TO: **Hon. Anthony J. Scirica, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Ed Carnes, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: **Report of the Advisory Committee on Criminal Rules**

DATE: **May 15, 2003**

I. Introduction.

The Advisory Committee on the Rules of Criminal Procedure met on April 28-29, 2003, in Santa Barbara, California and took action on proposed amendments to the Rules of Criminal Procedure.

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II. Action Items—Summary and Recommendations.

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Second, the Committee has considered and recommended amendments to the following Rules:

- Rule 12.2. Notice of Insanity Defense; Mental Examination; Sanction for Failing to Disclose.
- Rules 29, 33, 34 & 45. Regarding Ruling by Judge on Motions to Extend Time for Filing Motions Under Those Rules.
- Rule 32. Sentencing; Regarding Victim Allocution.
- Rule 32.1. Revoking or Modifying Probation or Supervised Release; Regarding Allocution by Defendant.
- New Rule 59. Review of Rulings by Magistrate Judges.

The Committee recommends that those rules be published for public comment.

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IV. Action Items—Recommendation to Publish Amendments to Rules.

A. ACTION ITEM—Rule 12.2. Notice of Insanity Defense; Mental Examination and Sanctions for Failure to Disclose.

For the last year the Committee has considered a proposal to amend Rule 12.2 to fill a perceived gap. Although the rule

contains a sanctions provision for failing to comply with the requirements of the rule, there is no provision stating possible sanctions if the defendant does not comply with Rule 12.2(c)(3), which requires the defendant to disclose to the government the results and reports of the defendant's expert examination.

The Committee has unanimously proposed an amendment to Rule 12.2(d) to address that issue and requests that the rule be published for public comment.

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B. ACTION ITEM—Rules 29, 33, 34, and 45; Proposed Amendments re Rulings by Court and Setting Times for Filing Motions.

In Rules 29, 33, and 34 the court is required to rule on any motion for an extension of time, within the seven-day period specified for filing the underlying motion. Failure to do so deprives the court of the jurisdiction to consider an underlying motion, filed after the seven-day period. *See United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict"). Thus, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal within the seven-day period, the judge must rule on that motion or request within the same seven-day period. If for some reason the court does not act on the request within the seven days, the court lacks jurisdiction to act on the underlying substantive motion.

Parallel amendments have been proposed for Rules 29, 33, and 34 and a conforming change has been proposed for Rule 45. The defendant would still be required to file motions under those rules within the specified seven-day period unless the time is extended. And the defendant would still be required to file within that seven-day period any request for extension. The change is that the court would not be required to act on that motion within the same seven-day period on the request for the extension.

The Rule and Committee Note . . . was approved by an 8 to 2 vote of the Committee . . ..

C. ACTION ITEM—Rule 32, Sentencing; Proposed Amendment re Allocution Rights of Victims of Non-violent and Non-sexual Abuse Felonies.

Currently, Rule 32(i)(4) provides for allocution at sentencing by victims of violent crimes and sexual abuse. Although there is no provision in the current rule for victim allocution for other felonies, the Committee understands that many courts nonetheless consider statements from victims of felonies that do not involve violence or sexual abuse.

At its September 2002 meeting, the Committee decided to amend Rule 32 to provide for allocution for victims of non-violent and non-sexual abuse felonies. At its April 2003 meeting, the Committee continued its discussion of the proposed amendment and voted by a margin of 7 to 2, with one abstention, to recommend that the proposed amendment be published for comment.

The Committee considered but rejected a provision that would provide that a court's decision regarding allocution in this type of case would not be reviewable. In rejecting that provision, the Committee considered the fact that there is already some authority for the view that victims do not have standing to appeal a court's decision denying them the ability to address the court.

The proposed amendment does not make any specific provision for hearing from representatives of victims of non-violent or non-sexual abuse felonies, because the Committee believes that the policy reasons for permitting statements by third persons are not as compelling in cases involving "economic" crimes. In any event, the rule does not prohibit the court from considering statements from third persons, speaking on behalf of victims.

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D. ACTION ITEM—Rule 32.1. Revoking Or Modifying Probation Or Supervised Release. Proposed Amendments To Rule Concerning Defendant's Right Of Allocution.

In *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002), the court observed that there is no explicit provision in Rule 32.1 giving the defendant a right to allocution; it suggested that the Advisory Committee might wish to address that matter. At the Committee's April 2002 meeting, it voted to amend Rule 32.1 to address allocution rights at revocation hearings; at its September 2002 meeting, the Committee decided to consider a further amendment to the rule that would include a similar allocution provision in proceedings to modify a sentence.

The Committee unanimously approved the proposed amendment to Rule 32.1 and recommends that the Standing Committee approve the amendments for publication.

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E. ACTION ITEM—Rule 59; Proposed New Rule Concerning Rulings by a Magistrate Judge

In response to a decision by the Ninth Circuit in *United States v. Abonce-Barerra*, 257 F.3d 959, 969 (9th Cir. 2001), the Committee has considered an amendment to the Rules of Criminal Procedure that would parallel Federal Rule of Civil Procedure 72, which addresses procedures for appealing decisions by magistrate judges.

At its April 2002 meeting, the Committee voted to consider the issue further and at its September 2002 meeting the Committee adopted a draft rule that would have included not only procedures for appealing a magistrate judge's decision but would also have addressed the ability of a magistrate judge to take a guilty plea. That provision was dropped, however, due to two developments. First, the Magistrate Judges' Committee was opposed to any reference in the rule to taking guilty pleas. And second, the Ninth Circuit had granted *en banc* review in *United States v. Reyna-Tapia*, 294 F.3d 1192 (9th Cir.), *vacated by* 315 F.3d 1107 (9th Cir. 2002), the case that had provided the impetus for including reference to guilty pleas in the proposed rule. [Following the meeting, the Committee learned the court had decided that a magistrate judge could hear Rule 11 plea colloquies, for findings and recommendations and that the district court was not required to conduct a de novo review unless one of the parties objected.]

The current draft, approved by a vote of 8 to 1 would be new Rule 59 and it would address only the issue of appealing a magistrate judge's orders, both for dispositive and nondispositive matters.

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 12.2. Notice of an Insanity Defense; Mental Examination

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(d) Failure to Comply.

(1) ***Failure to Give Notice or to Submit to Examination.*** ~~If the defendant fails to give notice under Rule 12.2(b) or does not submit to an examination when ordered under Rule 12.2(c), the~~ The court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt or the issue of punishment in a capital case~~.~~ if the defendant fails to:

(A) give notice under Rule 12.2(b); or

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

(B) submit to an examination when ordered under Rule 12.2(c).

(2) ***Failure to Disclose.*** The court may exclude any expert evidence for which the defendant has failed to comply with the disclosure requirement of Rule 12.2(c)(3).

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COMMITTEE NOTE

The amendment to Rule 12.2(d) fills a gap created in the 2002 amendments to the rule. The substantively amended rule that took effect December 1, 2002, permits a sanction of exclusion of "any expert evidence" for failure to give notice or failure to submit to an examination, but provides no sanction for failure to disclose reports. The proposed amendment is designed to address that specific issue.

Rule 12.2(d)(1) is a slightly restructured version of current Rule 12.2(d). Rule 12.2(d)(2) is new and permits the court to exclude any expert evidence for failure to comply with the disclosure requirement in Rule 12.2(c)(3). The sanction is intended to apply only to the evidence related to the matters addressed in the report that the defense failed to disclose. Unlike the broader sanction for the two violations listed in Rule 12.2(d)(1)—which can substantially affect the entire hearing—the Committee believed that it would be overbroad to expressly authorize exclusion of "any" expert evidence, even evidence unrelated to the

results and reports that were not disclosed as required in Rule 12.2(c)(3).

As with sanctions for violating other parts of the rule, the amendment entrusts to the court the discretion to fashion an appropriate sanction proportional to the failure to disclose the results and reports of the defendant's expert examination. *See Taylor v. Illinois*, 484 U.S. 400, 414 n. 19 (1988) (court should consider "the effectiveness of less severe sanctions, the impact of preclusion on the evidence at trial and the outcome of the case, the extent of prosecutorial surprise or prejudice, and whether the violation was willful"), citing *Fendler v. Goldsmith*, 728 F.2d 1181 (9th Cir. 1983).

Rule 29. Motion for a Judgment of Acquittal

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(c) After Jury Verdict or Discharge.

(1) Time for a Motion. A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later. ~~, or within any other time the court sets during the 7-day period.~~

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COMMITTEE NOTE

Rule 29(c) has been amended to remove the requirement that the court must act within seven days after a guilty verdict or after the court discharges the jury, if it sets another time for filing a motion for a judgment of acquittal. This amendment parallels similar changes to Rules 33 and 34. Further, a conforming amendment has been made to Rule 45(b)(2).

Currently, Rule 29(c) requires the defendant to move for a judgment of acquittal within seven days of the guilty verdict, or after the court discharges the jury, whichever occurs later, or some other time set by the court in an order issued within that same seven-day period. Similar provisions exist in Rules 33 and 34. Courts have held that the seven-day rule is jurisdictional. Thus, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request within the seven days, it loses jurisdiction to act on the underlying substantive motion. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Assuming that the current rule was intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of time, so long as it does so within the seven-day period. Thus, the Committee believed that the rule should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to

act on a motion to extend the time for filing within a particular period of time or lose jurisdiction to do so.

Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion for a judgment of acquittal under Rule 29 within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion within the specified time, the court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 32. Sentencing and Judgment

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(i) Sentencing.

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(4) Opportunity to Speak.

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(B) *By a Victim* *of a Crime of Violence or Sexual Abuse*. Before imposing sentence, the court must address any victim of a

crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence. Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present:

(i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or

(ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.

(C) *By a Victim of a Felony Offense*. Before imposing sentence, the court must address any victim of a felony offense, not involving violence or sexual abuse, who is

present at sentencing and must permit the victim to speak or submit any information about the sentence. If the felony offense involved multiple victims, the court may limit the number of victims who will address the court.

~~(C)~~(D) *In Camera Proceedings.* Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

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COMMITTEE NOTE

In a series of amendments, Rule 32 has been modified to provide allocution for victims of violent crimes, and more recently for victims of sexual offenses. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-222, 108 Stat. 1796 (amending Rule 32 to provide for victim allocution in crimes of violence). In 2002, Rule 32 was amended to extend the right of victim allocution to victims of sexual abuse. *See* Rule 32(a)(1)(B). The amendment to Rule 32(i)(4) expands the right of victim-allocution to all felony cases.

The role of victim allocution has become part of the accepted landscape in federal sentencing. *See generally* J. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39 (2001). And although the actual practice varies, some courts currently permit statements from victims of crimes that do not involve violence or sexual abuse. Typical examples include statements from victims of fraud and other economic crimes. Victims of non-violent felonies may have pertinent information that could affect application of a particular sentencing guideline. At the same time, however, there are potential problems with victim allocution, particularly in cases involving a large number of victims. *See* Barnard, *supra*, at 65-78 (noting arguments against victim allocution).

Rule 32(i)(4)(C) is a new provision that extends the right of allocution to victims of felonies that do not involve either sexual abuse or violence. The amendment attempts to strike a reasonable balance between the interest of victims in being heard and the ability of the court to efficiently move its sentencing docket. Although the rule requires the court to hear from victims if any are present and wish to speak, it gives the court some discretion about the manner in which victims are to be heard. In a particular case, the court may permit, or require some or all of the victims to present their information in the form of written statements. The rule explicitly states that if there are multiple victims, the court may properly limit the number of persons who will be permitted to address the court during sentencing.

The amendment does not include any provision requiring a court to permit a representative to speak on behalf of a victim, as the court must do for victims of sexual abuse or violence. The Committee believed that the policy reasons for permitting a victim to speak through a representative in a case involving sexual abuse or violence do not exist in most other types of cases. Nonetheless,

there is nothing in the rule that would prohibit the court from permitting a third person to represent the views of one or more victims of a felony not involving violence or sexual assault.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

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(b) Revocation.

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(2) Revocation Hearing. Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to:

(A) written notice of the alleged violation;

(B) disclosure of the evidence against the person;

(C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear; ~~and~~

(D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel. ; and

(E) an opportunity to make a statement and present any information in mitigation.

(c) Modification.

(1) In General. Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to counsel. and an opportunity to make a statement and present any information in mitigation.

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COMMITTEE NOTE

The amendments to Rule 32.1(b) and (c) are intended to address a gap in the rule. As noted by the court in *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002) (per curiam), there is no explicit provision in current Rule 32.1 for allocution rights for a person upon resentencing. In that case the court noted that several circuits had concluded that the right to allocution in Rule 32 extended to supervised release revocation hearings. *See United States v. Patterson*, 128 F.3d 1259, 1261 (8th Cir. 1997) (Rule 32 right to allocution applies); *United States v. Rodriguez*, 23 F.3d 919, 921 (5th Cir. 1997) (right of allocution, in Rule 32, applies at revocation proceeding). But the court agreed with the Sixth Circuit that the allocution right in Rule 32 was not incorporated into Rule 32.1. *See United States v. Waters*, 158 F.3d 933 (6th Cir. 1998) (allocution right in Rule 32 does not apply to revocation proceedings). The *Frazier* court observed that the problem with the incorporation approach is that it would require application of other provisions specifically applicable to sentencing proceedings under Rule 32, but not expressly addressed in Rule 32.1. 283 F.3d at 1245. The court, however, believed that it would be "better practice" for courts to provide for allocution at revocation proceedings and stated that "[t]he right of allocution seems both important and firmly embedded in our jurisprudence." *Id.*

The amended rule recognizes the importance of allocution and now explicitly recognizes that right at revocation hearings, Rule 32.1(b)(2), and extends it as well to modification hearings where the court may decide to modify the terms or conditions of the defendant's probation, Rule 32.1(c)(1). In each instance the court is required to give the defendant the opportunity to make a statement and present any mitigating information.

Rule 33. New Trial

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(b) Time to File.

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(2) Other Grounds. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty. ~~, or within such further time as the court sets during the 7-day period.~~

COMMITTEE NOTE

Rule 33(b)(2) has been amended to remove the requirement that the court must act within seven days after a verdict or finding of guilty if it sets another time for filing a motion for a new trial. This amendment parallels similar changes to Rules 29 and 34. Further, a conforming amendment has been made to Rule 45(b)(2).

Currently, Rule 33(b)(2) requires the defendant to move for a new trial within seven days after the verdict or the finding of guilty verdict, or within some other time set by the court in an order issued during that same seven-day period. Similar provisions exist in Rules 29 and 34. Courts have held that the seven-day rule is jurisdictional. Thus, if a defendant files a request for an

extension of time to file a motion for a judgment of acquittal within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request within the seven days, it loses jurisdiction to act on the underlying substantive motion. *See, e.g.*, *United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Assuming that the current rule was intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of time, so long as it does so within the seven-day period. Thus, the Committee believed that the rule should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to act on a motion to extend the time for filing within a particular period of time or lose jurisdiction to do so.

Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion for a new trial under Rule 33(b)(2) within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion for new trial within the specified time, the court may nonetheless consider that untimely underlying motion if the

court determines that the failure to file it on time was the result of excusable neglect.

Rule 34. Arresting Judgment

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(b) Time to File. The defendant must move to arrest judgment within 7 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere. ~~, or within such further time as the court sets during the 7-day period.~~

COMMITTEE NOTE

Rule 34(b) has been amended to remove the requirement that the court must act within seven days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere if it sets another time for filing a motion to arrest a judgment. The amendment parallels similar amendments to Rules 29 and 33. Further, a conforming amendment has been made to Rule 45(b).

Currently, Rule 34(b) requires the defendant to move to arrest judgment acquittal within seven days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere, or within some other time set by the court in an order issued by the court within that same seven-day period. Similar provisions exist in Rules 29 and 33. Courts have held that the

seven-day rule is jurisdictional. Thus, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal within the seven-day period, the judge must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request within the seven days, the court loses jurisdiction to act on the underlying substantive motion, if it is not filed within the seven days. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Assuming that the current rule was intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of time, so long as it does so within the seven-day period. Thus, the Committee believed that the rule should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to rule on a motion to extend the time for filing within a particular period of time or lose jurisdiction to do so.

Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion to arrest judgment under Rule 34 within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(b), if for some reason the defendant fails to file the underlying motion within the specified time, the court may

nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 45. Computing and Extending Time

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(b) Extending Time.

(1) In General. When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made:

(A) before the originally prescribed or previously extended time expires; or

(B) after the time expires if the party failed to act because of excusable neglect.

(2) Exception. The court may not extend the time to take any action under Rule ~~Rules 29, 33, 34 and~~ 35, except as stated in ~~those rules~~ that rule.

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COMMITTEE NOTE

Rule 45(b) has been amended to conform to amendments to Rules 29, 33, and 34, which have been amended to remove the requirement that the court must act within the seven-day period specified in each of those rules if it sets another time for filing a motion under those rules.

Currently, Rules 29(c)(1), 33(b)(1), and 34(b) require the defendant to move for relief under those rules within the seven-day periods specified in those rules or within some other time set by the court in an order issued during that same seven-day period. Courts have held that the seven-day rule is jurisdictional. Thus, for example, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal or a motion for new trial within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request for an extension of time within the seven days, the court loses jurisdiction to act on the underlying substantive motion. *See, e.g.*, *United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Rule 45(b)(2) currently specifies that a court may not extend the time for taking action under Rules 29, 33, or 34, except as provided in those rules.

Assuming that the current provisions in Rules 29, 33, and 34 were intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of

time, under those rules, as long as it does so within the seven-day period. Thus, the Committee believed that those rules should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to rule on a motion to extend the time for filing, within a particular period of time or lose jurisdiction to do so. The change to Rule 45(b)(2) is thus a conforming amendment.

The defendant is still required to file motions under Rules 29, 33, and 34 within the seven-day period specified in those rules. The defendant, however, may consistently with Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1), if for some reason the defendant fails to file the underlying motion within the specified time, the court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 59. Matters Before a Magistrate Judge

(a) ***Nondispositive Matters***. A district judge may refer to a magistrate judge for determination any matter that does not dispose of the case. The magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record an oral or written order stating the determination. A party may

serve and file any objections to the order within 10 days after being served with a copy of a written order or after the oral order is made on the record, or at some other time the court sets. The district judge must consider any timely objections and modify or set aside any part of the order that is clearly erroneous or contrary to law. Failure to object in accordance with this rule waives a party's right to review.

(b) ***Dispositive Matters.***

(1) ***Referral to magistrate judge.*** A district judge may refer to a magistrate judge for recommendation any matter that may dispose of the case including a defendant's motion to dismiss or quash an indictment or information, or a motion to suppress evidence. The magistrate judge must promptly conduct the required proceedings. A record must be made of any

evidentiary proceeding before the magistrate judge and of any other proceeding if the magistrate judge considers it necessary. The magistrate judge must enter on the record a recommendation for disposing of the matter, including any proposed findings of fact. The clerk must immediately serve copies on all parties.

(2) Objections to findings and recommendations. Within 10 days after being served with a copy of the recommended disposition, or such other period as fixed by the court, a party may serve and file any specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the party objecting to the recommendation must promptly arrange for transcribing the record, or whatever

portions of it the parties agree to or the magistrate judge considers sufficient. Failure to object in accordance with this rule waives a party's right to review.

(3) De novo review of recommendations. The district judge must consider de novo any objection to the magistrate judge's recommendation. The district judge may accept, reject, or modify the recommendation, receive further evidence, or may resubmit the matter to the magistrate judge with instructions.

COMMITTEE NOTE

Rule 59 is a new rule that creates a procedure for a district judge to review nondispositive and dispositive decisions by magistrate judges. The rule is derived in part from Federal Rule of Civil Procedure 72.

The Committee's consideration of a new rule on the subject of review of magistrate judges' decisions resulted from *United States v. Abonce-Barrera*, 257 F.3d 959 (9th Cir. 2001). In that case the Ninth Circuit held that the Criminal Rules do not require appeals from nondispositive decisions by magistrate judges to

district judges as a requirement for review by a court of appeals. The court suggested that Federal Rule of Civil Procedure 72 could serve as a suitable model for a criminal rule.

New Rule 59(a) sets out procedures to be used in reviewing nondispositive matters, that is, those matters that do not dispose of the case. The rule requires that if the district judge has referred a matter to a magistrate judge, that the magistrate judge must issue an oral or written order on the record. To preserve the issue for further review, a party must object to that order within 10 days after being served with a copy of the order or after the oral order is made on the record or at some other time set by the court. If an objection is made, the district court is required to consider the objection. If the court determines that the magistrate judge's order, or a portion of the order, is clearly erroneous or contrary to law, the court must set aside the order, or the affected part of the order. *See also* 28 U.S.C. § 636(b)(1)(A).

Rule 59(b) provides for assignment and review of recommendations made by magistrate judges on dispositive matters, including motions to suppress or quash an indictment or information. The rule directs the magistrate judge to consider the matter promptly, hold any necessary evidentiary hearings, and enter his or her recommendation on the record. After being served with a copy of the magistrate judge's recommendation, under Rule 59(b)(2), the parties have a period of 10 days to file any objections. If any objections are filed, the district court must consider the matter de novo and accept, reject, or modify the recommendation, or return the matter to the magistrate judge for further consideration.

Both Rule 59(a) and (b) contain a provision that explicitly states that failure to file an objection in accordance with the rule amounts to a waiver of the issue. This waiver provision is

intended to establish the requirements for objecting in a district court in order to preserve appellate review of magistrate judges' decisions. In *Thomas v. Arn*, 474 U.S. 140, 155 (1985), the Supreme Court approved the adoption of waiver rules on matters for which a magistrate judge had made a decision or recommendation. The Committee believes that the waiver provisions will enhance the ability of a district court to review a magistrate judge's decision or recommendation by requiring a party to promptly file an objection to that part of the decision or recommendation at issue. Further, the Supreme Court has held that a de novo review of a magistrate judge's decision or recommendation is required to satisfy Article III concerns only where there is an objection. *Peretz v. United States*, 501 U.S. 923 (1991).

Despite the waiver provisions, the district judge retains the authority to review any magistrate judge's decision or recommendation whether or not objections are timely filed. This discretionary review is in accord with the Supreme Court's decision in *Thomas v. Arn*, *supra*, at 154. *See also Mathews v. Weber*, 423 U.S. 261, 270-271 (1976).