verdict.~~

(*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 right to be present whenever a defendant, initially present,

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

(2) engages in conduct which is such as to justify his being excluded from the courtroom.

(*c*) *Presence Not Required. A defendant need not be present in the following situations:*

(*1*) A corporation may appear by counsel for all purposes.

(*2*) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.

(3) At a conference or argument between counsel upon a question of law.

(4) At a reduction of sentence under ~~Rule~~ rule 35.

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Rule 43. Presence of the Defendant.

ADVISORY COMMITTEE NOTE

The revision of rule 43 is designed to reflect *Illinois* v. *Allen*, 397 U.S. 337 (1970). In *Allen*, the court held that "there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." 397 U.S. at 343-344.

Since rule 43 formerly limited trial-in absentia to situations in which there is a "voluntary absence after the trial has been commenced," it could be read as precluding a federal judge from exercising the third option held to be constitutionally permissible in Allen. The amendment is designed to make clear that the judge does have the power to exclude the defendant from the courtroom when the circumstances warrant such action.

The decision in *Allen* makes no attempt to spell out standards to guide a judge in selecting the appropriate method to ensure decorum in the courtroom and there is no attempt to do so in the revision of the rule.

The concurring opinion of Mr. Justice Brennan stresses that the trial judge should make a reasonable effort to enable an excluded defendant "to communicate with his attorney and, if possible, to keep apprised of the progress of the trial." 397 U.S. at 351. The Federal Judicial Center is presently engaged in experimenting with closed circuit television in courtrooms. The experience gained from these

experiments may make closed circuit television readily available in federal courtrooms through which an excluded defendant would be able to hear and observe the trial.

The defendant's right to be present during the trial on a capital offense has been said to be so fundamental that it may not be waived. *Diaz* v. *United States*, 223 U.S. 442, 455 (1912) (dictum); *Near* v. *Cunningham*, 313 F. 2d 929, 931 (4th Cir. 1963); C. Wright, Federal Practice and Procedure: Criminal § 723 at 199 (1969, Supp. 1971).

However, in Illinois v. Allen, supra, the court's opinion suggests that sanctions such as contempt may be least effective where the defendant is ultimately facing a far more serious sanction such as the death penalty. 397 U.S. at 345. The ultimate determination of when a defendant can waive his right to be present in a capital case is left for further clarification by the courts.

Subdivision (b)(1) makes clear that voluntary absence may constitute a waiver even if the defendant has not been informed by the court of his obligation to remain during the trial. Of course, proof of voluntary absence will require a showing that the defendant knew of the fact that the trial or other proceeding was going on. C. Wright, Federal Practice and Procedure: Criminal §723 n.35 (1969). But it is unnecessary to show that he was specifically warned of his obligation to be present; a warning seldom is thought necessary in current practice.

Subdivision (c)(3) makes clear that the defendant need not be present when the subject matter of a conference between counsel relates to an issue of law. Thus, in a hearing on a pretrial motion, the presence of a defendant is not required if the issue is limited to a question of law. For a discussion of the requirement of presence at the pretrial motion stage, see C. Wright, Federal Practice and Procedure: Criminal §721 at 195 (1969).

The other changes in the rule are editorial in nature. In the last phrase of the first sentence, "these rules" is changed to read "this rule," because there are no references in any of the other rules to situations where the defendant is not required to be present. The phrase "at the time of the plea," is added to subdivision (a) to make perfectly clear that defendant must be present at the time of the plea. See rule 11 (e)(5) which provides that the judge may set a time, other than arraignment, for the holding of a plea agreement procedure.

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 at every stage of the proceedings from his initial appearance before the ~~commissioner~~ *federal magistrate* or the court through appeal, unless he waives such appointment.

(b) ASSIGNMENT PROCEDURE. The procedures for implementing the right set out in subdivision (a) shall be those provided by law and by local rules of court established pursuant thereto.

ADVISORY COMMITTEE NOTE

Subdivision (a) is amended to reflect the Federal Magistrates Act of 1968. The phrase "federal magistrate" is defined in rule 54.

Rule 46. *Release from Custody*

Rule 46. Release on Bail.

(a) RIGHT TO BAIL.

(1) *Before Conviction.* A person arrested for an offense not punishable by death shall be admitted to bail. A person arrested for an offense punishable by death may be admitted to bail by any court or judge authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense.

(2) *Upon Review.* Bail may be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay. Pending appeal to a court of appeals, bail may be allowed by the trial judge, by the court of appeals, or by any judge thereof or by the circuit justice, to run until final termination of the proceedings in all courts. Pending appeal or certiorari to the Supreme Court, bail may be allowed by the court of appeals or by any judge thereof or by the Supreme Court or by a justice thereof. Any Court or any judge or justice authorized to grant bail may at any time revoke the order admitting the defendant to bail.

(b) BAIL FOR WITNESS. If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail the court or commissioner may commit him to the custody of the marshal pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail.

(c) TERMS. If the defendant is admitted to bail, the terms thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail, the character of the defendant, and the policy

~~against unnecessary detention of defendants pending trial.~~

~~(d) Form, Conditions and Place of Deposit. A person required or permitted to give bail shall execute a bond for his appearance. The commissioner or court or judge or justice, having regard to the considerations set forth in subdivision (c), may require one or more sureties, may authorize the acceptance of cash or bonds or notes of the United States in an amount equal to or less than the face amount of the bond, or may authorize the release of the defendant without security upon his written agreement to appear at a specified time and place and upon such conditions as may be prescribed to insure his appearance. Bail given originally on appeal shall be deposited in the registry of the district court from which the appeal is taken.~~

(a) Release Prior to Trial. Eligibility for release prior to trial shall be in accordance with 18 U.S.C. 3146, 3148, or 3149.

(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 presence during the trial or to assure that his conduct will not obstruct the orderly and expeditious progress of the trial.

(c) Pending Sentence and Notice of Appeal. Eligibility for release pending sentence or pending notice of appeal or expiration of the time allowed for filing notice of appeal, shall be in accordance with 18 U.S.C. 3148. The burden of establishing that the defendant will not flee or pose *a danger to any other person or to the community rests with the defendant.*

(d) ~~(e)~~ 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 proposes to justify and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by him and remaining undischarged and all his other liabilities. No bond shall be approved unless the surety thereon appears to be qualified.

(e) ~~(f)~~ FORFEITURE.

(1) Declaration. If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.

(2) Setting Aside. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(3) Enforcement. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses.

(4) Remission. After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

(f) ~~(g)~~ EXONERATION. When the condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody.

(g) ~~(h)~~ 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 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.

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Rule 46. Release from Custody.

ADVISORY COMMITTEE NOTE

The amendments are intended primarily to bring rule 46 into general conformity with the Bail Reform Act of 1966 and to deal in the rule with some issues not now included within the rule.

Subdivision (a) makes explicit that the Bail Reform Act of 1966 controls release on bail prior to trial.

Subdivision (b) deals with an issue not dealt with by the Bail Reform Act of 1966 or explicitly in former rule 46, that is, the issue of bail during trial. The rule gives the trial judge discretion to continue the prior conditions of release or to impose such additional conditions as are adequate to insure presence at trial or to insure that his conduct will not obstruct the orderly and expeditious progress of the trial.

Subdivision (c) provides for release during the period between the conviction and sentencing and for the giving of a notice of appeal or of the expiration of the time allowed for filing notice of appeal. There are situations in which defense counsel may informally indicate an intention to appeal but not actually give notice of appeal for several days. To deal with this situation the rule makes clear that the district court has authority to release under the terms of 18 U.S.C. §3148 pending notice of appeal (e.g., during the ten days after entry of judgement; see rule 4 (b) of the Rules of Appellate Procedure). After the filing of notice of appeal, release by the district court shall be in accordance with the provisions of rule 9 (b) of the Rules of Appellate Procedure. The burden of establishing that grounds for release exist is placed upon the defendant in the recognition that the fact of conviction justifies retention in custody in situations where doubt exists as to whether a defendant can be safely released pending either sentence or the giving of notice of appeal.

Subdivisions (d), (e), (f), and (g) remain unchanged. They are formerly lettered (e), (f), (g), and (h).

Special statutory provisions authorizing preventive detention are applicable to the District of Columbia. D. C. Code §§23-1321-23-1332, as amended by Act of July 29, 1970, Pub. L. 91-358. For reference relating to the D.C. legislation, see C. Wright, Federal Practice and Procedure: Criminal §761, p. 57 (Supp. 1971).

Rule 54. Application and Exception.

(a) COURTS. ~~and Commissioners. (1) Courts.~~ These rules apply to all criminal proceedings in the United States District Courts; in the District Court of Guam; ~~and~~ *in* the District Court of the Virgin Islands; *and* (except as otherwise provided in the Canal Zone Code) ~~these rules apply to all criminal~~ proceedings in the United States District Court for the District of the Canal Zone; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that all offenses shall continue to be prosecuted in the District Court of Guam and in the District Court of the Virgin Islands by information as heretofore except such as may be required by local law to be prosecuted by indictment by grand jury.

~~(2) *Commissioners.* The rules applicable to criminal proceedings before commissioners apply to similar proceedings before judges of the United States or of the District of Columbia. They do not apply to criminal proceedings before other officers empowered to commit persons charged with offenses against the United States.~~

(b) PROCEEDINGS.

(1) Removed Proceedings. These rules apply to criminal prosecutions removed to the United States district courts from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law.

(2) Offenses Outside a District or State. These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, except that such proceedings may be had in any district authorized by Title 18 U.S.C., § 3238.

(3) Peace Bonds. These rules do not alter the power of judges of the United States or of United States ~~commissioners~~ *magistrates* to hold to security of the peace and for good behavior under Title 18, U.S.C., § 3043, and under Revised Statutes, § 4069, 50 U.S.C., § 23, but in such cases the procedure shall conform to these rules so far as they are applicable.

~~(4) *Trials Before Commissioners.* These rules do not apply to proceedings before United States commissioners and in the district courts under Title 18, U.S.C., §§ 3401, 3402, relating to petty offenses on federal reservations.~~

(4) Proceedings Before United States Magistrates. Proceedings involving minor offenses before United States magistrates, as defined in subdivision (c) of this rule, are governed by the Rules of Procedure for the Trial of Minor Offenses before United States Magistrates.

(5) Other Proceedings. These rules are not applicable to extradition and rendition of fugitives; civil forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. Except as provided in rule 20(d) they do not apply to proceedings under Title 18, U.S.C., Chapter 403—Juvenile Delinquency—so far as they are inconsistent with that Chapter. They do not apply to summary trials for offenses against the navigation laws under Revised Statutes §§ 4300-4305, 33 U.S.C., §§ 391-396, or to proceedings involving disputes between seamen under Revised Statutes, §§ 4079-4081, as amended, 22 U.S.C. §§ 256-258, or to proceedings for fishery offenses under the Act of June 28, 1937, ch. 392, 50 Stat. 325-327, 16 U.S.C., §§ 772-772i, or to proceedings against a witness in a foreign country under Title 28, U.S.C., 1784.

(c) APPLICATION OF TERMS. As used in these rules the ~~term~~ *following terms have the designated meanings.*

"Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in Puerto Rico, in a territory or in an insular possession.

"Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney and when applicable to cases arising under the laws of Guam means the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein.

"Civil action" refers to a civil action in a district court.

The words "demurrer," "motion to quash," "plea in abatement," "plea in bar" and "special plea in bar," or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in rule 12.

"District court" includes all district courts named in subdivision (a) ~~, paragraph (1)~~ of this rule.

"Federal magistrate" means a United States magistrate as defined in 28 U.S.C. §§ 631–639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates.

"Judge of the United States" includes a judge of a district court, court of appeals, or the supreme court.

"Law" includes statutes and judicial decisions.

"Magistrate" includes a United States magistrate as defined in 28 U.S.C. §§ 631–639, a judge of the United States, another judge or judicial officer specifically empowered by statute in force in any territory or possession, the commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates, and a state or local judicial officer, authorized by 18 U.S.C. § 3041 to perform the functions prescribed in rules 3, 4, and 5.

"Minor offense" is defined in 18 U.S.C. § 3401.

"Oath" includes affirmations.

"Petty offense" is defined in 18 U.S.C. § 1 (3).

"State" includes District of Columbia, Puerto Rico, territory and insular possession.

"United States magistrate" means the officer authorized by 28 U.S.C. §§ 631–639.

ADVISORY COMMITTEE NOTE

Subdivisions (a) and (b) are amended to delete the references to "commissioners" and to substitute, where appropriate, the phrase "United States magistrates."

Subdivision (a)(2) is deleted. In its old form it makes reference to "rules applicable to criminal proceedings before commissioners," which are now replaced by the Rules of Procedure for the Trial of Minor Offenses before United States Magistrates (1971). Rule 1 of the magistrates' rules provides that they are applicable to cases involving "minor offenses" as defined in 18 U.S.C. §3401 "before United States magistrates." Cases involving "minor offenses" brought before a judge of the district court will be governed by the Rules of Criminal Procedure for the United States District Courts.

The last sentence of old subdivision (a)(2) is stricken for two reasons: (1) Whenever possible, cases should be brought before a United States magistrate rather than before a state or local judicial officer authorized by 18 U.S.C. §3041. (2) When a state or local judicial officer is involved, he should conform to the federal rules.

Subdivision (b)(4) makes clear that minor offense cases before United States magistrates are governed by the Rules of Procedure for the Trial of Minor Offenses before United States Magistrates (1971). See rule 1 of the magistrates' rules.

In subdivision (b)(5) the word "civil" is added before the word "forfeiture" to make clear that the rules do apply to criminal forfeitures. This is clearly the intention of Congress. See Senate Report No. 91-617, 91st Cong., 1st Sess., Dec. 16, 1969, at 160:

> Subsection (a) provides the remedy of criminal forfeiture. Forfeiture trials are to be governed by the Fed. R. Crim. P. But see Fed. R. Crim. P. 54 (b)(5).

Subdivision (c) is amended to list the defined terms in alphabetical order to facilitate the use of the rule. There are added six new definitions.

"Federal magistrate" is a phrase to be used whenever the rule is intended to confer authority on any federal judicial officer including a United States magistrate.

"Judge of the United States" is a phrase defined to include district court, court of appeals, and supreme court judges. It is used in the rules to indicate that only a judge (not to include a United States magistrate) is authorized to act.

"Magistrate" is a term used when both federal and state judicial officers may be authorized to act. The scope of authority of state or local judicial officers is clarified by the enumeration of those rules (3, 4, and 5) under which they are authorized to act.

"United States magistrate" is a phrase which refers to the federal judicial officer created by the Federal Magistrates Act (28 U.S.C. §§631-639).

Also added are cross references to the statutory definitions of "minor offense" and "petty offense."

Rule 55. Records.

The clerk of the district court and each United States ~~commissioner~~ *magistrate* shall keep such records in criminal proceedings as the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, may prescribe. Among the records required to be kept by the clerk shall be a book known as the "criminal docket" in which, among other things, shall be entered each order or judgment of the court. The entry of an order or judgment shall show the date the entry is made.