
AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 30, 1979, pursuant to 18 U. S. C. §§ 3771 and 3772, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *ante*, p. 970. The Judicial Conference Reports referred to in that letter are not reproduced herein.

Note that under 18 U. S. C. § 3771, such amendments do not take effect until so reported to Congress and until the expiration of 90 days thereafter. Moreover, Congress may defer the effective date to a later date or until approved by Act of Congress, or may modify such amendments.

For earlier publication of the Federal Rules of Criminal Procedure and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, and 425 U. S. 1157.

SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 30, 1979

ORDERED:

1. That the Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein Rules 26.2 and 32.1 and amendments to Rules 6 (e), 7 (c)(2), 9 (a), 11 (e)(2) and (6), 17 (h), 18, 32 (c)(3)(E) and 32 (f), 35, 40, 41 (a), (b) and (c), and 44 (c) as hereinafter set forth:

[See *infra*, pp. 989-999.]

2. That the foregoing amendments and additions to the rules of procedure shall take effect on August 1, 1979, and shall govern all criminal proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

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

SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 14, 1975

Continued

1. That the Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein Rules 30.2 and 32.1 and amendments to Rules 6 (e), 7 (a)(2), 9 (a), 11 (a)(2) and (b), 17 (b), 18, 22 (a)(2)(i) and 32 (b), 32 (d), 41 (a), (b), and (c), and 44 (a) as hereinafter set forth:

(Text set up 359-360)

2. That the foregoing amendments and additions to the rules of procedure shall take effect on August 1, 1975 and shall govern all criminal proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That the Court further do, and he hereby is authorized to transmit to the Congress the foregoing amendments and additions to the Rules of Criminal Procedure in accordance with the provisions of Title 18, United States Code, Sections 3371 and 3372.

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 6. The grand jury.

(e) *Recording and disclosure of proceedings.*

(1) *Recording of proceedings.*—All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

(2) *General rule of secrecy.*—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) *Exceptions.*

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(4) *Sealed indictments.*—The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

Rule 7. The indictment and the information.

(c) *Nature and contents.*

(2) *Criminal forfeiture.*—No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or

the information shall allege the extent of the interest or property subject to forfeiture.

Rule 9. Warrant or summons upon indictment or information.

(a) *Issuance.*—Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in an information supported by a showing of probable cause under oath as is required by Rule 4 (a), or in an indictment. Upon the request of the attorney for the government a summons instead of a warrant shall issue. If no request is made, the court may issue either a warrant or a summons in its discretion. More than one warrant or summons may issue for the same defendant. The clerk shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue.

Rule 11. Pleas.

(e) *Plea agreement procedure.*

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

(6) *Inadmissibility of pleas, plea discussions, and related statements.*—Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

- (A) a plea of guilty which was later withdrawn;
- (B) a plea of nolo contendere;
- (C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or
- (D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

Rule 17. Subpoena.

(h) *Information not subject to subpoena.*—Statements made by witnesses or prospective witnesses may not be subpoenaed from the government or the defendant under this rule, but shall be subject to production only in accordance with the provisions of Rule 26.2.

Rule 18. Place of prosecution and trial.

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.

Rule 26.2. Production of statements of witnesses.

(a) *Motion for production.*—After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the government or the defendant and his attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

(b) *Production of entire statement.*—If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party.

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

(d) *Recess for examination of statement.*—Upon delivery of the statement to the moving party, the court, upon application of that party, may recess proceedings in the trial for the examination of such statement and for preparation for its use in the trial.

(e) *Sanction for failure to produce statement.*—If the other party elects not to comply with an order to deliver a statement to the moving party, the court shall order that the

testimony of the witness be stricken from the record and that the trial proceed, or, if it is the attorney for the government who elects not to comply, shall declare a mistrial if required by the interest of justice.

(f) *Definition.*—As used in this rule, a “statement” of a witness means:

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

(2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or

(3) a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.

Rule 32. Sentence and judgment.

(c) *Presentence investigation.*

(3) *Disclosure.*

(E) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons or the Parole Commission pursuant to 18 U. S. C. §§ 4205 (c), 4252, 5010 (e), or 5037 (c) shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.

(f) [*Revocation of probation.*] [*Abrogated*]

Rule 32.1. Revocation or modification of probation.

(a) *Revocation of probation.*

(1) *Preliminary hearing.*—Whenever a probationer is held in custody on the ground that he has violated a condition of his probation, he shall be afforded a prompt hearing before any judge, or a United States magistrate who has been given

authority pursuant to 28 U. S. C. § 636 to conduct such hearings, in order to determine whether there is probable cause to hold the probationer for a revocation hearing. The probationer shall be given

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

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

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

(D) notice of his right to be represented by counsel.

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

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

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

(B) disclosure of the evidence against him;

(C) an opportunity to appear and to present evidence in his own behalf;

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

(E) notice of his right to be represented by counsel.

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

Rule 35. Correction or reduction of sentence.

(a) *Correction of sentence.*—The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

(b) *Reduction of sentence.*—The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

Rule 40. Commitment to another district.

(a) *Appearance before federal magistrate.*—If a person is arrested in a district other than that in which the offense is alleged to have been committed, he shall be taken without unnecessary delay before the nearest available federal magistrate. Preliminary proceedings concerning the defendant shall be conducted in accordance with Rules 5 and 5.1, except that if no preliminary examination is held because an indictment has been returned or an information filed or because the defendant elects to have the preliminary examination conducted in the district in which the prosecution is pending, the person shall be held to answer upon a finding that he is the person named in the indictment, information or warrant. If the defendant is held to answer, he shall be held to answer in the district court in which the prosecution is pending, provided that a warrant is issued in that district if the arrest was made without a warrant, upon production of the warrant or a certified copy thereof.

(b) *Statement by federal magistrate.*—In addition to the statements required by Rule 5, the federal magistrate shall inform the defendant of the provisions of Rule 20.

(c) *Papers*.—If a defendant is held or discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

(d) *Arrest of probationer*.—If a person is arrested for a violation of his probation in a district other than the district of supervision, he shall be taken without unnecessary delay before the nearest available federal magistrate. The federal magistrate shall:

(1) Proceed in accordance with Rule 32.1 (a) if jurisdiction over the probationer is transferred to that district pursuant to 18 U. S. C. § 3653;

(2) Hold a prompt preliminary hearing in accordance with Rule 32.1 (a)(1) if the alleged violation occurred in that district, and either (i) hold the probationer to answer in the district court of the district having probation supervision or (ii) dismiss the proceedings and so notify that court; or

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

(e) *Arrest for failure to appear*.—If a person is arrested on a warrant in a district other than that in which the warrant was issued, and the warrant was issued because of the failure of the person named therein to appear as required pursuant to a subpoena or the terms of his release, the person arrested shall be taken without unnecessary delay before the nearest available federal magistrate. Upon production of the warrant or a certified copy thereof and upon a finding that the person before him is the person named in the warrant, the federal magistrate shall hold the person to answer in the district in which the warrant was issued.

(f) *Bail*.—If bail was previously fixed in another district where a warrant, information or indictment issued, the fed-

eral magistrate shall take into account the amount of bail previously fixed and the reasons set forth therefor, if any, but will not be bound by the amount of bail previously fixed. If the federal magistrate fixes bail different from that previously fixed, he shall set forth the reasons for his action in writing.

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 court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government.

(b) *Property or persons which may be seized with a warrant.*—A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

(c) *Issuance and contents.*

(1) *Warrant upon affidavit.*—A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and

may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

Rule 44. Right to and assignment of counsel.

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

