104th Congress, 2d Session – – – – – – – – – – – – – House Document 104–202

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE THAT HAVE BEEN ADOPTED BY THE COURT, PURSUANT TO 28 U.S.C. 2072

APRIL 24, 1996.—Referred to the Committee on the Judiciary and ordered to be printed.

U.S. GOVERNMENT PRINTING OFFICE

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

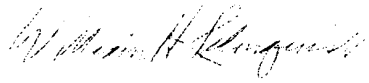
April 23, 1996

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,



Honorable Newt Gingrich
Speaker of the House of Representatives
Washington, D.C. 20515

(1)

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Criminal Rule 32.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 1996, and shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 32. Sentence and Judgment

* * * * *

(d) JUDGMENT.

* * * * *

(2) *Criminal Forfeiture.* If a verdict contains a finding that property is subject to a criminal forfeiture, or if a defendant enters a guilty plea subjecting property to such forfeiture, the court may enter a preliminary order of forfeiture after providing notice to the defendant and a reasonable opportunity to be heard on the timing and form of the order. The order of forfeiture shall authorize the Attorney General to seize the property subject to forfeiture, to conduct any discovery that the court considers proper to help identify, locate, or dispose of the property, and to begin proceedings consistent with any statutory requirements pertaining to ancillary hearings and the rights of third parties. At

sentencing, a final order of forfeiture shall be made part of the sentence and included in the judgment. The court may include in the final order such conditions as may be reasonably necessary to preserve the value of the property pending any appeal.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

October 12, 1995

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for the consideration of the Court proposed amendments to Rule 32 of the Federal Rules of Criminal Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am also transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Criminal Procedure.

L. Ralph Mecham

Enclosures

EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
SEPTEMBER 1995

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

IV. AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

A. Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted to your committee proposed amendments to Federal Rules of Criminal Procedure 16* and 32 together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated to the bench and bar for comment in September 1994. A public hearing was held in Los Angeles in January 1995.

* * * * *

Rule 32 (*Sentence and Judgment*) would be amended to permit a court explicitly to conduct forfeiture proceedings after the return of a verdict, but before sentencing.

The proposed amendments to the Federal Rules of Criminal Procedure, as recommended by your committee, are in *Appendix D* together with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rules 16* and 32 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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*At its September 19-20, 1995 session the Judicial Conference did not approve the proposed amendments to Criminal Rule 16.

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

Agenda F-19
(Appendix D)
Rules
September 1995

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

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

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

SUBJECT Report of Advisory Committee on Rules of Criminal Procedure

DATE: May 23, 1995

I. INTRODUCTION.

At its meeting on April 10, 1995, the Advisory Committee on the Rules of Criminal Procedure considered proposed or pending amendments to several Rules of Criminal Procedure. This report addresses those proposals. The minutes of that meeting, a GAP Report, and a proposed amendment to Rule 24(a) are attached.

II. ACTION ITEMS

A. Action on Rules Published for Public Comment: Rules 16 and 32

At its June 1994 meeting the Standing Committee approved for publication for public comment amendments to Rule 16 and 32. The deadline for those comments was February 28, 1995 and at its April 1995 meeting the Advisory Committee considered the comments, made several minor changes to the rules and now presents them to the Standing Committee. The amended Rules and Committee Notes are included in the attached GAP Report.

* * * * *

3. Action on Proposed Amendments to Rule 32(d). Forfeiture Proceedings Before Sentencing

The Advisory Committee made a number of changes to Rule 32(d) after publication. Those changes which are discussed more fully in the attached GAP Report, do not in the Committee's view require additional publication and comment.

The Advisory Committee recommends that the Standing Committee approve the amendments to Rule 32(d) and forward them to the Judicial Conference for approval.

* * * * *

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

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

SUBJECT: GAP REPORT: Explanation of Changes Made Subsequent to the Circulation for Public Comment of Rules 16 and 32.

DATE: May 23, 1995

At its June 1994 meeting the Standing Committee approved the circulation for public comment of proposed amendments to Rules 16 and 32.

Both rules were published in September 1994, with a deadline of February 28, 1995 for any comments. At a hearing on January 27, 1995 representatives of the Committee heard the testimony of several witnesses regarding the amendments to Rule 16. At its meeting in Washington, D.C. on April 10, 1995, the Advisory Committee considered the writtent submissions of members of the public as well as the testimony of the witnesses.

Summaries of the any comments on each Rule, the Rules, and the accompanying Committee Notes are attached.

The Advisory Committee's actions on the amendments subsequent to the circulation for public comment are as follows:

* * * * *

3. Rule 32(d). Forfeiture Proceedings.

Five commentators, including the Department of Justice, which had proposed the amendment, supported the proposed amendment to Rule 32(d) which permits the trial court to enter a forfeiture order prior to sentencing. The Department of Justice's comments suggested changes which might have been considered significant enough to require republication for public comment. Ultimately, the Committee changed the rule in the following respects: (1) the amendment now provides that the procedures in Rule 32(d) may be applied where the defendant has entered a plea of guilty subjecting property to forfeiture; (2) the Committee eliminated any reference to specific timing requirements; and (3) the Committee added the last sentence which recognizes the authority of the court to include conditions in its final order which preserve the value of the property pending any appeals.

Given the relatively minor nature of these changes and the low number of public comments on the published version, the Committee believes that republication of this amendment is unnecessary.

* * * * *

1 **Rule 32. Sentence and Judgment**[1]

2 (d) JUDGMENT.

3 * * * * *

4 (2) *Criminal Forfeiture.* ~~When a verdict contains a~~
5 ~~finding of criminal forfeiture, the judgment must authorize~~
6 ~~the Attorney General to seize the interest or property~~
7 ~~subject to forfeiture on terms that the court considers~~
8 ~~proper.~~ If a verdict contains a finding that property is
9 subject to a criminal forfeiture, or if a defendant enters a
10 guilty plea subjecting property to such forfeiture, the court
11 may enter a preliminary order of forfeiture after providing
12 notice to the defendant and a reasonable opportunity to be
13 heard on the timing and form of the order. The order of
14 forfeiture shall authorize the Attorney General to seize the
15 property subject to forfeiture, to conduct any discovery that
16 the court considers proper to help identify, locate, or
17 dispose of the property, and to begin proceedings consistent
18 with any statutory requirements pertaining to ancillary

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[1]. New matter is underlined and matter to be omitted is lined through.

19 hearings and the rights of third parties. At sentencing, a
20 final order of forfeiture shall be made part of the sentence
21 and included in the judgment. The court may include in the
22 final order such conditions as may be reasonably necessary
23 to preserve the value of the property pending any appeal.

COMMITTEE NOTE

Subdivision (d)(2). A provision for including a verdict of criminal forfeiture as a part of the sentence was added in 1972 to Rule 32. Since then, the rule has been interpreted to mean that any forfeiture order is a part of the judgment of conviction and cannot be entered before sentencing. *See, e.g., United States v. Alexander*, 772 F. Supp. 440 (D. Minn. 1990).

Delaying forfeiture proceedings, however, can pose real problems, especially in light of the implementation of the Sentencing Reform Act in 1987 and the resulting delays between verdict and sentencing in complex cases. First, the government's statutory right to discover the location of property subject to forfeiture is triggered by entry of an order of forfeiture. *See* 18 U.S.C. § 1963(k) and 21 U.S.C. § 853(m). If that order is delayed until sentencing, valuable time may be lost in locating assets which may have become unavailable or unusable. Second, third persons with an interest in the property subject to forfeiture must also wait to petition the court to begin ancillary proceedings until the forfeiture order has been entered. *See* 18 U.S.C. § 1963(l) and 21 U.S.C. § 853(m). And third, because the government cannot actually seize the property until an order of forfeiture is entered, it may be necessary for the court to enter restraining orders to maintain the status quo.

The amendment to Rule 32 is intended to address these concerns by specifically recognizing the authority of the court to

enter a preliminary forfeiture order before sentencing. Entry of an order of forfeiture before sentencing rests within the discretion of the court, which may take into account anticipated delays in sentencing, the nature of the property, and the interests of the defendant, the government, and third persons.

The amendment permits the court to enter its order of forfeiture at any time before sentencing. Before entering the order of forfeiture, however, the court must provide notice to the defendant and a reasonable opportunity to be heard on the question of timing and form of any order of forfeiture.

The rule specifies that the order, which must ultimately be made a part of the sentence and included in the judgment, must contain authorization for the Attorney General to seize the property in question and to conduct appropriate discovery and to begin any necessary ancillary proceedings to protect third parties who have an interest in the property.

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