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

TO: Hon. Robert E. Keeton, Chairman Standing Committee on Rules of Practice and Procedure

FROM: Hon. Wm. Terrell Hodges, Chairman Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: Report on Proposed and Pending Rules of Criminal Procedure and Rules of Evidence

DATE: June 19, 1991

I. INTRODUCTION

At its May 1991, meeting the Advisory Committee on Rules of Criminal Procedure acted upon proposed amendments to ten (10) different rules. The Advisory Committee recommends that the Standing Committee approve the proposed amendments for circulation to the bench and the bar for public comment. This report briefly addresses those proposed amendments and the recommendations to the Standing Committee. The minutes of the Committee's May meeting and copies of the proposed amendments and the accompanying Committee Notes are attached.

II. RULES PENDING COMMENT BY THE BENCH AND BAR

There are currently no Rules of Criminal Procedure or Rules of Evidence pending comment by the bench and the bar.

III. PROPOSED AMENDMENTS TO RULES OF CRIMINAL PROCEDURE

The Advisory Committee recommends that the following amendments be approved by the Standing Committee. The proposed amendments are attached.

A. Rule 16(a)(1). Disclosure of Experts. The proposed amendments would generally parallel similar provisions in Federal Rule of Civil Procedure 26 and would expand discovery to both the defense and the government. The proposed amendment requires that upon request by the defendant, the government must disclose the identity, address, and qualifications of any expert the government intends to call as a witness. The government must also disclose the subject matter of the expected testimony and a summary of the grounds for each opinion, including other experts upon whom the witness is relying. The proposed amendment includes a reciprocal disclosure provision which would require similar disclosures by the defense.

B. Rule 26.3. Mistrial. Rule 26.3 is a new rule, recommended by the Department of Justice, which would require the trial court to permit each side to comment on the propriety of a mistrial before entering an order to that effect. In particular, it would permit each party to put on the record whether it consents or objects to a mistrial and thereby avoid double jeopardy issues which might otherwise result.

C. Rule 40(a). Appearance Before Federal Magistrate Judge. The proposed amendment to Rule 40(a) is one of two amendments being proposed by the Advisory Committee which would permit use of facsimile transmissions in presenting information to a court. The amendment to Rule 40(a) would permit a federal magistrate judge to rely upon a facsimile transmission of a warrant (or a certified copy of the warrant) in determining whether a defendant should be removed to the charging district.

D. Rule 41(c)(2). Warrant Upon Oral Testimony. The proposed amendment to Rule 40(c)(2) is intended to expand the authority of Federal magistrate judges in considering oral requests for search warrants. It would permit a federal magistrate judge to consider not only sworn oral testimony, but also facsimile transmissions. The Committee considered the possibility of expanding use of facsimile transmissions in other provisions, i.e. Rule 41(c)(2)(B), Application, Rule 41(c)(2)(C), Issuance, and Rule 41(g), Return of Papers to Clerk, but decided that permitting use of facsimile transmissions in those situations would not necessarily save time and would pose problems of preserving the transmissions.

The Committee will continue to consider possible amendments to other Rules of Criminal Procedure which would permit use of facsimile transmissions.

E. Rule 12(i). Production of Statements at Suppression Hearing. A minor amendment would delete language in the last sentence of Rule 12(i). This amendment is one of a series of proposed amendments which would address the production of witness Statements at various hearings and proceedings conducted under the Rules of Criminal Procedure. A proposed amendment to Rule 26.2 addresses the ability of the court to redact privileged matter, thus making the language in Rule 12(i) redundant.

F. Rule 26.2. Production of Statements of Witnesses. Rule 26.2, like the Jencks Act, currently permits a party to request production of prior statements (except by the defendant) of a witness after the witness has testified. Although the rule currently applies only at trial and at suppression hearings (Rule 12), the proposed addition of subsection (g) to Rule 26.2 would make the rule applicable at sentencing hearings (Rule 32), at hearings to revoke or modify probation or supervised release (Rule 32.1), at detention hearings (Rule 46) and at evidentiary hearings held under 28 U.S.C. § 2255. The amendments generally reflect the Committee's view that disclosing a witness's statement at these various proceedings will enhance the ability of the parties to present accurate information which may affect the credibility of the witness. In each of these instances, the witness's statements would not be ordered disclosed until after the witness has testified or the witness's affidavit has been introduced.

G. Rule 32(f). Production of Statements at Sentencing Hearing. As noted in the discussion concerning proposed amendments to Rule 26.2, the addition of subsection (f) to Rule 32 would permit each side to obtain copies of any statements made by a witness, after that witness has testified or the witness's affidavit has been introduced. At least one court has held that such statements can be produced at sentencing proceedings. United States v. Rosa, 891 F.2d 1074 (3d Cir. 1989).

H. Rule 32.1(c), Production of Statements. The proposed addition of subsection (c) would recognize that witness statements may be ordered disclosed at hearings to revoke or modify probation or hearings concerning supervised release. See Rule 26.2 supra.

I. Rule 46. Release from Custody. The addition of subsection (i) would provide for production of a witness's statements, under Rule 26.2., supra, at detention hearings.

J. Rule 8. Evidentiary Hearing, Rules Governing Proceedings in the United States District Courts Under § 2255 of Title 28, United States Code. The proposed amendment to Rule 8 parallels similar amendments to other Rules of Criminal Procedure which extend Rule 26.2 (Production of Witness Statements) to other proceedings conducted pursuant to the Federal Rules of Criminal Procedure. At least one court has already recognized that a witness's prior statements may be ordered produced at a § 2255 hearing. United States v. White, 342 F.2d 379, 382, n. 4 (4th Cir. 1959). The amendment would explicitly grant the authority to do so.

IV. TECHNICAL AMENDMENTS

The Judicial Improvements Act of 1990 (P.L. 101-650, Title III, Section 321) provides:

> After the enactment of this Act, each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge, and any reference to any United States magistrate or magistrate that is contained in title 28, United States Code, in any other Federal statute, or in any regulation of any department or agency of the United States in the executive branch that was issued before the enactment of this Act, shall be deemed to refer to a United States magistrate judge appointed under section 631 of title 28, United States Code.

The Advisory Committee requests that the Standing Committee approve technical amendments to Rules 1, 3, 4, 5, 5.1, 6, 9, 17, 32.1, 40, 41, 44, 49, 54, 55, 57, and 58 to effect this change of name. Thus, wherever the term magistrate is used to refer to a United States magistrate, the term should be "United States magistrate judge" Under recent amendments to the rules governing the Procedures for the Conduct of Business by the Judicial Conference Committees, the Standing Committee may make technical changes to the Rules without first publishing them for comment by tne bench and the bar.

V. PROPOSED RULES GOVERNING TIME LIMITS

At the request of the Standing Committee, the Advisory Committee carefully considered and discussed the proposal that appropriate civil and criminal rules of procedure be amended to reflect time limits on various portions of the

trial of cases. Following extended discussion on the point, the Committee indicated that it was not inclined at this point to propose any amendments to the Criminal Rules. One of the chief concerns expressed was the fact that setting time limits might present serious confrontation clause problems by limiting cross-examination by the defendant. The Committee, however, does support efforts to expedite cases and applauds the concept of adopting such amendments in the civil rules in the hope that favorable experiences in civil cases will ease the way for similar changes in criminal practice, notwithstanding Sixth Amendment problems.

Attach.

PRELIMINARY DRAFT
OF PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE*

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

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(i) PRODUCTION OF STATEMENTS AT SUPPRESSION HEARING. Except as herein provided, rule 26.2 shall apply at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer shall be deemed a witness called by the government ~~, and upon a claim of privilege the court shall excise the portions of the statement containing privileged matter~~.

COMMITTEE NOTE

The amendment in subdivision (i) is one of a series of contemporaneous amendments to Rules 26.2, 32(f), 32.1, 46, and Rule 8 of the Rules Governing § 2255 Hearings, which extended Rule 26.2, Production of Statements of Witnesses, to other proceedings or hearings conducted under the Rules of Criminal Procedure. Language was added to Rule 26.2(c) which explicitly states that the trial court may excise privileged matter from the requested witness statements. That change to Rule 26.2 rendered similar language in Rule 12(i) redundant.

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

Rule 16. Discovery and Inspection

(a) DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.

(1) *Information Subject to Disclosure.*

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(E) EXPERT WITNESSES. Upon request of a defendant, the government shall disclose to the defendant any evidence which the government may present at trial under Rules 702, 703, or 705 of the Federal Rules of Evidence. This disclosure shall be in the form of a written report prepared and signed by the witness that includes a complete statement of all opinions to be expressed and the basis and reasons therefor, the data or other information relied upon in forming such opinions, any exhibits to be used as a summary of or support for such opinions, and the qualifications of the witness.

(2) *Information Not Subject to Disclosure.* Except as provided in paragraphs (A), (B), ~~and~~ (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents

made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

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(b) DISCLOSURE OF EVIDENCE BY THE DEFENDANT.

(1) *Information Subject to Disclosure.*

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(C). EXPERT WITNESSES. If the defendant requests disclosure under subdivision (a)(1)(E) of this rule, upon compliance with the request by the government, the defendant, on request of the government, shall provide the government with a written report prepared and signed by the witness that includes a complete statement of all opinions to be expressed and the basis and reasons therefor, the data or other information relied upon in forming such opinions, any exhibits to be used as a summary of or support for such opinions, and the qualifications of the witness.

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COMMITTEE NOTE

The addition of subdivisions (a)(1)(E) and (b)(1)(C) expand federal criminal discovery by requiring notice and disclosure, respectively, of the identities of expert witnesses, what they are expected to testify to, and the bases of their testimony. The amendment tracks closely with similar language in Federal Rule of Civil Procedure 26 and is intended to reduce the element of surprise which often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination. See Eads, Adjudication by Ambush: Federal Prosecutors' Use of Nonscientific Experts in a System of Limited Criminal Discovery, 67 N. Carolina L. Rev. 577, 622 (1989).

Like other provisions in Rule 16, subdivision (a)(1)(E) requires the government to disclose certain information regarding its expert witnesses if the defendant first requests the information. Once the requested information is provided, the government is entitled, under (b)(1)(C) to reciprocal discovery of the same information from the defendant.

With increased use of both scientific and nonscientific expert testimony, one of the most basic discovery needs of counsel is to learn that an expert is expected to testify. See Gianelli, Criminal Discovery, Scientific Evidence, and DNA, 44 Vand. L. Rev. 793 (1991); Symposium on Science and the Rules of Legal Procedure, 101 F.R.D. 599 (1983). This is particularly important where the expert is expected to testify on matters which touch on new or controversial techniques or opinions. The amendment is intended to meet this need by first, requiring notice of the expert's identity and qualifications which in turn will permit the requesting party to interview the prospective witness in preparation for trial and determine whether in fact the witness is

an expert within the definition of Federal Rule of Evidence 702. Like Rule 702, which generally provides a broad definition of who qualifies as an "expert," the amendment is broad in that it includes both scientific and nonscientific experts and does not distinguish between those cases where the expert will be presenting testimony on novel scientific evidence. The rule does not extend, however, to witnesses who may offer only lay opinion testimony under Federal Rule of Evidence 701.

Secondly, the requesting party is entitled to disclosure of the substance of the expected testimony. This provision is intended to permit more complete pretrial preparation by the requesting party. For example, this should inform the requesting party whether the expert will be providing only background information on a particular issue or whether the witness will actually offer an opinion.

Thirdly, and perhaps most importantly, the requesting party is to be informed of the grounds of the bases of the expert's opinion, including identification of other experts upon whom the testifying expert may be relying. Rule 16(a)(1)(D) covers disclosure and access to any results or reports of mental or physical examinations and scientific testing. But the fact that no formal written reports have been made does not necessarily mean that an expert will not testify at trial. At least one federal court has concluded that this provision did not otherwise require the government to disclose the identity of its expert witnesses where no reports had been prepared. See, e.g., United States v. Johnson, 713 F.2d 654 (11th Cir. 1983, cert. denied, 484 U.S. 956 (1984)(there is no right to witness list and Rule 16 was not implicated because no reports were made in the case). The amendment should remedy that problem. Without regard to whether a party would be entitled to the underlying bases for expert testimony under other provisions of Rule 16, the amendment requires disclosure the bases relied upon. That would necessarily cover not only written and oral reports, tests, reports, and investigations, but any information which might be recognized as legitimate basis for an opinion under Federal Rule of Evidence 703, including opinions of other experts.

As with other discovery requests under Rule 16, subdivision (d) is available to either side to seek ex parte a protective or modifying order concerning requests for information under (a)(1)(E) or (b)(1)(C).

Rule 26.2. Production of Statements of Witnesses

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(c) PRODUCTION OF EXCISED STATEMENT. If the other party claims that the statement contains privileged information or matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that are privileged or that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over the defendant's objection shall be preserved by the attorney for the government, and, in the event of a conviction and an appeal by the defendant, shall be made available to the appellate court for the

purpose of determining the correctness of the decision to excise the portion of the statement.

(d) RECESS FOR EXAMINATION OF STATEMENT. Upon delivery of the statement to the moving party, the court, upon application of that party, may recess the proceedings ~~in the trial~~ for the examination of such statement and for preparation for its use in the ~~trial~~ proceedings.

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(g) SCOPE OF RULE. Subdivisions (a)-(d) and (f) of this rule shall apply at a suppression hearing held pursuant to Rule 12, at trial pursuant this rule, at sentencing pursuant to Rule 32(f), at hearings to revoke or modify probation or supervised release held pursuant to Rule 32.1(c), at detention hearings held pursuant to Rule 46(i), and at an evidentiary hearing held pursuant to Section 2255 of Title 28, United States Code.

COMMITTEE NOTE

The addition of subsection (g), which describes the scope of the Rule, recognizes other contemporaneous amendments in the Rules of Criminal Procedure which extend the application of Rule 26.2 to other proceedings. Those changes are thus consistent with the extension of

Rule 26.2 in 1983 to suppression hearings conducted pursuant to Rule 12. See Rule 12(i).

In extending Rule 26.2 to suppression hearings in 1983, the Committee offered several reasons. First, production of witness statements enhances the ability of the court to assess the credibility of the witnesses and thus assist the court in making accurate factual determinations at suppression hearings. Second, because witnesses testifying at a suppression hearing may not necessarily testify at the trial itself, waiting until after a witness testifies at trial before requiring production of that witness's statement would be futile. Third, the Committee believed that it would not work to leave the suppression issue open until trial, where Rule 26.2 would then be applicable. Finally, one of the central reasons for requiring production of statements at suppression hearings was the recognition that by its nature, the results of a suppression hearing have a profound and ultimate impact on the issues presented at trial.

The reasons given in 1983 for extending Rule 26.2 to a suppression hearing are equally compelling with regard to other adversary type hearings which ultimately depend on accurate and reliable information. That is, there is a continuing need for information affecting the credibility of witnesses who present testimony or written statements which are considered by the court in making its decision. And that need exists without regard to whether the witness is presenting testimony or an affidavit at a pretrial hearing, at a trial, or at a post-trial proceeding.

As noted in the 1983 Advisory Committee Note to Rule 12(i), the courts have generally declined to extend the Jencks Act, 18 U.S.C. § 3500, beyond the confines of actual trial testimony. That result will be obviated by the addition of Rule 26.2(g) and amendments to the Rules noted in that new subdivision.

Although amendments to Rules 32, 32.1, 46, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255 specifically address the requirement of producing a witness's statement, Rule 26.2 has become known as the

central "rule" requiring production of statements. Thus, the references in the Rule itself will assist the bench and bar in locating other Rules which include similar provisions.

The amendment to Rule 26.2 and the other designated Rules is not intended to require production of a witness' statement before the witness actually testifies or before the witness' affidavit is presented to the court.

Minor conforming amendments have been made to subsection (d) to reflect that Rule 26.2 will be applicable to proceedings other than the trial itself. And language has been added to subsection (c) to recognize explicitly that privileged matter may be excised from the witness's prior statement.

Rule 26.3 Mistrial

Before ordering a mistrial, the court shall provide an opportunity for the government and for each defendant to comment on the propriety of the order, including whether each party consents or objects to a mistrial, and to suggest any alternatives.

COMMITTEE NOTE

Rule 26.3 is a new rule designed to reduce the possibility of an erroneously ordered mistrial which could produce adverse and irretrievable consequences. The rule is not designed to change in any way the substantive law governing mistrials but instead is directed at providing both sides with an opportunity to

place on the record their views about the proposed order declaring a mistrial. In particular, the court must give each side an opportunity to state whether it objects or consents to the order. But the Rule does not require each side to state its position.

Recently several cases have held that retrial of a defendant was barred by the Double Jeopardy Clause of the Constitution because the trial court had abused its discretion in declaring a mistrial. See United States v. Dixon, 913 F.2d 1305 (8th Cir. 1990); United States v. Bates, 917 F.2d 388 (9th Cir. 1990). In both cases the appellate courts concluded that the trial court had acted precipitously and had failed to solicit the views of the parties as to the necessity of a mistrial and the feasibility of any alternative action. The new Rule is designed to remedy that situation.

The Committee regards the Rule as a balanced and modest procedural device which could benefit both the prosecution and the defense. While the Dixon and Bates decisions adversely affected the government's interest in prosecuting the defendants on serious crimes, the new Rule could also benefit defendants. The Rule also ensures that the defendant has the opportunity to dissuade a judge from declaring a mistrial in a case where granting one would not be an abuse of discretion, but the defendant believes that the prospects for a favorable outcome before that particular court or jury are stronger than they would be at a retrial.

Rule 32. Sentence and Judgment

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(f) Production of Statements at Sentencing Hearing.

(1) In General. Rule 26.2 (a)-(d), (f) shall apply at a sentencing hearing under this rule.

(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order pursuant to Rule 26.2(a) to deliver a statement to the moving party, the court shall not consider the affidavit or testimony of the witness in sentencing.

COMMITTEE NOTE

The addition of subsection (f) to Rule 32 is one of a number of contemporaneous amendments extending Rule 26.2 to hearings and proceedings other than the trial itself. The amendment to Rule 32 specifically codifies the result in cases such as United States v. Rosa, 891 F.2d 1074 (3d. Cir. 1989). In that case the defendant pleaded guilty to a drug offense. During sentencing the defendant unsuccessfully attempted to obtain Jencks Act materials relating to a co-accused who testified as a government witness at sentencing. In concluding that the trial court erred in not ordering the government to produce its witness' statement, the court stated:

> We believe the sentence imposed on a defendant is the most critical stage of criminal proceedings, and is, in effect, the "bottom-line" for the defendant, particularly where the defendant has pled guilty. This being so, we can perceive no purpose in denying the defendant the ability to effectively cross-examine a government witness where such testimony may, if

> accepted, add substantially to the defendant's sentence. In such a setting, we believe that the rationale of Jencks v. United States...and the purpose of the Jencks Act would be disserved if the government at such a grave stage of a criminal proceeding could deprive the accused of material valuable not only to the defense but to his very liberty. Id. at 1079.

The court added that the defendant had not been sentenced under the new Sentencing Guidelines and that its decision could take on greater importance under those rules. Under Guideline sentencing, said the court, the trial judge has less discretion to moderate a sentence and is required to impose a sentence based upon specific factual findings which need not be established beyond a reasonable doubt. Id at n. 3.

Although the Rosa decision only decided the issue of access by the defendant to Jencks material, the amendment parallels Rules 26.2 (applying Jencks Act to trial) and 12(i) (applying Jencks Act to suppression hearing) in that both the defense and the prosecution are entitled to Jencks material.

Production of a statement is triggered by the witness' oral testimony or the presentation of the witness' affidavit. If neither is presented, no production is required. The sanction provision rests on the assumption that the proponent of the witness' affidavit or testimony has deliberately elected to withhold relevant material.

Rule 32.1. Revocation or Modification of Probation or Supervised Release

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(c) PRODUCTION OF STATEMENTS

(1) In General. Rule 26.2(a)-(d) and (f) shall apply at any hearing under this rule.

(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order pursuant to Rule 26.2(a) to deliver a statement to the moving party, the court shall not consider the affidavit or testimony of the witness.

COMMITTEE NOTE

The addition of subdivision (c) is one of several amendments which extend Rule 26.2 to Rules 32(f), 32.1, 46, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255. As noted in the Committee Note to Rule 26.2, the central purpose of extending that Rule to other hearings and proceedings rests heavily upon the compelling need for accurate information affecting the credibility of witnesses who have presented evidence. While that need is certainly clear in a trial on the merits, it is equally compelling and perhaps more so, in other pretrial and post-trial proceedings in which both the prosecution and defense have high interests at stake. In the case of revocation or modification of probation or supervised release proceedings, not only is the defendant's liberty interest at stake, but the government also has a stake in protecting the interests of the community.

Providing for production of witness statements at hearings conducted pursuant to Rule 32.1 will enhance the procedural due process which the rule now provides and which the Supreme Court required in Morrissey v. Brewer, 408 U.S. 471 (1972) and Gagnon v. Scarpelli, 411 U.S. 778 (1973). Access to prior statements of a witness will enhance the ability of both the defense and prosecution to test the credibility of the other side's witnesses under Rule 32.1(a)(1), (a)(2), and (b) respectively, and thus will assist the court in assessing credibility.

Production of a witness's statement is triggered by the witness' testimony or presentation of the written affidavit. If neither is presented, production is not required.

Rule 40. Commitment to Another District

(a). APPEARANCE BEFORE FEDERAL MAGISTRATE. If a person is arrested in a district other than that in which the offense is alleged to have been committed, that person shall be taken without unnecessary delay before the nearest available federal magistrate. Preliminary proceedings concerning the defendant shall be conducted in accordance with Rules 5 and 5.1, except that if no preliminary examination is held because an indictment has been returned or an information filed or because the defendant elects to have the preliminary examination conducted in the district in which the prosecution is pending, the person

shall be held to answer upon a finding that such person is the person named in the indictment, information or warrant. If held to answer, the defendant shall be held to answer in the district court in which the prosecution is pending, provided that a warrant is issued in that district if the arrest was made without a warrant, upon production of the warrant or a certified copy thereof. The warrant or certified copy may be produced by facsimile transmission.

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COMMITTEE NOTE

The amendment to subdivision (a) is intended to expedite the process of determining where a defendant will be held to answer by permitting facsimile transmission of a warrant or a certified copy of the warrant. The amendment recognizes that there has been an increased reliance by the public in general, and the legal profession in particular, on accurate and efficient transmission of important legal documents by facsimile machines.

Rule 41. Search and Seizure

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(c) ISSUANCE AND CONTENTS.

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(2) *Warrant Upon Oral Testimony.*

(A) GENERAL RULE. If the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate judge may issue a warrant based, in whole or in part, upon sworn ~~oral~~ testimony communicated by telephone or other appropriate means ~~.~~ , including facsimile transmission.

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COMMITTEE NOTE

The amendment to Rule 41(c)(2)(A) is intended to expand the authority of magistrates and judges in considering oral requests for search warrants. It also recognizes the value and increased dependance of the public generally on facsimile machines to efficiently and accurately transmit written information. It should thus have the effect of encouraging law enforcement officers to seek a warrant, especially in those cases where it is necessary or desirable to supplement oral telephonic communications by written materials which may now be transmitted electronically as well.

The Committee considered amendments to Rule 41(c)(2)(B), Application, Rule 41(c)(2)C), Issuance, and Rule 41(g), Return of Papers to Clerk, but determined that permitting use of facsimile machines in those instances would not save time and would present problems and questions concerning the need to preserve facsimile copies.

Rule 46. Release from Custody

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(i) PRODUCTION OF STATEMENTS.

(1) In General. Rule 26.2(a)-(d) and (f) shall apply at a detention hearing held pursuant to 18 U.S.C. § 3144.

(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order pursuant to Rule 26.2(a) to deliver a statement to the moving party, the court shall not consider the affidavit or testimony of witness at the detention hearing.

COMMITTEE NOTE

The addition of subdivision (i) to this Rule is one of a series of similar amendments to Rules 26.2, 32, 32.1, and Rule 8 of the Rules Governing Proceedings Under 28 U.S.C. § 2255 which now extend Rule 26.2 to other proceedings and hearings. As pointed out in the Committee Note to the amendment to Rule 26.2, without regard to whether a witness' testimony or affidavit is being considered at a pretrial proceeding, at the trial itself, or at a post-trial proceeding, there is continuing and compelling need to assess the credibility and reliability of information relied upon by the court. Production of a witness's prior statements directly furthers that goal.

The need for reliable information is no less crucial in a proceeding to determine whether a defendant should

be released from custody. The issues decided at pretrial detention hearings are important to both a defendant and the community. For example, a defendant charged with criminal acts may be incarcerated prior to an adjudication of guilt without bail on grounds of future dangerousness which is not subject to proof beyond a reasonable doubt. Although the defendant clearly has an interest in remaining free prior to trial, the community has an equally compelling interest in being protected from potential criminal activity committed by persons awaiting trial.

In upholding the constitutionality of pretrial detention based upon dangerousness, the Supreme Court in United States v. Salerno, 481 U.S. 739 (1986), stressed the existence of procedural safeguards in the Bail Reform Act. The Act provides for the right to counsel and the right to cross-examine adverse witnesses. See, e.g., 18 U.S.C. § 3142(f)(right of defendant to cross-examine adverse witness). Those safeguards, said the Court, are "specifically designed to further the accuracy of that determination." 481 U.S. at 751. The Committee believes that requiring the production of a witness' statement will further enhance the fact-finding process.

Given the fact that in the case of pretrial detention hearings held very early in the prosecution of a case, a particular witness' statement may not yet be on file, it may be difficult to locate and produce that statement. Or the parties may not even be aware that a statement exists. The amendment nonetheless envisions that reasonable efforts should be made to locate such statements, assuming that they in fact exist. If a witness' statement is not discovered until after the pretrial detention hearing, the court may reopen the proceeding if the statement would have a material bearing on the court's decision regarding detention. See 18 U.S.C. § 3142(f).

RULES GOVERNING PROCEEDINGS IN THE UNITED STATES DISTRICT COURT UNDER § 2255 OF TITLE 28, UNITED STATES CODE

Rule 8. Evidentiary Hearing

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(d) Production of Statements at Evidentiary Hearing.

(1) In General. Federal Rule of Criminal Procedure 26.2(a)-(d), and (f) shall apply at an evidentiary hearing under these rules.

(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order pursuant to Federal Rule of Criminal Procedure 26.2(a) to deliver a statement to the moving party, the court shall not consider the affidavit or testimony of the witness at the evidentiary hearing.

COMMITTEE NOTE

The amendment to Rule 8 is one of a series of parallel amendments to Federal Rules of Criminal Procedure, 32, 32.1, and 46 which extend the scope of Rule 26.2 (Production of witness statements) to proceedings other than the trial itself. The amendments are grounded on the compelling need for accurate and

credible information in making decisions concerning the defendant's liberty. See the Advisory Committee Note to Rule 26.2(g). A few courts have recognized the authority of a judicial officer to order production of prior statements by a witness at a § 2255 hearing, see, e.g., United States v. White, 342 F.2d 379, 382, n.4 (4th Cir. 1959). The amendment to Rule 8, however, now grants explicit authority to do so.

The amendment is not intended to require production of a witness's statement before the witness actually presents oral testimony or the witness' affidavit is presented to the court for its consideration.