EXHIBIT D

BYRON R. WHITE
CIRCUIT JUSTICE
WASHINGTON D. C. 20543

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Cheyenne, Wyoming
May 28, 1965

Honorable Albert B. Maris
United States Circuit Judge
United States Court House
Philadelphia, Pennsylvania

Dear Judge:

I transmit herewith to you for presentation to the Committee on Rules of Practice and Procedure a series of amendments (with accompanying Advisory Committee's Notes) to the Rules of Criminal Procedure for the United States District Court as recommended by the Advisory Committee on Criminal Rules.

The Advisory Committee on Criminal Rules has met seven times since its formation in 1960. It has canvassed all of the Rules and has circulated both a Preliminary Draft and a Second Preliminary Draft of proposed amendments to the Rules. Widespread comment has been received from members of the bench and the bar which has been most helpful to the Committee in its deliberations.

The Advisory Committee is submitting to you all proposals for change upon which the Committee has thus far agreed. Many suggestions were rejected by the Committee and are not reflected in its report. Other proposals require further study and it is anticipated that the Committee will have amendments to propose to your Committee in the future.

Two comments are necessary to explain specific portions of the attached draft of amendments:

(1) Alternative formulations of an amendment to Rule 32(c)(2) are presented. The Committee was evenly divided and voted to send both formulations forward so that your Committee could choose between them.

(2) Amendments to Rule 37 are submitted incorporating changes proposed by the Appellate Rules Committee in order that action may be taken on them pending final action on the Uniform Rules of Appellate

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Procedure. These amendments were developed in collaboration between the two advisory committees with the draft as presented coming from Professor Ward, Reporter for the Appellate Rules Committee. Amendments relating to appeals are also presented for Rules 45, 49 and 55. When the Uniform Rules of Appellate Procedure are put into effect, a number of conforming amendments to the Criminal Rules will be necessary.

Sincerely yours,

John C. Pickett.

John C. Pickett.

PROPOSED AMENDMENTS TO RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS*

Rule 4. Warrant or Summons Upon Complaint

(a) Issuance. 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. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

Advisory Committee's Note

In Giordenello v. United States, 357 U.S. 480 (1958) it was held that to support the issuance of a warrant the complaint must contain in addition to a statement "of the essential facts constituting the offense" (Rule 3) a statement of the facts relied upon by the complainant to establish probable cause. The amendment permits the complainant to state the facts constituting probable cause in a separate affidavit in lieu of spelling them out in the complaint. See also Jaben v. United States, 381 U.S. 214 (1965).

Rule 5. Proceedings Before the Commissioner

(b) Statement by the Commissioner. The commissioner 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 his right to have a preliminary examination. He shall also

* New matter is shown in italics; matter to be omitted is lined through.

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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 commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

Advisory Committee's Note

The first change is designed to insure that under the revision made in Rule 4(a) the defendant arrested on a warrant will receive the same information concerning the basis for the issuance of the warrant as would previously have been given him by the complaint itself.

The second change obligates the commissioner to inform the defendant of his right to request the assignment of counsel if he is unable to obtain counsel. Cf. the amendment to Rule 44, and the Advisory Committee's Note thereon.

Rule 6. The Grand Jury

(d) Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, ~~or~~ stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the 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. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

(f) Finding and Return of Indictment. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a judge in open court. ~~If the defendant has been held to answer~~ If the defendant is in custody or has given bail and 12 jurors do not concur in finding an indictment, the foreman shall so report to the court in writing forthwith.

Advisory Committee's Note

Subdivision (d). The amendment makes it clear that recording devices may be used to take evidence at grand jury sessions.

Subdivision (e). The amendment makes it clear that the operator of a recording device and a typist who transcribes recorded testimony are bound to the obligation of secrecy.

Subdivision (f). A minor change conforms the language to what doubtless is the practice. The need for a report to the court that no indictment has been found may be present even though the defendant has not been "held to answer." If the defendant is in custody or has given bail, some official record should be made of the grand jury action so that the defendant can be released or his bail exonerated.

Rule 7. The Indictment and the Information

(f) Bill of Particulars. The court ~~for cause~~ may direct the filing of a bill of particulars. A motion for a bill of particulars may be made ~~only~~ before arraignment or within ten days after arraignment or at such ~~other~~ later time ~~before or after arraignment as may be prescribed by rule or order~~ as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

Advisory Committee's Note

The amendment to the first sentence eliminating the requirement of a showing of cause is designed to encourage a more liberal attitude by the courts toward bills of particulars without taking away the discretion which courts must have in dealing with such motions in individual cases. For an illustration of wise use of this discretion see the opinion by Justice Whittaker written when he was a district judge in United States v. Smith, 16 F.R.D. 372 (W.D.Mo. 1954).

The amendment to the second sentence gives discretion to the court to permit late filing of motions for bills of particulars in meritorious cases. Use of late motions for the purpose of delaying trial should not, of course, be permitted. The courts have not been agreed as to their power to accept late motions in the absence of a local rule or a previous order. See United States v. Miller, 217 F. Supp. 760 (E.D. Pa. 1963); United States v. Taylor, 25 F.R.D. 225 (E.D. N.Y. 1960); United States v. Sterling, 122 F. Supp. 81 (E.D. Pa. 1954) (all taking a limited view of the power of the court). But cf. United States v. Brown, 179 F. Supp. 893 (E.D. N.Y. 1959) (exercising discretion to permit an out of time motion).

Rule 11. Pleas

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 the 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.

Advisory Committee's Note

The great majority of all defendants against whom indictments or informations are filed in the federal courts plead guilty. Only a comparatively small number go to trial. See United States Attorneys Statistical Report, Fiscal Year 1964, p. 1. The fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all in the federal courts.

Three changes are made in the second sentence. The first change makes it clear that before accepting either a plea of guilty or nolo contendere the court must determine that the plea is made voluntarily with understanding of the nature of the charge. The second change expressly requires the court to address the defendant personally in the course of determining that the plea is made voluntarily and with understanding of the nature of the charge. The reported cases reflect some confusion over this matter. Compare United States v. Diggs, 304 F.2d 929 (6th Cir. 1962); Domenica v. United States, 292 F.2d 483 (1st Cir. 1961); Gundlach v. United States, 262 F.2d 72 (4th Cir. 1958), cert. den., 360 U.S. 904 (1959); and Julian v. United States, 236 F.2d 155 (6th Cir. 1956), which contain the implication that personal interrogation of the defendant is the better practice even when he is represented by counsel, with Meeks v. United States, 298 F.2d 204 (5th Cir. 1962); Nunley v. United States, 294 F.2d 579 (10th Cir. 1961), cert. den., 368 U.S. 991 (1962); and United

States v. Von der Heide, 169 F. Supp. 560 (D.D.C. 1959).

The third change in the second sentence adds the words "and the consequences of his plea" to state what clearly is the law. See e.g., Von Moltke v. Gillies, 332 U.S. 708, 724 (1948); Kerchevel v. United States, 274 U.S. 220, 223 (1927); Munich v. United States, 337 F.2d 356 (9th Cir. 1964); Pilkington v. United States, 315 F.2d 204 (4th Cir. 1963); Smith v. United States, 324 F.2d 436 (D.C. Cir. 1963); but cf. Marvel v. United States, 335 F.2d 101 (5th Cir. 1964).

A new sentence is added at the end of the rule to impose a duty on the court in cases where the defendant pleads guilty to satisfy itself that there is a factual basis for the plea before entering judgment. The court should satisfy itself, by inquiry of the defendant or the attorney for the government, or by examining the presentence report, or otherwise, that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty. Such inquiry should, e.g., protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge. For a similar requirement see Mich. Stat. Ann § 28.1058 (1954); Mich. Sup. Ct. Rule 35A; In re Valle, 364 Mich. 471, 110 N.W. 2d 673 (1961); People v. Barrows, 358 Mich. 267, 99 N.W. 2d 347 (1959); People v. Bumpus, 355 Mich. 374, 94 N.W. 2d 854 (1959); People v. Coates, 337 Mich. 56, 59 N.W. 2d 83 (1953). See also Stinson v. United States, 316 F.2d 554 (5th Cir. 1963). The normal consequence of a determination that there is not a factual basis for the plea would be for the court to set aside the plea and enter a plea of not guilty.

For a variety of reasons it is desirable in some cases to permit entry of judgment upon a plea of nolo contendere without inquiry into the factual

basis for the plea. The new third sentence is not, therefor, made applicable to pleas of nolo contendere. It is not intended by this omission to reflect any view upon the effect of a plea of nolo contendere in relation to a plea of guilty. That problem has been dealt with by the courts. See, e.g., Lott v. United States, 367 U.S. 421, 426 (1961).

Rule 14. Relief From Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

Advisory Committee's Note

A defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or confession made by that co-defendant. This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand. Limiting instructions to the jury may not in fact erase the prejudice. While the question whether to grant a severance is generally left within the discretion of the trial court, recent Fifth Circuit cases have found sufficient prejudice involved to make denial of a motion for severance reversible error. See Schaffer v. United States, 221 F.2d 17 (5th Cir. 1955); Barton v. United States, 263 F.2d 894 (5th Cir. 1959). It has even been suggested that when the confession of the co-defendant comes as a surprise at the trial, it may be error to deny a motion for a mistrial. See Belvin v. United States, 273 F.2d 583 (5th Cir. 1960).

The purpose of the amendment is to provide a procedure whereby the issue of possible prejudice can be resolved on the motion for severance. The judge may direct the disclosure of the confessions or statements of the defendants to him for in camera inspection as an aid to determining whether the possible prejudice justifies ordering separate trials. Cf. note, Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure, 74 Yale L.J. 551, 565 (1965).

Rule 16. Discovery and Inspection

~~Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.~~

(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the government 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, (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, and (3) recorded testimony of the defendant before a grand jury.

(b) Other Books, Papers, Documents, or Tangible Objects or Places. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, 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 to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a)(2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by 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.

(c) Discovery by the Government. If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. 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.

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

(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 by the government the court may permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the court in camera. If the court enters an order granting relief following a showing in camera, the entire text of the government'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.

(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.

(g) Continuing Duty to Disclose; Failure to Comply. If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. 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.

Advisory Committee's Note

The extent to which pretrial discovery should be permitted in criminal cases is a complex and controversial issue. The problems have been explored in detail in recent legal literature, most of which has been in favor of increasing the range of permissible discovery. See, e.g. Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth, 1963 Wash. U.L.Q. 279; Everett, Discovery in Criminal Cases - In Search of a Standard, 1964 Duke L.J. 477; Fletcher, Pretrial Discovery in State Criminal Cases, 12 Stan.L.Rev. 293 (1960); Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149, 1172-1198 (1960); Krantz, Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice, 42 Neb. L. Rev. 127 (1962); Louisell, Criminal Discovery, Dilemma Real or Apparent, 49 Calif. L. Rev. 56 (1961); Louisell, The Theory of Criminal Discovery and the Practice of Criminal Law, 14 Vand. L. Rev. 921 (1961); Moran, Federal Criminal Rules Changes: Aid or Illusion for the Indigent Defendant?, 51 A.B.A.J. 64 (1965);

Symposium, Discovery in Federal Criminal Cases, 33 F.R.D. 47-128 (1963); Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L.Rev. 228 (1964); Developments in the Law--Discovery, 74 Harv. L.Rev. 940, 1051-1063. Full judicial exploration of the conflicting policy considerations will be found in State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953) and State v. Johnson, 28 N.J. 133, 145 A.2d 313 (1958); cf. State v. Murphy, 36 N.J. 172, 175 A.2d 622 (1961); State v. Moffa, 36 N.J. 219, 176 A.2d 1 (1961). The rule has been revised to expand the scope of pretrial discovery. At the same time provisions are made to guard against possible abuses.

Subdivision (a). The court is authorized to order the attorney for the government to permit the defendant to inspect and copy or photograph three different types of material:

(1) Relevant written or recorded statements or confessions made by the defendant, or copies thereof. The defendant is not required to designate because he may not always be aware that his statements or confessions are being recorded. The government's obligation is limited to production of such statements as are 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. Discovery of statements and confessions is in line with what the Supreme Court has described as the "better practice" (Cicenia v. LaGay, 357 U.S. 504, 511 (1958)), and with the law in a number of states. See, e.g., Del. Rules Crim. Proc., Rule 16; Ill. Stat. Ch. 38, § 729; Md. Rules Proc., Rule 728; State v. McGee, 91 Ariz. 101, 370 P.2d 261 (1962); Cash v. Superior Court, 53 Cal. 2d 72, 346 P.2d 407 (1959); State v. Bickham, 239 La. 1094, 121 So.2d 207, cert. den. 364 U.S. 874 (1960); People v. Johnson, 356 Mich. 619, 97 N.W.2d 739 (1959); State v. Johnson, supra; People v. Stokes, 24 Misc.2d 755, 204 N.Y.Supp.2d 827 (Ct. Gen. Sess. 1960). The amendment also makes it clear that discovery extends to recorded as well as written statements.

For state cases upholding the discovery of recordings, see, e.g., People v. Cartier, 51 Cal. 2d 590, 335 P.2d 114 (1959); State v. Minor, 177 A.2d 215 (Del. Super.Ct. 1962).

(2) Relevant results or reports of physical or mental examinations, and of scientific tests or experiments (including fingerprint and handwriting comparisons) made in connection with the particular case, or copies thereof. Again the defendant is not required to designate but the government's obligation is limited to production of items 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. With respect to results or reports of scientific tests or experiments the range of materials which must be produced by the government is further limited to those made in connection with the particular case. Cf. Fla. Stats, § 909.18; State v. Superior Court, 90 Ariz. 133, 367 P.2d 6 (1961); People v. Cooper, 53 Cal. 2d 755, 770, 3 Cal. Rptr. 148, 157, 349 P.2d 964, 973 (1960); People v. Stokes, supra, at 762, 204 N.Y.Supp.2d at 835.

(3) Relevant recorded testimony of a defendant before a grand jury. The policy which favors pretrial disclosure to a defendant of his statements to government agents also supports, pretrial disclosure of his testimony before a grand jury. Courts, however, have tended to require a showing of special circumstances before ordering such disclosure. See, e.g., United States v. Johnson, 215 F.Supp. 300 (D.Md. 1963). Disclosure is required only where the statement has been recorded and hence can be transcribed.

Subdivision (b). This subdivision authorizes the court to order the attorney for the government to permit the defendant to inspect and copy or photograph all other books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession,

custody or control of the government. Because of the necessarily broad and general terms in which the items to be discovered are described, several limitations are imposed:

(1) While specific designation is not required of the defendant, the burden is placed on him to make a showing of materiality to the preparation of his defense and that his request is reasonable. The requirement of reasonableness will permit the court to define and limit the scope of the government's obligation to search its files while meeting the legitimate needs of the defendant. The court is also authorized to limit discovery to portions of items sought.

(2) Reports, memoranda, and other internal government documents made by government agents in connection with the investigation or prosecution of the case are exempt from discovery. Cf. Palermo v. United States, 360 U.S. 343 (1959); Ogden v. United States, 303 F.2d 724 (9th Cir. 1962).

(3) Except as provided for reports of examinations and tests in subdivision (a)(2), statements made by government witnesses or prospective government witnesses to agents of the government are also exempt from discovery except as provided by 18 U.S.C. § 3500. The Advisory Committee concludes that if any change is to be made with respect to this subject matter, it should be made by Congress.

Subdivision (c). This subdivision permits the court to condition a discovery order under subdivision (a)(2) and subdivision (b) by requiring the defendant to permit the government to discover similar items which the defendant intends to produce at the trial and which are within his possession, custody or control under restrictions similar to those placed in subdivision (b) upon discovery by the defendant. While the government normally has resources adequate to secure the information necessary for trial, there are some situations in which mutual

disclosure would appear necessary to prevent the defendant from obtaining an unfair advantage. For example, in cases where both prosecution and defense have employed experts to make psychiatric examinations, it seems as important for the government to study the opinions of the experts to be called by the defendant in order to prepare for trial as it does for the defendant to study those of the government's witnesses. Or in cases (such as anti-trust cases) in which the defendant is well represented and well financed, mutual disclosure so far as consistent with the privilege against self-incrimination would seem as appropriate as in civil cases. State cases have indicated that a requirement that the defendant disclose in advance of trial materials which he intends to use on his own behalf at the trial is not a violation of the privilege against self-incrimination. See Jones v. Superior Court, 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); Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U. L. Rev. 228, 246 (1964); Comment, The Self-Incrimination Privilege: Barrier to Criminal Discovery, 51 Calif. L. Rev. 135 (1963); Note, 76 Harv. L. Rev. 838 (1963).

Subdivision (d). This subdivision is substantially the same as the last sentence of the existing rule.

Subdivision (e). This subdivision gives the court authority to deny, restrict or defer discovery upon a sufficient showing. Control of the abuses of discovery is necessary if it is to be expanded in the fashion proposed in subdivisions (a) and (b). Among the considerations to be taken into account by the court will be the safety of witnesses and others, a particular danger of perjury or witness intimidation, the protection of information vital to the national security, and the protection of business enterprises from economic reprisals. For an example of a use of a protective order in state practice, see People v. Lopez, 60 Cal.2d 223, 32 Cal. Rptr. 424, 384 P.2d 16 (1963). See also Brennan, Remarks on Discovery, 33 F.R.D. 56, 65 (1963); Traynor,

Ground Lost and Found in Criminal Discovery, 39 N.Y.U. L. Rev. 228, 244, 250.

In some cases it would defeat the purpose of the protective order if the government were required to make its showing in open court. The problem arises in its most extreme form where matters of national security are involved. Hence a procedure is set out where upon motion by the government the court may permit the government to make its showing, in whole or in part, in a written statement to be inspected by the court in camera. If the court grants relief based on such showing, the government's statement is to 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. Cf. 18 U.S.C. § 3500.

Subdivision (f). This subdivision is designed to encourage promptness in making discovery motions and to give the court sufficient control to prevent unnecessary delay and court time consequent upon a multiplication of discovery motions. Normally one motion should encompass all relief sought and a subsequent motion permitted only upon a showing of cause. Where pretrial hearings are used pursuant to Rule 17.1, discovery issues may be resolved at such hearings.

Subdivision (g). The first sentence establishes a continuing obligation on a party subject to a discovery order with respect to material discovered after initial compliance. The duty provided is to notify the other party, his attorney or the court of the existence of the material. A motion can then be made by the other party for additional discovery and, where the existence of the material is disclosed shortly before or during the trial, for any necessary continuance.

The second sentence gives wide discretion to the court in dealing with the failure of either party to comply with a discovery order. Such discretion will permit the court to consider the reasons why disclosure was not made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances.

Rule 17. Subpoena

(b) ~~Indigent~~ Defendants Unable to Pay. The court ~~or a judge thereof~~ may shall order at any time that a subpoena be issued for service on a named witness upon an ex parte application ~~upon motion or request~~ of ~~an indigent~~ a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. ~~The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed; and shall show that the evidence of the witness is material to the defense; that the defendant cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness.~~ If the court ~~or judge~~ orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.

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

Advisory Committee's Note.

Subdivision (b). Criticism has been directed at the requirement that an indigent defendant disclose

in advance the theory of his defense in order to obtain the issuance of a subpoena at government expense while the government and defendants able to pay may have subpoenas issued in blank without any disclosure. See Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice (1963) p. 27. The Attorney General's Committee also urged that the standard of financial inability to pay be substituted for that of indigency. Id. at 40-41. In one case it was held that the affidavit filed by an indigent defendant under this subdivision could be used by the government at his trial for purposes of impeachment. Smith v. United States, 312 F.2d 867 (D.C.Cir. 1962). There has also been doubt as to whether the defendant need make a showing beyond the face of his affidavit in order to secure issuance of a subpoena. Greenwell v. United States, 317 F.2d 108 (D.C.Cir. 1963).

The amendment makes several changes. The references to a judge are deleted since applications should be made to the court. An ex parte application followed by a satisfactory showing is substituted for the requirement of a request or motion supported by affidavit. The court is required to order the issuance of a subpoena upon finding that the defendant is unable to pay the witness fees and that the presence of the witness is necessary to an adequate defense.

Subdivision (d). The subdivision is revised to bring it into conformity with 28 U.S.C. § 1825.

Rule 17.1. Pretrial Conference

At any time after the filing of the indictment or information the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. No admissions

made by the defendant or his attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and his attorney. This rule shall not be invoked in the case of a defendant who is not represented by counsel.

Advisory Committee's Note

This new rule establishes a basis for pretrial conferences with counsel for the parties in criminal cases within the discretion of the court. Pretrial conferences are now being utilized to some extent even in the absence of a rule. See, generally, Brewster, Criminal Pre-Trials--Useful Techniques, 29 F.R.D. 442 (1962); Estes, Pre-Trial Conferences in Criminal Cases, 23 F.R.D. 560 (1959); Kaufman, Pre-Trial in Criminal Cases, 23 F.R.D. 551 (1959); Kaufman, Pre-Trial in Criminal Cases, 42 J. Am. Jud. Soc. 150 (1959); Kaufman, The Appalachian Trial: Further Observations on Pre-Trial in Criminal Cases, 44 J. Am. Jud. Soc. 53 (1960); West, Criminal Pre-Trials--Useful Techniques, 29 F.R.D. 436 (1962); Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 399-403, 468-470 (1960). Cf. Mo. Sup. Ct. Rule 25.09; Rules Governing the N.J. Courts, § 3:5-3.

The rule is cast in broad language so as to accommodate all types of pretrial conferences. As the third sentence suggests, in some cases it may be desirable or necessary to have the defendant present. See Committee on Pretrial Procedure of the Judicial Conference of the United States, Recommended Procedures in Criminal Pretrials, 37 F.R.D. 95 (1965).

Rule 18. ~~District and Division~~
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. ~~but if the district consists of two or more divisions the~~

~~trial shall be had in a division 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.

Advisory Committee's Note

The amendment eliminates the requirement that the prosecution shall be in a division in which the offense was committed and vests discretion in the court to fix the place of trial at any place within the district with due regard to the convenience of the defendant and his witnesses.

The Sixth Amendment provides that the defendant shall have the right to a trial "by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. * * *" There is no constitutional right to trial within a division. See United States v. Anderson, 328 U.S. 699, 704, 705 (1946); Barrett v. United States, 169 U.S. 218 (1898); Lafoon v. United States, 250 F.2d 958 (5th Cir. 1958); Carrillo v. Squier, 137 F.2d 648 (9th Cir. 1943); McNealey v. Johnston, 100 F.2d 280, 282 (9th Cir. 1938). Cf. Platt v. Minnesota Mining and Manufacturing Co., 376 U.S. 240 (1964).

The existing requirement for venue within the division operates in an irrational fashion. Divisions have been created in only half of the districts, and the differentiation between those districts with and those without divisions often bears no relationship to comparative size or population. In many districts a single judge is required to sit in several divisions and only brief and infrequent terms may be held in particular divisions. As a consequence there is often undue delay in the disposition of criminal cases--delay which is particularly serious with respect to defendants who have been unable to secure release on bail pending the holding of the next term of court.

If the court is satisfied that there exists in the place fixed for trial prejudice against the defendant so great as to render the trial unfair, the court may, of course, fix another place of trial within the district (if there be such) where such prejudice does not exist. Cf. Rule 21 dealing with transfers between districts.

Rule 20. Transfer From the District For Plea and Sentence

(a) Indictment or Information Pending. A defendant arrested or held in a district other than that in which the indictment or information is pending against him may state in writing; ~~after receiving a copy of the indictment or information;~~ 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, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is held and the prosecution shall continue in that district.

(b) Indictment or Information Not Pending. A defendant arrested on a warrant issued upon a complaint in a district other than the district 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, 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 the 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 and the prosecution shall continue in that district. When the defendant is brought before the court to plead to an information filed in the district where the warrant was issued, he may at that time waive indictment as provided in Rule 7, and the prosecution may continue based upon the information originally filed.

(c) Effect of Not Guilty Plea. If after the proceeding has been transferred pursuant to subdivision (a) or (b) of this rule the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced and the proceeding shall be restored to the docket of that court. The defendant's statement that he wishes to plead guilty or nolo contendere shall not be used against him ~~unless he was represented by counsel when it was made.~~

(d) Juveniles. A juvenile (as defined in 18 U.S.C. § 5031) who is arrested or held 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. 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.

Advisory Committee's Note

Present Rule 20 has proved to be most useful. In some districts, however, literal compliance with the procedures spelled out by the rule has resulted in unnecessary delay in the disposition of cases. This delay has been particularly troublesome where the defendant has been arrested prior to the filing of an indictment or information against him. See e.g., the procedure described in Donovan v. United States, 205 F.2d 557 (10th Cir. 1953). Furthermore, the benefit of the rule has not been available to juveniles electing to be proceeded against under 18 U.S.C. §§ 5031-5037. In an attempt to clarify and simplify the procedure the rule has been recast into four subdivisions.

Subdivision (a). This subdivision is intended to apply to the situation in which an indictment or information is pending at the time at which the defendant indicates his desire to have the transfer made. Two amendments are made to the present language of the rule. In the first sentence the words "or held" and "or is held" are added to make it clear that a person already in state or federal custody within a district may request a transfer of federal charges pending against him in another district. See 4 Barron, Federal Practice and Procedure 146 (1951). The words "after receiving a copy of the indictment or information" are deleted. The defendant should be permitted, if he wishes, to initiate transfer proceedings under the Rule without waiting for a copy of the indictment or information to be obtained. The defendant is protected against prejudice by the fact that under subdivision (c) he can, in effect, rescind his action by pleading not guilty after the transfer has been completed.

Subdivision (b). This subdivision is intended to apply to the situation in which no indictment or information is pending but the defendant has been arrested on a warrant issued upon a complaint in another district. Under the procedure set out he may initiate the transfer proceedings without waiting for the filing of an indictment or information in the district where the complaint is pending.

Also it is made clear that the defendant may validate an information previously filed by waiving indictment in open court when he is brought before the court to plead. See United States v. East, 5 F.R.D. 389 (N.D. Ind. 1946); Potter v. United States, 36 F.R.D. 394 (W.D.Mo. 1965). Here again the defendant is fully protected by the fact that at the time of pleading in the transferee court he may then refuse to waive indictment and rescind the transfer by pleading not guilty.

Subdivision (c). The last two sentences of the existing rule are included here. The last sentence is amended to forbid use against the defendant of his statement that he wishes to plead guilty or nolo contendere whether or not he was represented by counsel when it was made. Since under the amended rule the defendant may make his statement prior to receiving a copy of the indictment or information, it would be unfair to permit use of that statement against him.

Subdivision (d). Under 18 U.S.C. § 5033 a juvenile who has committed an act in violation of the law of the United States in one district and is apprehended in another must be returned to the district "having cognizance of the alleged violation" before he can consent to being proceeded against as a juvenile delinquent. This subdivision will permit a juvenile after he has been advised by counsel and with the approval of the court and the United States attorney to consent to be proceeded against in the district in which he is arrested or held. Consent is required only of the United States attorney in the district of the arrest in order to permit expeditious handling of juvenile cases. If it is necessary to recognize special interests of particular districts where offenses are committed--e.g., the District of Columbia with its separate Juvenile Court (District of Columbia Code § 11-1551(a))--the Attorney General may do so through his administrative control over United States Attorneys.

Subdivision (e). This subdivision is added to make it clear that a defendant who appears in one district in response to a summons issued in the district where the offense was committed may initiate transfer proceedings under the rule.

Rule 21. Transfer From the District ~~or Division~~ for Trial

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

(b) Transfer in Other Cases. ~~Offense Committed in Two or More Districts or Divisions.~~ For the convenience of parties and witnesses, and in the interest of justice, ~~T~~the court upon motion of the defendant may ~~shall~~ transfer the proceeding as to him or any one or more of the counts thereof to another district ~~or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.~~

(c) Proceedings on Transfer. When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, and the prosecution shall continue in that district ~~or division~~.

Advisory Committee's Note

Subdivision (a). All references to divisions are eliminated in accordance with the amendment to Rule 18 eliminating division venue. The defendant is given the right to a transfer only when he can show that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in the district. Transfers within the district to avoid prejudice will be within the power of the judge to fix the place of trial as provided in the amendments to Rule 18. It is also made clear that on a motion to transfer under this subdivision the court may select the district to which the transfer may be made. Cf. United States v. Parr, 17 F.R.D. 512, 519 (S.D. Tex. 1955); Parr v. United States, 351 U.S. 513 (1956).

Subdivision (b). The existing rule limits change of venue for reasons other than prejudice in the district to those cases where venue exists in more than one district. Upon occasion, however, convenience of the parties and witnesses and the interest of justice would best be served by trial in a district in which no part of the offense was committed. See, e.g., Travis v. United States, 364 U.S. 631 (1961), holding that the only venue of a charge of making or filing a false non-Communist affidavit required by § 9(h) of the National Labor Relations Act is in Washington, D.C. even though all the relevant witnesses may be located at the place where the affidavit was executed and mailed. See also Barber, Venue in Federal Criminal Cases: A Plea for Return to Principle, 42 Tex.L.Rev. 39 (1963); Wright, Proposed Changes in Federal Civil, Criminal and Appellate Procedure, 35 F.R.D. 317, 329 (1964). The amendment permits a transfer in any case on motion of the defendant on a showing that it would be for the convenience of parties and witnesses, and in the interest of justice. Cf. 28 U.S.C.

§ 1404(a), stating a similar standard for civil cases. See also Platt v. Minnesota Min. & Mfg. Co., 376 U.S.C. 240 (1964). Here, as in subdivision (a), the court may select the district to which the transfer is to be made. The amendment also makes it clear that the court may transfer all or part of the offenses charged in a multi-count indictment or information. Cf. United States v. Choate, 276 F.2d 724 (5th Cir. 1960). References to divisions are eliminated in accordance with the amendment to Rule 18.

Subdivision (c). The reference to division is eliminated in accordance with the amendment to Rule 18.

Rule 23. Trial by Jury or by the Court

(c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

Advisory Committee's Note

This amendment adds to the rule a provision added to Civil Rule 52(a) in 1946.

Rule 24. Trial Jurors

(c) Alternate Jurors. The court may direct that not more than ~~4~~ 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers,

facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, ~~and~~ 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

Advisory Committee's Note

Experience has demonstrated that four alternate jurors may not be enough for some lengthy criminal trials. See, e.g., United States v. Bentvena, 288 F.2d 442 (2d Cir. 1961); Reports of the Proceedings of the Judicial Conference of the United States, 1961, p. 104. The amendment to the first sentence increases the number authorized from four to six. The fourth sentence is amended to provide an additional peremptory challenge where a fifth or sixth alternate juror is used.

The words "or are found to be" are added to the second sentence to make clear that an alternate juror may be called in the situation where it is first discovered during the trial that a juror was unable or disqualified to perform his duties at the time he was sworn. See United States v. Goldberg, 330 F.2d 30 (3rd Cir. 1964), cert. den. 377 U.S. 953 (1964).

The Committee has also been concerned with the problems which arise in lengthy criminal trials when a juror becomes disqualified or unable to perform his duties after the jury retires to consider its verdict. The constitutionality and feasibility of substituting an alternate juror under such circumstances is under continuing study.

Rule 25. Judge; Disability

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

(b) After Verdict or Finding of Guilt. If by reason of absence ~~from the district~~, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

Advisory Committee's Note

In September, 1963, the Judicial Conference of the United States approved a recommendation of its Committee on Court Administration that provision be made for substitution of a judge who becomes disabled during trial. The problem has become serious because of the increase in the number of long criminal trials. See 1963 Annual Report of the Director of the Administrative Office of the United States Courts, p. 114, reporting a 25% increase in criminal trials lasting more than one week in fiscal year 1963 over 1962.

Subdivision (a). The amendment casts the rule into two subdivisions and in subdivision (a) provides for substitution of a judge during a jury trial upon his certification that he has familiarized himself with the record of the trial. For similar provisions see Alaska Rules of Crim. Proc., Rule 25; California Penal Code, § 1053.

Subdivision (b). The words "from the district" are deleted to permit the local judge to act in those situations where a judge who has been assigned from within the district to try the case is, at the time for sentence, etc., back at his regular place of holding court which may be several hundred miles from the place of trial. It is not intended, of course, that substitutions shall be made where the judge who tried the case is available within a reasonable distance from the place of trial.

Rule 26.1. Determination of Foreign Law

A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 26. The court's determination shall be treated as a ruling on a question of law.

Advisory Committee's Note

At present, the Federal Rules of Criminal Procedure do not contain a provision explicitly regulating the determination of foreign law. The resolution of issues of foreign law, when relevant in federal criminal proceedings, falls within the general compass of Rule 26 which provides for application of "the [evidentiary] principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." See Green, Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts 6-7, 17-18 (1962). Although traditional "common-law" methods for determining foreign-country law have proved inadequate, the courts have not developed more appropriate practices on the basis of this flexible rule. Cf. Green, op. cit. supra at 26-28. On the inadequacy of common-law procedures for determining foreign law, see e.g., Nussbaum, Proving the Law of Foreign Countries, 3 Am. J. Comp. L. 60 (1954).

Problems of foreign law that must be resolved in accordance with the Federal Rules of Criminal Procedure are most likely to arise in places such as Washington, D.C., the Canal Zone, Guam, and the Virgin Islands, where the federal courts have general criminal jurisdiction. However, issues of foreign law may also arise in criminal proceedings commenced in other federal districts. For example, in an extradition proceeding, reasonable ground to believe that the person sought to be extradited is charged with, or was convicted of, a crime under the laws of the demanding state must generally be shown. See Factor v. Laubenheimer, 290 U.S. 276 (1933); Fernandez v. Phillips, 268 U.S. 311 (1925); Bishop, International Law: Cases and Materials (2d ed. 1962). Further, foreign law may be invoked to justify non-compliance with a subpoena duces tecum, Application of Chase Manhattan Bank, 297 F.2d 611 (2nd Cir. 1962), and under certain circumstances, as a defense to prosecution. Cf. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). The content of foreign law may also be relevant in proceedings arising under 18 U.S.C. §§ 1201, 2312-2317.

The Advisory Committee on Civil Rules, the Commission and Advisory Committee on International Rules of Judicial Procedure (see Act of Sept. 2, 1958, 72 Stat. 1743) and the Columbia Law School Project on International Procedure developed collaboratively a proposed Civil Rule 44.1 governing Determination of Foreign Law. The Advisory Committee on Criminal Rules was consulted during this development. The rule proposed here is substantially the same as proposed Civil Rule 44.1. A full explanation of the merits and practicability of the rule will be contained in the Advisory Committee's Note to Civil Rule 44.1.

It is necessary here to add only one comment to the explanations made in connection with the civil rule. The second sentence of the criminal rule proposed here frees the court from the restraints of the ordinary rules of evidence in

determining foreign law. This freedom, made necessary by the peculiar nature of the issue of foreign law, should not constitute an unconstitutional deprivation of the defendant's rights to confrontation of witnesses. The issue is essentially one of law rather than of fact. Furthermore, the cases have held that the Sixth Amendment does not serve as a rigid barrier against the development of reasonable and necessary exceptions to the hearsay rule. See Kay v. United States, 255 F.2d 476, 480 (4th Cir. 1958), cert. den., 358 U.S. 825 (1958); Matthews v. United States, 217 F.2d 40?, 418 (5th Cir. 1954); United States v. Leathers, 135 F.2d 507 (2d Cir. 1943); and cf., Painter v. Texas, 85 S.Ct. 1065 (1965); Douglas v. Alabama, 85 S. Ct. 1074 (1965).

Rule 28. Expert Witnesses and Interpreters

(a) Expert Witnesses. The court may order the defendant or the government or both to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any, and may thereafter be called to testify by the court or by any party. He shall be subject to cross-examination by each party. The court may determine the reasonable compensation of such a witness and direct its payment out of such funds as may be provided by law. The parties also may call expert witnesses of their own selection.

(b) Interpreters. The court may appoint an interpreter of its own selection and may fix the

reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government, as the court may direct.

Advisory Committee's Note

Subdivision (a). The existing rule is made a separate subdivision. The amendment permits the court to inform the witness of his duties in writing since it often constitutes an unnecessary inconvenience and expense to require the witness to appear in court for such purpose.

Subdivision (b). This new subdivision authorizes the court to appoint and provide for the compensation of interpreters. General language is used to give discretion to the court to appoint interpreters in all appropriate situations. Interpreters may be needed to interpret the testimony of non-English speaking witnesses or to assist non-English speaking defendants in understanding the proceedings or in communicating with assigned counsel. Interpreters may also be needed where a witness or a defendant is deaf.

Rule 29. Motion for Judgment of Acquittal

(a) Motion Before Submission to Jury. ~~Motion for Judgment of Acquittal.~~ Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the Government is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. ~~If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal.~~

(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

Advisory Committee's Note

Subdivision (a). A minor change has been made in the caption.

Subdivision (b). The last three sentences are deleted with the matters formerly covered by them transferred to the new subdivision (c).

Subdivision (c). The new subdivision makes several changes in the existing procedure. A motion for judgment of acquittal may be made after discharge of the jury whether or not a motion was made before submission to the jury. It is believed that no

legitimate interest of the government will be prejudiced by permitting the court to direct an acquittal on a post-verdict motion. The constitutional requirement of a jury trial in criminal cases is primarily a right accorded to the defendant. Cf. Adams v. United States, ex rel. McCann, 317 U.S. 269 (1942); Singer v. United States, 380 U.S. 24 (1965); Note, 65 Yale L. J. 1032 (1956).

The time in which the motion may be made has been changed to 7 days in accordance with the amendment to Rule 45(a) which by excluding Saturday from the days to be counted when the period of time is less than 7 days would make 7 days the normal time for a motion required to be made in 5 days. Also the court is authorized to extend the time as is provided for motions for new trial (Rule 33) and in arrest of judgment (Rule 34).

References in the existing rule to the motion for a new trial as an alternate to the motion for judgment of acquittal and to the power of the court to order a new trial have been eliminated. Motions for new trial are adequately covered in Rule 33. Also the existing wording is subject to the interpretation that a motion for judgment of acquittal gives the court power to order a new trial even though the defendant does not wish a new trial and has not asked for one.

Rule 30. Instructions

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed.

No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury; and, on request of any party, out of the presence of the jury.

Advisory Committee's Note

The amendment requires the court, on request of any party, to require the jury to withdraw in order to permit full argument of objections to instructions.

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 ~~the defendant~~ 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. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(c) Presentence Investigation.

(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. The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

(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's Note

Subdivision (a)(1). The amendment writes into the rule the holding of the Supreme Court that the court before imposing sentence must afford an opportunity to the defendant personally to speak in his own behalf. See Green v. United States, 365 U.S. 301 (1961); Hill v. United States, 368 U.S. 424 (1962). The amendment also provides an opportunity for counsel to speak on behalf of the defendant.

Subdivision (a)(2). This amendment is a substantial revision and a relocation of the provision now found in Rule 37(a)(2): "When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on

behalf of the defendant." The court is required to advise the defendant of his right to appeal in all cases which have gone to trial after plea of not guilty because situations arise in which a defendant represented by counsel at the trial is not adequately advised by such counsel of his right to appeal. Trial counsel may not regard his responsibility as extending beyond the time of imposition of sentence. The defendant may be removed from the courtroom immediately upon sentence and held in custody under circumstances which make it difficult for counsel to advise him. See, e.g., Hodges v. United States, 368 U.S. 139 (1961). Because indigent defendants are most likely to be without effective assistance of counsel at this point in the proceedings, it is also provided that defendants be notified of the right of a person without funds to apply for leave to appeal in forma pauperis. The provision is added here because this rule seems the most appropriate place to set forth a procedure to be followed by the court at the time of sentencing.

Subdivision (c)(2). It is not a denial of due process of law for a court in sentencing to rely on a report of a presentence investigation without disclosing such report to the defendant or giving him an opportunity to rebut it. Williams v. New York, 337 U.S. 241 (1949); Williams v. Oklahoma, 358 U.S. 576 (1959). However, the question whether as a matter of policy the defendant should be accorded some opportunity to see and refute allegations made in such reports has been the subject of heated controversy. For arguments favoring disclosure, see Tappan, Crime, Justice, and Correction, 558 (1960); Model Penal Code, 54-55 (Tent. Draft No. 2, 1954); Thomsen, Confidentiality of the Presentence Report: A Middle Position, 28 Fed. Prob., March 1964. p. 8; Wyzanski, A Trial Judge's Freedom and Responsibility, 65 Harv. L. Rev. 1281, 1291-2 (1952); Note, Employment of Social Investigation Reports in Criminal and Juvenile Proceedings, 58 Colum. L. Rev. 702 (1958); cf. Kadish, The Advocate and the Expert: Counsel in the Peno-Correctional Process, 45 Minn. L. Rev. 803, 806, (1961). For arguments opposing disclosure, see

Barnett and Gronewold, Confidentiality of the Presentence Report, 26 Fed. Prob. March 1962, p. 26; Judicial Conference Committee on Administration of the Probation System, Judicial Opinion on Proposed Change in Rule 32(c) of the Federal Rules of Criminal Procedure - a Survey (1964); Keve, The Probation Officer Investigates, 6-15 (1960); Parsons, The Presentence Investigation Report Must be Preserved as a Confidential Document, 28 Fed. Prob. March 1964, P. 3; Sharp, The Confidential Nature of Presentence Reports, 5 Cath. U. L. Rev. 127 (1955); Wilson, A New Arena is Emerging to Test the Confidentiality of Presentence Reports, 25 Fed. Prob. Dec. 1961, p. 6; Federal Judge's Views on Probation Practices, 24 Fed. Prob. March 1960, p. 10.

In a few jurisdictions the defendant is given a right of access to the presentence report. In England and California a copy of the report is given to the defendant in every case. English Criminal Justice Act of 1948, 11 & 12 Geo. 6, c. 58, § 43; Cal. Pen. C. § 1203. In Alabama the defendant has a right to inspect the report. Ala. Code. Title 42, § 23. In Ohio and Virginia the probation officer reports in open court and the defendant is given the right to examine him on his report. Ohio Rev. Code, § 2947.06; Va. Code, § 53-278.1. The Minnesota Criminal Code of 1963, § 609.115(4), provides that any presentence report "shall be open for inspection by the prosecuting attorney and the defendant's attorney prior to sentence and on the request of either of them a summary hearing in chambers shall be held on any matter brought in issue, but confidential sources of information shall not be disclosed unless the court otherwise directs." Cf. Model Penal Code § 7.07(5) (P.O.D. 1962): "Before imposing sentence, the Court shall advise the defendant or his counsel of the factual contents and the conclusions of any presentence investigation or psychiatric examination and afford fair opportunity, if the defendant so requests, to controvert them. The sources of confidential information need not, however, be disclosed."

Practice in the federal courts is mixed, with a substantial minority of judges permitting disclosure while most deny it. See the recent survey prepared for the Judicial Conference of the District of Columbia by the Junior Bar Section of the Bar Association of the District of Columbia, reported in Conference Papers on Discovery in Federal Criminal Cases, 33 F.R.D. 101, 125-127 (1963). See also Gronewold, Presentence Investigation Practices in the Federal Probation System, Fed. Prob. Sept. 1958, pp. 27, 31. For divergent judicial opinions see Smith v. United States, 223 F.2d 750, 754 (5th Cir. 1955) (supporting disclosure); United States v. Durham, 181 F. Supp. 503 (D.D.C. 1960) (supporting secrecy).

Substantial objections to compelling disclosure in every case have been advanced by federal judges, including many who in practice often disclose all or parts of presentence reports. See Judicial Conference Committee on the Administration of the Probation System, Judicial Opinion on Proposed Change in Rule 32(c) of the Federal Rules of Criminal Procedure - A Survey (1964). Hence, the amendment goes no further than to make it clear that courts may disclose all or part of the presentence report to the defendant or to his counsel. It is hoped that courts will make increasing use of their discretion to disclose so that defendants generally may be given full opportunity to rebut or explain facts in presentence reports which will be material factors in determining sentences. For a description of such a practice in one district, see Thomsen, Confidentiality of the Presentence Report: A Middle Position, 28 Fed. Prob., March 1964, p. 8.

It is also provided that any material disclosed to the defendant or his counsel shall be disclosed to the attorney for the government. Such disclosure will permit the government to participate in the resolution of any factual questions raised by the defendant.

Subdivision (f). This new subdivision writes into the rule the procedure which the cases have derived from the provision in 18 U.S.C. § 3653 that a person arrested for violation of probation "shall be taken before the court" and that thereupon the court may revoke the probation. See Escoe v. Zerbst, 295 U.S. 490 (1935); Brown v. United States, 236 F.2d 253 (9th Cir. 1956), cert. den. 356 U.S. 922 (1958). Compare Model Penal Code § 301.4 (P.O.D. 1962); Hink, The Application of Constitutional Standards of Protection to Probation, 29 U. Chi. L. Rev. 483 (1962).

Rule 33. New Trial

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

Advisory Committee's Note

The amendments to the first two sentences are designed to make it clear that a judge has no power to order a new trial on his own motion, that he can act only in response to a motion timely made by a defendant. Problems of double jeopardy arise when the court acts on its own motion. See United States v. Smith, 331 U.S. 469 (1947). These amendments will not, of course, change the power which the court has in certain circumstances prior to verdict or finding of guilty to declare a mistrial and order a new trial on its own motion. See e.g., Gori v. United States, 367 U.S. 364 (1961); Downum v.

United States, 372 U.S. 734 (1963); United States v. Tateo, 377 U.S. 463 (1964). The amendment to the last sentence changes the time in which the motion may be made to 7 days. See the Advisory Committee's Note to Rule 29.

Rule 34. Arrest of Judgment

The court on motion of a defendant shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 7 days after ~~determination of guilt~~ verdict or finding of guilty, or after plea of guilty or nolo contendere, or within such further time as the court may fix during the 5 7-day period.

Advisory Committee's Note

The words "on motion of a defendant" are added to make clear here, as in Rule 33, that the court may act only pursuant to a timely motion by the defendant.

The amendment to the second sentence is designed to clarify an ambiguity in the rule as originally drafted. In Lott v. United States, 367 U.S. 421 (1961) the Supreme Court held that when a defendant pleaded nolo contendere the time in which a motion could be made under this rule did not begin to run until entry of the judgment. The Court held that such a plea was not a "determination of guilt." No reason of policy appears to justify having the time for making this motion commence with the verdict or finding of guilt but not with the acceptance of the plea of nolo contendere or the plea of guilty. The amendment will change the result in the Lott case and make the periods uniform. The amendment also changes the time in which the motion may be made to 7 days. See the Advisory Committee's Note to Rule 29.

Rule 35. Correction or Reduction 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. The court may reduce a sentence within ~~60~~ 120 days after the sentence is imposed, or within ~~60~~ 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within ~~60~~ 120 days after ~~receipt of an~~ entry of any order or judgment of the Supreme Court denying ~~an application for a writ of certiorari~~ 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.

The Advisory Committee's Note

The amendment to the first sentence gives the court power to correct a sentence imposed in an illegal manner within the same time limits as those provided for reducing a sentence. In Hill v. United States, 368 U.S. 424 (1962) the Court held that a motion to correct an illegal sentence was not an appropriate way for a defendant to raise the question whether when he appeared for sentencing the court had afforded him an opportunity to make a statement in his own behalf as required by Rule 32(a). The amendment recognizes the distinction between an illegal sentence, which may be corrected at any time, and a sentence imposed in an illegal manner, and provides a limited time for correcting the latter.

The second sentence has been amended to increase the time within which the court may act from 60 days to 120 days. The 60-day period is frequently too short to enable the defendant to obtain and file the evidence, information and argument to support a reduction in sentence. Especially where a defendant has been committed to an institution at a distance from the sentencing court, the delays involved in institutional mail inspection procedures and the time required to contact relatives, friends and counsel may result in the 60-day period passing before the court is able to consider the case.

The other amendments to the second sentence are designed to clarify ambiguities in the timing provisions. In those cases in which the mandate of the court of appeals is issued prior to action by the Supreme Court on the defendant's petition for certiorari, the rule created problems in three situations: (1) If the writ were denied, the last phrase of the rule left obscure the point at which the period began to run because orders of the Supreme Court denying applications for writs are not sent to the district courts. See Johnson v. United States, 235 F.2d 459 (5th Cir. 1956). (2) If the writ were granted but later dismissed as improvidently granted, the rule did not provide any time period for reduction of sentence. (3) If the writ were granted and later the Court affirmed a judgment of the court of appeals which had affirmed the conviction, the rule did not provide any time period for reduction of sentence. The amendment makes it clear that in each of these three situations the 120-day period commences to run with the entry of the order or judgment of the Supreme Court.

The third sentence has been added to make it clear that the time limitation imposed by Rule 35 upon the reduction of a sentence does not apply to such reduction upon the revocation of probation as authorized by 18 U.S.C. § 3653.

Rule 37. Taking Appeal; and Petition for Writ of Certiorari

(a) Taking Appeal to a Court of Appeals

(1) How an Appeal is Taken; Notice of Appeal. An appeal permitted by law from a district court to a court of appeals is taken by filing ~~with the clerk of the district court~~ a notice of appeal in ~~duplicate~~ the district court within the time provided by paragraph (2) of this subdivision. ~~Petitions for allowance of appeal, citations and assignments of error in cases governed by these rules are abolished.~~ The notice of appeal shall ~~set forth the title of the case, the name and address of the appellant and of the appellant's attorney, a general statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, the place of confinement if the defendant is in custody and a statement that the appellant appeals~~

from the judgment or order. The notice of appeal shall be signed by the appellant or appellant's attorney; or by the clerk if the notice is prepared by the clerk as provided in paragraph (2) of this subdivision; specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. A copy of The duplicate notice of appeal and a statement of the docket entries shall be forwarded immediately by the clerk of the district court to the clerk of the court of appeals. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to adverse parties; but his failure so to do does not affect the validity of the appeal. The clerk shall serve notice of the filing of a notice of appeal by mailing a copy thereof to all parties other than the appellant. When an appeal is taken by a defendant, the clerk shall also serve a copy of the notice of appeal upon him, either by personal service or by mail addressed to him. The clerk shall note on each copy to be served the date on which the notice of appeal was filed, and shall note in the docket the names of the parties on whom he serves copies, with the date of mailing or other service. Failure of the clerk to serve notice shall not affect the validity of the appeal.

(2) Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from; but if a motion for a new trial or in arrest of judgment has been made within the 10 day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. The notice of appeal by a defendant shall be filed within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order

shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of the order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of judgment. ~~When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant.~~ When Aan appeal by the government ~~when~~ is authorized by statute, ~~may be taken~~ the notice of appeal shall be filed within 30 days after entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this paragraph when it is entered in the criminal docket.

Upon a showing of excusable neglect, the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing the notice of appeal otherwise allowed to any party for a period not to exceed 30 days from the expiration of the original time prescribed by this paragraph.

Advisory Committee's Note

Subdivision (a)(1). The first and third sentences of the present subdivision are rewritten, and the fourth sentence is eliminated, in order to assimilate the method of taking an appeal in criminal cases with the somewhat simpler method provided for civil cases. The second sentence of present (a)(1) is eliminated as being no longer necessary. The duty imposed on the clerk by the present sixth sentence is expanded in the interest of providing a defendant with actual notice that his appeal has been taken and in the interest of orderly procedure generally.

Subdivision (a)(2). The amended subdivision is based upon the present subdivision with the following additions, omissions and changes:

(1) The first sentence is the first clause of the present first sentence, reworded to indicate the mandatory character of the provision that the notice be filed within 10 days.

(2) The second sentence incorporates the holding in Lemke v. United States, 346 U.S. 325 (1953).

(3) The third and fourth sentences are based upon the final clause of the first sentence of the present subdivision (a)(2). That clause provides that a motion for a new trial or in arrest of judgment made within the 10 day period allowed for the filing of a notice of appeal terminates the running of the time for appeal and permits an appeal to be taken within 10 days after entry of the order denying the motion. The question has arisen as to whether a motion filed within the 10 day period but beyond the time allowed for its filing by the applicable rules (Rules 33 and 34) terminates the running of the time for appeal. Cf. Lott v. United States, 280 F.2d 24 (5th Cir. 1960), holding that an invalid motion does not extend the time, with Smith v. United States, 273 F.2d 462 (10th Cir. 1959), holding that it does. On reviewing the Lott case the Supreme Court called attention to the conflict and expressed the hope that the rule would be clarified. Lott v. United States, 367 U.S. 421, 425 (1961). The proposed amendment makes it clear that only a timely motion will have the effect of terminating the time for filing the notice of appeal and that a motion based on newly discovered evidence will have the effect only if it is filed before or within 10 days after entry of judgment. The latter qualification is necessary because a motion for a new trial based on newly discovered evidence is timely under Rule 33 if filed within 2 years of the entry of judgment.

(4) The sixth sentence is added to fix the precise time at which a judgment is entered. There has been some doubt on the point. In Richards v.

United States, 192 F.2d 602 (D.C. Cir. 1951) it was held that the time for appeal ran, not from the date of the sentence, nor from the date the judgment was signed, but from the date it was filed and entered in the docket. But dicta in Hyche v. United States, 278 F.2d 915 (5th Cir. 1960) and United States v. Isabella, 251 F.2d 223 (2d Cir. 1958) state that the time for appeal starts to run from the time of the sentence in open court.

(5) The sentence comprising the final paragraph effects a major change in the present rule, under which courts have been held powerless to extend the time fixed by rule for taking an appeal. United States v. Robinson, 361 U.S. 220 (1960). The desirability of a provision permitting an extension in appropriate cases is evidenced by Berman v. United States, 378 U.S. 530 (1964), Fallen v. United States, 306 F.2d 697 (5th Cir. 1962), rev'd 378 U.S. 139 (1964), and United States v. Isabella, 251 F.2d 223 (2d Cir. 1958).

Contrary to the usual rule (see Rule 45(b); see also Rule 6(b) of the Federal Rules of Civil Procedure) the district court is authorized to extend the time after its expiration without motion and notice. The usual requirement of motion and notice has the effect of reducing the time within which an extension of the time for appeal may be sought, since, unlike other motions for extensions, the relief itself can be granted only within a fixed time after expiration of the original time. While an adverse party ought ordinarily be afforded an opportunity to contest a request for an extension, the special circumstances which not infrequently obtain in criminal cases suggest that the district court should be empowered to grant extensions in appropriate cases without motion and notice.

(6) The second sentence of present subdivision (a)(2) has been transferred, in amended form, to Rule 32.

Rule 38. Stay of Execution, and Relief Pending Review

(a) Stay of Execution.

(2) Imprisonment. A sentence of imprisonment shall be stayed if an appeal is taken and the defendant ~~elects not to commence service of the sentence or~~ is admitted to bail. If 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.

Advisory Committee's Note

A defendant sentenced to a term of imprisonment is committed to the custody of the Attorney General who is empowered by statute to designate the place of his confinement. 18 U.S.C. § 4082. The sentencing court has no authority to designate the place of imprisonment. See, e.g., Hogue v. United States, 287 F.2d 99 (5th Cir. 1961), cert. den., 368 U.S. 932 (1961).

When the place of imprisonment has been designated, and notwithstanding the pendency of an appeal, the defendant is usually transferred from the place of his temporary detention within the district of his conviction unless he has elected "not to commence service of the sentence." This transfer can be avoided only if the defendant makes the election, a course sometimes advised by counsel who may deem it necessary to consult with the defendant from time to time before the appeal is finally perfected. However, the election deprives the defendant of a right to claim credit for the time spend in jail pending the disposition of the appeal because 18 U.S.C. § 3568 provides that the

sentence of imprisonment commences to run only from "the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence." See, e.g., Shelton v. United States, 234 F.2d 132 (5th Cir. 1956).

The amendment eliminates the procedure for election not to commence service of sentence. In lieu thereof it is provided that 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 the appeal is to be heard for the period reasonably necessary to permit the defendant to assist in the preparation of his appeal to the court of appeals. Under this procedure the defendant would no longer be required to serve dead time in a local jail in order to assist in preparation of his appeal.

Rule 40. Commitment to Another District; Removal

(b) Arrest in Distant District.

(2) Statement by Commissioner or Judge. The commissioner or judge 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 of his right to have a hearing or to waive a hearing by signing a waiver before the commissioner or judge. 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.

Advisory Committee's Note

The amendment conforms to the change made in the corresponding procedure in Rule 5(b).

Rule 44. Right to and Assignment of Counsel

~~If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain 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 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's Note

A new rule is provided as a substitute for the old to provide for the assignment of counsel to defendants unable to obtain counsel during all stages of the proceeding. The Supreme Court has recently made clear the importance of providing counsel both at the earliest possible time after arrest and on appeal. See Crooker v. California, 357 U.S. 433 (1958); Cicenia v. LaGay, 357 U.S. 504 (1958); White v. Maryland, 373 U.S. 59 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963). See also Association of the Bar of the City of New York, Special Committee to Study the Defender System, Equal Justice for the Accused (1959); Report of the Attorney General's Committee on Poverty and the Administration of Justice (1963); Beaney, Right to Counsel Before Arraignment, 45 Minn. L. Rev. 771 (1961); Boskey, The Right to Counsel in Appellate Proceedings, 45 Minn. L. Rev. 783 (1961); Douglas, The Right to Counsel--A Foreword, 45 Minn. L. Rev. 693 (1961); Kamisar, The Right to Counsel and the Fourteenth Amendment; A Dialogue on "The Most Pervasive Right" of an Accused, 30 U. Chi. L. Rev. 1 (1962);

Kamisar, Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values, 61 Mich. L. Rev. 219 (1962); Symposium, The Right to Counsel, 22 Legal Aid Briefcase 4-48 (1963). Provision has been made by law for a Legal Aid Agency in the District of Columbia which is charged with the duty of providing counsel and courts are admonished to assign such counsel "as early in the proceeding as practicable." D.C. Code § 2-2202. Congress has now made provision for assignment of counsel and their compensation in all of the districts. Criminal Justice Act of 1964.

Like the original rule the amended rule provides a right to counsel which is broader in two respects than that for which compensation is provided in the Criminal Justice Act of 1964: (1) the right extends to petty offenses to be tried in the district courts, and (2) the right extends to defendants unable to obtain counsel for reasons other than financial. These rules do not cover procedures other than those in the courts of the United States and before United States commissioners. See Rule 1. Hence, the problems relating to the providing of counsel prior to the initial appearance before a court or commissioner are not dealt with in this rule. Cf. Escobedo v. United States, 378 U.S. 478 (1964); Enker and Elsen, Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois, 49 Minn. L. Rev. 47 (1964).

Subdivision (a). This subdivision expresses the right of the defendant unable to obtain counsel to have such counsel assigned at any stage of the proceedings from his initial appearance before the commissioner or court through the appeal, unless he waives such right. The phrase "from his initial appearance before the commissioner or court" is intended to require the assignment of counsel as promptly as possible after it appears that the defendant is unable to obtain counsel. The right to assignment of counsel is not limited to those financially unable to obtain counsel. If a defendant is able to compensate counsel but still cannot obtain counsel, he is entitled to the assignment of counsel even though not to free counsel.

Subdivision (b). This new subdivision reflects the adoption of the Criminal Justice Act of 1964. See Report of the Judicial Conference of the United States on the Criminal Justice Act of 1964, 36 F.R.D. 277 (1964).

Rule 45. Time

(a) Computation. In computing any period of time the day of the act or event ~~after~~ from which the designated period of time begins to run ~~is~~ shall not ~~to~~ be included. The last day of the period so computed ~~is to~~ shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which ~~is neither~~ not a Saturday, a Sunday, ~~nor~~ or a legal holiday. When a period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. ~~A half holiday shall be considered as other days and not as a holiday.~~ As used in these rules, "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if ~~application~~ request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done ~~after the expiration of the specified period~~ if the failure to act was the result of excusable neglect; but the court may not ~~enlarge the period~~ extend the time for taking any action under Rules 32, 33, 34, ~~and 35, except as otherwise~~

~~provided in those rules; or the period for taking an appeal~~ 35, 37(a)(2) and 39(c), except to the extent and under the conditions stated in them.

Advisory Committee's Note

Subdivision (a). This amendment is designed to conform the subdivision with the amendments made effective on July 1, 1963, to the comparable provision in Civil Rule 6(a). The only major change is to treat Saturdays as legal holidays for the purpose of computing time.

Subdivision (b). The amendment conforms the subdivision to the amendments made effective in 1948 to the comparable provision in Civil Rule 6(b). One of these conforming changes, substituting the words "extend the time" for the words "enlarge the period" will clarify the ambiguity which gave rise to the decision in United States v. Robinson, 361 U.S. 220 (1960). The amendment also, in connection with the amendments to Rules 29 and 37, makes it clear that the only circumstances under which extensions can be granted under Rules 29, 33, 34, 35, 37(a)(2) and 39(c) are those stated in them.

Rule 46. Release on Bail

(c) ~~Amount~~ Terms. If the defendant is admitted to bail, the ~~amount~~ 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, ~~and~~ 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. ~~One or more sureties may be required; cash or bonds or notes of the United States may be accepted and in proper cases no security need be required.~~ 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.

(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.

Advisory Committee's Note

Subdivision (c). The more inclusive word "terms" is substituted for "amount" in view of the amendment to subdivision (d) authorizing releases

without security on such conditions as are necessary to insure the appearance of the defendant. The phrase added at the end of this subdivision is designed to encourage commissioners and judges to set the terms of bail so as to eliminate unnecessary detention. See Stack v. Boyle, 342 U.S. 1 (1951); Bandy v. United States, 81 S. Ct. 197 (1960); Bandy v. United States, 82 S. Ct. 11 (1961); Carbo v. United States, 82 S. Ct. 662 (1962); review den. 369 U.S. 868 (1962).

Subdivision (d). The amendments are designed to make possible (and to encourage) the release on bail of a greater percentage of indigent defendants than now are released. To the extent that other considerations make it reasonably likely that the defendant will appear it is both good practice and good economics to release him on bail even though he cannot arrange for cash or bonds in even small amounts. In fact it has been suggested that it may be a denial of constitutional rights to hold indigent prisoners in custody for no other reason than their inability to raise the money for a bond. Bandy v. United States, 81 S. Ct. 197 (1960).

The first change authorizes the acceptance as security of a deposit of cash or government securities in an amount less than the face amount of the bond. Since a defendant typically purchases a bail bond for a cash payment of a certain percentage of the face of the bond, a direct deposit with the court of that amount (returnable to the defendant upon his appearance) will often be equally adequate as a deterrent to flight. Cf. Ill. Code Crim. Proc. § 110-7 (1963).

The second change authorizes the release of the defendant without financial security on his written agreement to appear when other deterrents appear reasonably adequate. See the discussion of such deterrents in Bandy v. United States, 81 S. Ct. 197 (1960). It also permits the imposition of nonfinancial conditions as the price of dispensing with security for the bond. Such conditions are

commonly used in England. Devlin, The Criminal Prosecution in England, 89 (1958). See the suggestion in Note, Bail: An Ancient Practice Reexamined, 70 Yale L. J. 966, 975 (1961) that such conditions "* * * might include release in custody of a third party, such as the accused's employer, minister, attorney, or a private organization; release subject to a duty to report periodically to the court or other public official; or even release subject to a duty to return to jail each night." Willful failure to appear after forfeiture of bail is a separate criminal offense and hence an added deterrent to flight. 18 U.S.C. § 3146.

For full discussion and general approval of the changes made here see Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice 58-89 (1963).

Subdivision (h). The purpose of this new subdivision is to place upon the court in each district the responsibility for supervising the detention of defendants and witnesses and for eliminating all unnecessary detention. The device of the report by the attorney for the government is used because in many districts defendants will be held in custody in places where the court sits only at infrequent intervals and hence they cannot be brought personally before the court without substantial delay. The magnitude of the problem is suggested by the facts that during the fiscal year ending June 30, 1960, there were 23,811 instances in which persons were held in custody pending trial and that the average length of detention prior to disposition (i.e., dismissal, acquittal, probation, sentence to imprisonment, or any other method of removing the case from the court docket) was 25.3 days. Federal Prisons 1960, table 22, p. 60. Since 27,645 of the 38,855 defendants whose cases were terminated during the fiscal year ending June 30, 1960, pleaded guilty (United States Attorneys Statistical Report, October 1960, p. 1 and table 2), it would appear that the greater part of the detention reported occurs prior to the initial appearance of the defendant before the court.

Rule 49. Service and Filing of Papers

(a) Service; When Required. Written motions other than those which are heard ex parte, written notices, designations of record on appeal and similar papers shall be served upon ~~the adverse parties~~ each of the parties.

(c) Notice of Orders. Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party ~~affected thereby~~ a notice thereof and shall make a note in the docket of the mailing. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted by Rule 37 (a)(2).

Advisory Committee's Note

Subdivision (a). The words "adverse parties" in the present rule introduce a question of interpretation. *When, for example, is a co-defendant an adverse* party? The amendment requires service on each of the parties thus avoiding the problem of interpretation and promoting full exchange of information among the parties. No restriction is intended, however, upon agreements among co-defendants or between the defendants and the government restricting exchange of papers in the interest of eliminating unnecessary expense. Cf. the amendment made effective July 1, 1963, to Civil Rule 5(a).

Subdivision (c). The words "affected thereby" are deleted in order to require notice to all parties. Cf. the similar change made effective July 1, 1963, to Civil Rule 77(d).

The sentence added at the end of the subdivision is designed to eliminate the possibility of extension of the time to appeal beyond the provision for a 30 day extension on a showing of "excusable neglect" provided in Rule 37(a)(2). Cf. the similar change

made in Civil Rule 77(d) effective in 1948. The question has arisen in a number of cases whether failure or delay in giving notice on the part of the clerk results in an extension of the time for appeal. The "general rule" has been said to be that in the event of such failure or delay "the time for taking an appeal runs from the date of later actual notice or receipt of the clerk's notice rather than from the date of entry of the order." Lohman v. United States, 237 F.2d 645, 646 (6th Cir. 1956). See also Rosenbloom v. United States, 355 U.S. 80 (1957) (permitting an extension). In two cases it has been held that no extension results from the failure to give notice of entry of judgments (as opposed to orders) since such notice is not required by Rule 49(d). Wilkinson v. United States, 278 F.2d 604 (10th Cir. 1960), cert. den. 363 U.S. 829; Hyche v. United States, 278 F.2d 915 (5th Cir. 1960), cert. den. 364 U.S. 881. The excusable neglect extension provision in Rule 37(a)(2) will cover most cases where failure of the clerk to give notice of judgments or orders has misled the defendant. No need appears for an indefinite extension without time limit beyond the 30 day period.

Rule 54. Application and Exception

(a) Courts and Commissioners.

(1) Courts. These rules apply to all criminal proceedings in the United States District Courts; ~~which include the District Court for the Territory of Alaska;~~ in the District Court of Guam and the District Court of the Virgin Islands; 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. ~~The rules governing proceedings after verdict or finding of~~

~~guilt or plea of guilty apply~~ 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.

(b) Proceedings.

(5) Other Proceedings. These rules are not applicable to extradition and rendition of fugitives; fortfeiture 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) ~~T~~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, c. 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.

Advisory Committee's Note

Subdivision (a). The first change reflects the granting of statehood to Alaska. The second change conforms to Section 3501 of the Canal Zone Code.

Subdivison (b). The change is made necessary by the new provision in Rule 20(d).

Rule 55. Records

The clerk of the district court and each United States commissioner 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.

Advisory Committee's Note

Rule 37(a)(2) provides that for the purpose of commencing the running of the time for appeal a judgment or order is entered "when it is entered in the criminal docket." The sentence added here requires that such a docket be kept and that it show the dates on which judgments or orders are entered therein. Cf. Civil Rule 79(a).

Rule 56. Courts and Clerks

The court of appeals and the district court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, and Christmas Day.

Advisory Committee's Note

The change is in conformity with the changes made in Rule 45. See the similar changes in Civil Rule 77(c) made effective July 1, 1963.

Form 26.

NOTICE OF APPEAL

In the United States District Court for the .....District of.....,

.....Division

UNITED STATES OF AMERICA)
V.) No. .....
JOHN DOE)

Notice is hereby given that John Doe, defendant above named, hereby appeals to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from the order (describing it)) entered in this proceeding on the _____ day of _____, 19___.

Dated _____.

(S)_____

_____
(address)
Attorney for John Doe[1]

1. or "Appellant" or "Clerk" as the case may be.

Advisory Committee's Note

The form is revised to correspond with the amendments to Rule 37.

O R D E R

Ordered:

That Rule 19 and subdivision (c) of Rule 45 of the Rules of Criminal Procedure for the United States District Courts, promulgated by this Court on December 26, 1944, effective March 21, 1946, are hereby rescinded, effective _____.

ADVISORY COMMITTEE'S NOTE

Rule 19 is proposed to be rescinded in view of the amendments being proposed to Rule 18.

Subdivision (c) of Rule 45 is proposed to be rescinded as unnecessary in view of the 1963 amendment to 28 U.S.C. § 138 eliminating terms of court.