

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

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TO: Hon. Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice
and Procedure

FROM: Hon. D. Lowell Jensen, Chair
Advisory Committee on Federal Rules of Criminal
Procedure

SUBJECT Report of Advisory Committee on Rules of Criminal Procedure

DATE: December 4, 1996

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I. INTRODUCTION.

At its meeting on October 7th and 8th, 1996, the Advisory Committee on the Rules of Criminal Procedure considered proposed or pending amendments to several Rules of Criminal Procedure. This report addresses those proposals. The minutes of that meeting and proposed amendments to Rule 58 are attached.

II. ACTION ITEMS

A. Action on Proposed Changes to Rule 58

After the Committee met in October, the President signed the Federal Courts Improvement Act of 1996 (S. 1887). Section 202 amended 18 U.S.C. § 3401(b) and (g) and 28 U.S.C. § 636(a); those amendments eliminated the requirement that a defendant consent to a trial before a magistrate judge in those cases where the defendant is charged with a petty offense which is either a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction. That same section also amended §3401(b) by allowing the defendant to consent to a trial by a magistrate judge in all other

misdemeanor cases either orally on the record or in writing. Those statutory changes will require conforming amendments to Rule 58, Procedure for Misdemeanors and Other Petty Offenses.

On the recommendation of Hon. Phillip M. Pro (Chair of the Committee on the Administration of the Magistrate Judges System) and with the assistance of Mr. Rabiej (who drafted suggested conforming language) the Criminal Rules Committee was polled and agreed that the changes should be forwarded to the Standing Committee for action at its January 1997 meeting. The Style Committee has reviewed the draft and has made its suggested changes.

Under the rule-making procedures, "The Standing Committee may eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary." The Committee views the proposed amendments as "conforming" changes resulting from the changes in the underlying statutory provisions and believes that public comment is not necessary. If the changes are forwarded without public comment, and assuming they are approved by the Supreme Court, they would go into effect on December 1, 1997. If the normal procedure of publication and comment is followed, they would not go into effect until December 1, 1998.

A draft of the proposed changes to Rule 58, the Committee Note, and a copy of Section 202 of the Federal Courts Improvement Act of 1996, are attached.

The Advisory Committee recommends that the Standing Committee approve the amendments to Rule 58; without publication, and forward them to the Judicial Conference for approval.

III. INFORMATION ITEMS

1. Proposed Amendments to the Rules of Criminal Procedure Considered by the Advisory Committee

At its October 1996 meeting the Advisory Committee considered proposed changes to: Rule 11 concerning the impact of the Sentencing Guidelines on plea bargaining and plea procedures, and the ability of a defendant to withdraw a plea of guilty; Rule 24(c) (alternate jurors); Rule 25(b)(disability of judge); Rule 26 (taking of testimony); and Rule 32.2 (forfeiture procedures); Rule 40(a)(appearance before a magistrate judge). The Committee decided to consider draft amendments to Rules 11, 26, and 32.2 at its April 1997 meeting in Washington, D.C.

2. Position on Victims' Rights Amendment

The Committee discussed the pending congressional proposal concerning a victim's rights amendment. As a result of that discussion, the Committee authorized the Chairman to inform the Standing Committee that it believes that such an amendment would have an adverse impact on the operation of the Rules of Criminal Procedure.

3. Consideration of Proposed Amendments to Rule 103, Fed. R. Evid.

At the request of the Advisory Committee on the Rules of Evidence, the Committee discussed the proposed amendment(s) to Federal Rule of Evidence 103 regarding whether counsel must renew an evidentiary objection at trial to preserve error. Following discussion, the consensus of the Committee was that the issue should be left to caselaw development.

Attachments

Proposed Amendments to Rule 58
Excerpt from Federal Courts Improvement Act of 1996.
Minutes of Committee Meeting, Oct. 1996

Rule 58. Procedure for Misdemeanors and Other Petty Offenses

(a) SCOPE.

(1) *In General.* This rule governs the procedure and practice for the conduct of proceedings involving misdemeanors and other petty offenses, and for appeals to district judges of the district courts in such cases tried by United States magistrate judges.

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(b) PRETRIAL PROCEDURES.

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(2) *Initial Appearance.* At the defendant's initial appearance on a misdemeanor or other petty offense charge, the court shall inform the defendant of:

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- (C) ~~unless the charge is a petty offense for which appointment of counsel is not required,~~ the right to request the assignment appointment of counsel if the defendant is unable to obtain counsel, unless the charge is a petty offense for which an appointment of counsel is not required;

* * * * *

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

(i) the charge is a Class B misdemeanor motor-vehicle offense, a Class C misdemeanor, or an infraction; or

(ii) the defendant consents to trial, judgment, and sentencing before a magistrate judge;

- (F) ~~unless the charge is a petty offense,~~ the right to trial by jury before either a United States magistrate judge or a district judge of the district court, unless the charge is a petty offense; and

- (G) ~~if the defendant is held in custody and charged with a misdemeanor other than a petty offense,~~ the right to a preliminary examination in accordance with 18 U.S.C. § 3060, and the general circumstances under which the defendant may secure pretrial release, if the defendant is held in custody and charged with a misdemeanor other than a petty offense.

(3) *Consent and Arraignment.*

(A) TRIAL BEFORE A UNITED STATES MAGISTRATE JUDGE. ~~If the defendant signs a written consent to be tried before the magistrate judge which specifically waives trial before a judge of the district court, the magistrate judge shall take the defendant's plea.~~ A magistrate judge shall take the defendant's plea in a Class B misdemeanor charging a motor vehicle offense, a Class C misdemeanor, or an infraction. In every other misdemeanor case, a magistrate judge may take the plea only if the defendant consents either in writing or orally on the record to be tried before the magistrate judge and specifically waives trial before a district judge. The defendant may plead not guilty, guilty, or with the consent of the magistrate judge, nolo contendere.

Not
Guilty
Plea

(B) FAILURE TO CONSENT. ~~If the defendant does not consent to trial before the magistrate judge, In a misdemeanor case — other than a Class B misdemeanor charging a motor-vehicle offense, a Class C misdemeanor, or an infraction,— the defendant shall be ordered~~ magistrate judge shall order the defendant to appear before a district judge of the district court for further proceedings on notice, unless the defendant consents to trial before the magistrate judge.

* * * * *

(g) APPEAL.

(1) *Decision, Order, Judgment or Sentence by a District Judge.* An appeal from a decision, order, judgment or conviction or sentence by a district judge of the district court shall be taken in accordance with the Federal Rules of Appellate Procedure.

(2) *Decision, Order, Judgment or Sentence by a United States Magistrate Judge.*

(A) INTERLOCUTORY APPEAL. A decision or order by a magistrate judge which, if made by a district judge of the district court, could be appealed by the government or defendant under any provision of law, shall be subject to an appeal to a district judge of the district court provided such appeal is taken within 10 days of the entry of the decision or order. An appeal shall be taken by filing with the clerk of court a statement specifying the decision or order from which an appeal is taken and by serving a copy of the statement upon the adverse party, personally or by mail, and by filing a copy with the magistrate judge.

(B) APPEAL FROM CONVICTION OR SENTENCE. An appeal from a judgment of conviction or sentence by a magistrate judge to a district judge of the district court shall be taken within 10 days after entry of the judgment. An appeal shall be taken by filing with the clerk of court a statement specifying the judgment from which an appeal is taken, and by serving a copy of the statement upon the United States Attorney, personally or by mail, and by filing a copy with the magistrate judge.

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(D) SCOPE OF APPEAL. The defendant shall not be entitled to a trial de novo by a district judge of the district court. The scope of appeal shall be the same as an appeal from a judgment of a district court to a court of appeals.

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COMMITTEE NOTE

The Federal Courts Improvement Act of 1996, Sec. 202, amended 18 U.S.C. § 3401(b) and 28 U.S.C. 636(a) to remove the requirement that a defendant must consent to a trial before a magistrate judge in a petty offense that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction. Section 202 also changed 18 U.S.C. § 3401(b) to provide that in all other misdemeanor cases, the defendant may consent to trial either orally on the record or in writing. The amendments to Rule 58(b)(2) and (3) conform the rule to the new statutory language and include minor stylistic changes.

One Hundred Fourth Congress of the United States of America

AT THE SECOND SESSION

*Begun and held at the City of Washington on Wednesday,
the third day of January, one thousand nine hundred and ninety-six*

An Act

To make improvements in the operation and administration of the Federal courts,
and for other purposes.

*Be it enacted by the Senate and House of Representatives of
the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the "Federal Courts Improvement Act of 1996".

(b) **TABLE OF CONTENTS.**—The table of contents of this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I—CRIMINAL LAW AND CRIMINAL JUSTICE AMENDMENTS

Sec. 101. New authority for probation and pretrial services officers.

TITLE II—JUDICIAL PROCESS IMPROVEMENTS

Sec. 201. Duties of magistrate judge on emergency assignment.

Sec. 202. Consent to trial in certain criminal actions.

Sec. 203. Registration of judgments for enforcement in other districts.

Sec. 204. Vacancy in clerk position; absence of clerk.

Sec. 205. Diversity jurisdiction.

Sec. 206. Removal of cases against the United States and Federal officers or agencies.

Sec. 207. Appeal route in civil cases decided by magistrate judges with consent.

Sec. 208. Reports by judicial councils relating to misconduct and disability orders.

TITLE III—JUDICIARY PERSONNEL ADMINISTRATION, BENEFITS, AND PROTECTIONS

Sec. 301. Senior judge certification.

Sec. 302. Refund of contribution for deceased deferred annuitant under the Judicial Survivors' Annuities System.

Sec. 303. Bankruptcy judges reappointment procedure.

Sec. 304. Technical correction related to commencement date of temporary judgeships.

Sec. 305. Full-time status of court reporters.

Sec. 306. Court interpreters.

Sec. 307. Technical amendment related to commencement date of temporary bankruptcy judgeships.

Sec. 308. Contribution rate for senior judges under the judicial survivors' annuities system.

Sec. 309. Prohibition against awards of costs, including attorney's fees, and injunctive relief against a judicial officer.

TITLE IV—JUDICIAL FINANCIAL ADMINISTRATION

Sec. 401. Increase in civil action filing fee.

Sec. 402. Interpreter performance examination fees.

Sec. 403. Judicial panel on multidistrict litigation.

Sec. 404. Disposition of fees.

TITLE V—FEDERAL COURTS STUDY COMMITTEE RECOMMENDATIONS

Sec. 501. Qualification of Chief Judge of Court of International Trade.

TITLE VI—MISCELLANEOUS

- Sec. 601. Participation in judicial governance activities by district, senior, and magistrate judges.
- Sec. 602. The Director and Deputy Director of the administrative office as officers of the United States.
- Sec. 603. Removal of action from State court.
- Sec. 604. Federal judicial center employee retirement provisions.
- Sec. 605. Abolition of the special court, Regional Rail Reorganization Act of 1973.
- Sec. 606. Place of holding court in the District Court of Utah.
- Sec. 607. Exception of residency requirement for district judges appointed to the Southern District and Eastern District of New York.
- Sec. 608. Extension of civil justice expenses and delay reduction reports on demonstration and pilot programs.
- Sec. 609. Place of holding court in the Southern District of New York.
- Sec. 610. Venue for territorial courts.

TITLE I—CRIMINAL LAW AND CRIMINAL JUSTICE AMENDMENTS

SEC. 101. NEW AUTHORITY FOR PROBATION AND PRETRIAL SERVICES OFFICERS.

(a) **PROBATION OFFICERS.**—Section 3603 of title 18, United States Code, is amended—

- (1) by striking out "and" at the end of paragraph (8)(B);
- (2) by redesignating paragraph (9) as paragraph (10); and
- (3) by inserting after paragraph (8) the following new paragraph:

"(9) if approved by the district court, be authorized to carry firearms under such rules and regulations as the Director of the Administrative Office of the United States Courts may prescribe; and"

(b) **PRETRIAL SERVICES OFFICERS.**—Section 3154 of title 18, United States Code, is amended—

- (1) by redesignating paragraph (13) as paragraph (14); and
- (2) by inserting after paragraph (12) the following new paragraph:

"(13) If approved by the district court, be authorized to carry firearms under such rules and regulations as the Director of the Administrative Office of the United States Courts may prescribe."

TITLE II—JUDICIAL PROCESS IMPROVEMENTS

SEC. 201. DUTIES OF MAGISTRATE JUDGE ON EMERGENCY ASSIGNMENT.

The first sentence of section 636(f) of title 28, United States Code, is amended by striking out "(a) or (b)" and inserting in lieu thereof "(a), (b), or (c)".

SEC. 202. CONSENT TO TRIAL IN CERTAIN CRIMINAL ACTIONS.

(a) **AMENDMENTS TO TITLE 18.**—(1) Section 3401(b) of title 18, United States Code, is amended—

(A) in the first sentence by inserting ", other than a petty offense that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction," after "misdemeanor";

(B) in the second sentence by inserting "judge" after "magistrate" each place it appears;

(C) by striking out the third sentence and inserting in lieu thereof the following: "The magistrate judge may not proceed to try the case unless the defendant, after such explanation, expressly consents to be tried before the magistrate judge and expressly and specifically waives trial, judgment, and sentencing by a district judge. Any such consent and waiver shall be made in writing or orally on the record."; and

(D) by striking out "judge of the district court" each place it appears and inserting in lieu thereof "district judge".

(2) Section 3401(g) of title 18, United States Code, is amended by striking out the first sentence and inserting in lieu thereof the following: "The magistrate judge may, in a petty offense case involving a juvenile, that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction, exercise all powers granted to the district court under chapter 403 of this title. The magistrate judge may, in any other class B or C misdemeanor case involving a juvenile in which consent to trial before a magistrate judge has been filed under subsection (b), exercise all powers granted to the district court under chapter 403 of this title."

(b) AMENDMENTS TO TITLE 28.—Section 636(a) of title 28, United States Code, is amended—

(1) by striking out ".", and" at the end of paragraph (3) and inserting in lieu thereof a semicolon; and

(2) by striking out paragraph (4) and inserting the following:

"(4) the power to enter a sentence for a petty offense that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction; and

"(5) the power to enter a sentence for a class A misdemeanor, or a class B or C misdemeanor not covered by paragraph (4), in a case in which the parties have consented."

SEC. 203. REGISTRATION OF JUDGMENTS FOR ENFORCEMENT IN OTHER DISTRICTS.

(a) IN GENERAL.—Section 1963 of title 28, United States Code, is amended—

(1) by amending the section heading to read as follows:

"§ 1963. Registration of judgments for enforcement in other districts";

(2) in the first sentence—

(A) by striking out "district court" and inserting in lieu thereof "court of appeals, district court, bankruptcy court."; and

(B) by striking out "such judgment" and inserting in lieu thereof "the judgment"; and

(3) by adding at the end thereof the following new undesignated paragraph:

"The procedure prescribed under this section is in addition to other procedures provided by law for the enforcement of judgments."