104th Congress, 1st Session – – – – – – – – – – – – – – House Document 104–65

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

MAY 2, 1995.—Referred to the Committee on the Judiciary and ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

99–011 WASHINGTON : 1995

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

CHAMBERS OF
THE CHIEF JUSTICE

April 27, 1995

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. To maintain uniformity between revised and unrevised Rules, the Court has edited the amendments transmitted to the Supreme Court by the Judicial Conference of the United States to use the word "shall" in a consistent manner.

The rules are accompanied by an excerpt from the report of the Judicial Conference of the United States' Committee on Rules of Practice and Procedure and that Committee's Advisory Committee Notes. In order to minimize confusion, a footnote noting the changes made by the Supreme Court has been added to the marked-up version of the proposed amendments that accompanies the Advisory Committee Notes.

Sincerely,

William H. Rehnquist

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

SUPREME COURT OF THE UNITED STATES

Thursday, April 27, 1995

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 Rules 5, 40, 43, 49, and 57.

[See infra., pp. _____ _____ _____.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 1995, 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 5. Initial Appearance Before the Magistrate Judge

(a) IN GENERAL. Except as otherwise provided in this rule, an officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate judge or, if a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate judge, a complaint, satisfying the probable cause requirements of Rule 4(a), shall be promptly filed. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of this rule. An officer making an arrest under a

warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest and an attorney for the government moves promptly, in the district in which the warrant was issued, to dismiss the complaint.

* * * * *

Rule 40. Commitment to Another District

(a) APPEARANCE BEFORE FEDERAL MAGISTRATE JUDGE. 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 judge, in accordance with the provisions of Rule 5. Preliminary proceedings concerning the defendant shall be conducted in

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.

* * * * *

Rule 43. Presence of the Defendant

(a) PRESENCE REQUIRED. The defendant shall be present at the arraignment, at the time of the plea, at every

return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) CONTINUED PRESENCE NOT REQUIRED. The further progress of the trial to and including the return of the verdict, and the imposition of sentence, will not be prevented and the defendant will be considered to have waived the right to be present whenever a defendant, initially present at trial, or having pleaded guilty or nolo contendere,

(1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial),

(2) in a noncapital case, is voluntarily absent at the imposition of sentence, or

(3) after being warned by the court that disruptive conduct will cause the removal of the

is such as to justify exclusion from the courtroom.

(c) PRESENCE NOT REQUIRED. A defendant need not be present:

(1) when represented by counsel and the defendant is an organization, as defined in 18 U.S.C. § 18;

(2) when the offense is punishable by fine or by imprisonment for not more than one year or both, and the court, with the written consent of the defendant, permits arraignment, plea, trial, and imposition of sentence in the defendant's absence;

(3) when the proceeding involves only a conference or hearing upon a question of law; or

(4) when the proceeding involves a correction of sentence under Rule 35.

Rule 49. Service and Filing of Papers

* * * * *

[(e) FILING OF DANGEROUS OFFENDER NOTICE.] (Abrogated April 27, 1995, eff. December 1, 1995.)

Rule 57. Rules by District Courts

(a) IN GENERAL.

(1) Each district court acting by a majority of its district judges may, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice. A local rule shall be consistent with -- but not duplicative of -- Acts of Congress and rules adopted under 28 U.S.C. § 2072 and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(2) A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose

rights because of a nonwillful failure to comply with the requirement.

(b) PROCEDURE WHEN THERE IS NO CONTROLLING LAW. A judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

(c) EFFECTIVE DATE AND NOTICE. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of the rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office

of the United States Courts and shall be made available to the public.

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

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

November 2, 1994

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 Rules 5, 40, 43, 49, and 57 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 1994

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. Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Criminal Rules 5, 40, 43, 46,* 49, 53,** 57, and 59.*** The proposed amendments were circulated to bench and bar for comment in October 1993, with the exceptions of the proposed technical amendments to Rules 46 and 49. A public hearing was held immediately before the committee's meeting in April 1994.

The proposed amendments to Rule 5 (Initial Appearance Before the Magistrate Judge) would exempt the government from promptly presenting a defendant charged only under 18 U.S.C. § 1073 (Unlawful Flight to Avoid Prosecution) to a magistrate judge where the United States had no intention of prosecuting the defendant for that offense, but only assisting State authorities in apprehending the State offender. Under the amendments, the fugitive must be transferred without unnecessary delay to State officials, and the complaint alleging a violation of § 1073 must be dismissed.

Rule 40 (Commitment to Another District) would be amended to cross-reference the proposed changes in Rule 5. The proposed amendments to Rule 43 (Presence of the Defendant) would clarify the court's authority to sentence a defendant - who is absent voluntarily at the imposition of sentence, e.g., a fugitive - *in absentia* after jeopardy has attached, including after entry of a guilty or *nolo contendere* plea.

The proposed change to Rule 46(i) (Release from Custody) would correct an inadvertent cross-reference in the rule. Rule 49(e) (Service and Filing of Papers) would be repealed as unnecessary, because the statutory provisions referred to in the

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* The Standing Committee withdrew the proposed amendments to Rule 46 because the Violent Crime Control and Law Enforcement Act of 1994 effected the change intended by those proposed amendments.

** At its September 20, 1994 session the Judicial Conference did not approve the proposed amendments to Criminal Rule 53.

*** The Standing Committee did not approve the proposed amendment to Rule 59 for submission to the Judicial Conference.

provision regarding filing notice of dangerous offender status have been abrogated. The proposed amendments to Rules 46 and 49 are entirely technical or conforming in nature and publishing them for public comment was unnecessary.

The proposed amendments to Rule 53 (Regulation of Conduct in the Court Room) would retain the prohibition against broadcasting of criminal cases, but would permit it if the Judicial Conference authorizes televised coverage under whatever guidelines it determines to be appropriate. The change would not require the courts to permit such coverage in criminal cases. It would provide courts with the same discretion to permit televising criminal case proceedings as they have with regard to civil case proceedings. Judicial Conference guidelines to permit broadcasting of civil case proceedings are now under active consideration by the Committee on Court Administration and Case Management.

Your committee considered at length the proposed amendments to Rule 53. Several members voiced strong reservations or objections to the amendments. And they criticized the need and justification for the changes, disputing the favorable conclusions drawn from survey findings in various pilot projects, which monitored televised coverage in civil cases. Other members were persuaded that televised coverage would not interfere or adversely affect the conduct of criminal proceedings. Many State courts have permitted broadcasting of criminal case proceedings with no untoward problems. In addition, the vote of the Advisory Committee on Criminal Rules was nearly unanimous (only one member opposed the proposal) in approving the proposed amendments.

On a 7 to 6 vote, your committee decided to send forward the proposed amendments to Rule 53. At your committee's request, the chairman of the advisory committee agreed to revise the Committee Note and eliminate the discussion of the benefits of televised courtroom coverage. The amendment's primary purpose -- to provide the Judicial Conference with equal authority to permit and regulate televised coverage in civil and criminal trials -- would be highlighted.

Your Committee noted the advisory committee's desire to be actively involved in the drafting of appropriate guidelines. The Committee on Court Administration and Case Management (CACM) is responsible for monitoring the pilot projects dealing with televised broadcasting of judicial proceedings. Your committee will consult with CACM and advise them of the advisory committee's willingness to participate in the drafting of the guidelines.

Rule 57 (Rules by District Courts) would be amended to reflect similar changes proposed to the other sets of rules dealing with uniform numbering of local court rules and restrictions on the imposition of sanctions for noncompliance with local court procedures.

The proposed amendments to Rule 59 (Effective Date; Technical Amendments), which would authorize the Judicial Conference to make technical amendments to the

rules, were not approved along with proposed amendments to the other sets of rules on the same subject.

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 5, 40, 43, 46,* 49, 53,* and 57 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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* Proposed amendments were later withdrawn or rejected as noted in earlier footnotes.

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 1994

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 on Proposed and Pending Rules of Criminal Procedure

DATE: May 17, 1994

I. INTRODUCTION.

At its meeting April 18 & 19, 1994, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed or pending amendments to several Rules of Criminal Procedure. This report addresses those proposals and recommendations to the Standing Committee. A GAP Report and copies of the rules and the accompanying Committee Notes are attached along with a copy of the minutes of the April meeting.

II. RULES OF CRIMINAL PROCEDURE PUBLISHED FOR PUBLIC COMMENT.

A. In General.

Pursuant to action by the Standing Committee at its Summer 1993 meeting, proposed amendments in the following rules were published for public comment: Rule 5. Initial Appearance Before the Magistrate Judge; Rule 10. Arraignment; Rule 43. Presence of the Defendant; Rule 53. Regulation of Conduct in the Court Room; Rule 57. Rules by District Courts; and finally Rule 59.* Effective Date; Technical Amendments. A hearing on these amendments was held on April 18, 1994 in Washington, D.C. in conjunction with the Committee's meeting. In addition to the three witnesses who testified at that hearing (which was televised by C-Span), the Committee also carefully considered written comments on the proposed amendments.

The attached GAP Report provides more detailed discussion of the changes

* * * * *

*The Standing Committee did not approve the proposed amendment to Rule 59 for submission to the Judicial Conference.

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made to the rules since their publication. The following discussion briefly notes any significant changes and the Committee's recommended action:

B. Rule 5. Initial Appearance Before the Magistrate Judge: Exception for UFAP Defendants.

The amendment to Rule 5 would exempt the government from promptly presenting a defendant charged only under 18 U.S.C. § 1073 (Unlawful Flight to Avoid Prosecution, i.e., UFAP) to a magistrate where the United States had no intention of prosecuting the defendant for that offense. Although there were very few comments on the proposed amendment to Rule 5, one commentator suggested a conforming amendment to Rule 40. The Committee agreed with that proposal and as discussed *infra*, has proposed a minor amendment to Rule 40 to reflect the change to Rule 5.

Recommendation: The Advisory Committee, which approved the amendment to Rule 5 by a vote of 9 to 2, recommends that Standing Committee approve Rule 5 and forward it to the Judicial Conference for its approval.

C. Rule 10. Arraignment

The published amendment to Rule 10 would permit use of video teleconferencing to arraign a defendant not present in the courtroom. Of the few written comments received, most were opposed to the amendment, as were two of the witnesses who presented testimony on April 18th. In addition, Judge Diamond of the Committee on Defender Services had requested deferral of the proposed amendment pending completion of a pilot program. Following discussion of the issue the Committee voted by a margin of 10 to 0, with one abstention, to defer any further action on the amendment to Rule 10.

Recommendation: None at this time.

D. Rule 40. Commitment to Another District.

In discussing the published amendment to Rule 5, supra, the Committee concluded that some reference should be made in Rule 40(a), which also addresses appearances before federal magistrates. The minor amendment proposed by the Committee simply cross-references the change in Rule 5; a copy of the proposed change and a Committee Note are attached.

Recommendation: The Committee recommends that the amendment to Rule 40 be approved, *without public comment*, and forwarded to the Judicial Conference.

E. Rule 43. Presence of the Defendant; In Absentia Sentencing.

The proposed amendment to Rule 43 was intended to (1) provide for teleconferencing for pretrial sessions where the accused is not in the courtroom, and (2) provide for in absentia sentencing. Based upon its discussion regarding the proposed amendment to Rule 10, *supra*, the Committee voted to delete that provision from Rule 43. The Committee also modified the proposed language in Rule 43(b) to make it clear that in absentia sentencing could take place after jeopardy had attached, including entry of a guilty plea or a nolo contendere plea. The Committee voted by a margin of 9 to 1, with one abstention, to forward the proposed amendment, as modified, to the Standing Committee.

Recommendation: The Committee recommends that Rule 43, as modified, be approved and forwarded to the Judicial Conference, without further publication and comment.

F. Rule 53. Regulation of Conduct in the Court Room

The proposed amendment to Rule 53 would permit broadcasting from, and cameras in, federal criminal trials under guidelines or standards promulgated by the Judicial Conference. The Advisory Committee considered the testimony of one witness, Mr. Steve Brill of Court TV, and several written comments, which were for the most part supportive of the amendment. During the Committee's discussion of the amendment, it was suggested that broadcasting and cameras should only be permitted if both the prosecution and defense agreed to such coverage. The Committee was generally opposed to that suggestion because it would in effect frustrate the purpose of the amendment and any possible pilot programs. It was also suggested that the amendment to Rule 53 should be written in a more neutral tone. That suggestion was also rejected because as published, the rule reflects the view the general rule of no broadcasting or cameras unless appropriate guidelines are established by the Judicial Conference. The Committee ultimately decided, by vote of 9 to 1, to forward the proposed amendment to Rule 53 as it was published for comment.

The Committee agreed that in light of other Committees' interest regarding cameras in the court room, careful coordination with those committees would be required. The Committee also believed strongly that given the special problems associated with criminal trials, that it should be actively involved in the process of formulating appropriate guidelines. To that end, a subcommittee was appointed to draft suggested guidelines and to report to the Committee at its Fall 1994 meeting.

Recommendation: The Advisory Committee recommends that the amendment to Rule 53 be approved and forwarded to the Judicial Conference, with the recommendation that the Advisory Committee on Criminal Rules should be actively involved in drafting any appropriate guidelines.

G. Rule 57. Rules by District Courts

The proposed amendment to Rule 57 mirrors similar amendments in the other procedural rules. Although the Committee was informed that the Bankruptcy Committee had recommended substitution of the word "nonwillful" for "negligent failure," the Committee unanimously approved the amendment to Rule 57 as published. Following brief discussion of the issue, the Committee did delete a brief reference in the Committee Note which referred to untimely requests for trial as being an example of a "negligent failure."

Recommendation: The Committee recommends that Rule 57 be approved and forwarded to the Judicial Conference.

H. Rule 59. Effective Date; Technical Amendments.

The proposed amendment to Rule 59, which also mirrors similar amendments in the other rules, was noncontroversial. The Committee voted unanimously to approve the amendment as published.

Recommendation: The Advisory Committee recommends that the proposed amendment to Rule 59 be approved and forwarded to the Judicial Conference.

* * * * *

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 5, 10, 40, 43, 53, 57, and 59.

DATE: May 17, 1994

At its July 1993 meeting the Standing Committee approved the circulation for public comment of proposed amendments to Rules 5, 10, 43, 53, 57 and 59.

All six rules were published in the Fall 1993 with a deadline of April 15, 1994 for any comments. At its meeting on April 18 and 19, 1994 in Washington, D.C., three witnesses presented testimony to the Committee on the proposed amendments. The Advisory Committee has considered the written submissions of members of the public as well as the three witnesses. Summaries of 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:

1. Rule 5. Initial Appearance Before the Magistrate Judge: Exception for UFAP Defendants.

The Committee made no changes to the proposed amendment to Rule 5. Although there were very few comments on the proposed amendment to Rule 5, one commentator suggested a conforming amendment to Rule 40. The Committee agreed with that proposal and as discussed *infra*, has proposed a minor amendment to Rule 40 to reflect the change to Rule 5.

2. Rule 10. Arraignment

After considering the testimony of several witnesses and several written comments, the Committee has decided to defer any further consideration of the proposed amendment to

Rule 10 until its April 1995 meeting.

3. Rule 40. Commitment to Another District.

In discussing the published amendment to Rule 5, supra, the Committee concluded that some reference should be made in Rule 40(a), which also addresses appearances before federal magistrates. The minor amendment simply cross-references the change in Rule 5; a copy of the proposed change and a Committee Note are attached.

4. Rule 43. Presence of the Defendant; In Absentia Sentencing.

Based upon testimony of two witnesses and several written comments, the Committee changed the amendment by deleting the provision for video teleconferencing of pretrial sessions. The Committee also modified the proposed language in Rule 43(b) to make it clear that in absentia sentencing could take place after jeopardy had attached, including entry of a guilty plea or a nolo contendere plea.

5. Rule 53. Regulation of Conduct in the Court Room

The Committee made no changes to the proposed amendment to Rule 53 would permit broadcasting from, and cameras in, federal criminal trials under guidelines or standards promulgated by the Judicial Conference. The Advisory Committee considered the testimony of one witness, Mr. Steve Brill of Court TV, and several written comments, which were for the most part supportive of the amendment.

6. Rule 57. Rules by District Courts

No changes were made to the proposed amendment to Rule 57, which mirrors similar amendments in the other procedural rules. Following brief discussion of the issue, the Committee did delete a brief reference in the Committee Note which referred to untimely requests for trial as being an example of a "negligent failure" to follow a local rule.

7. Rule 59. Effective Date; Technical Amendments.

No changes were made to the proposed amendment to Rule 59, which also mirrors similar amendments in the other rules.

* * * * *

FEDERAL RULES OF CRIMINAL PROCEDURE*

1 **Rule 5. Initial Appearance Before the**
2 **Magistrate Judge**
3 (a) IN GENERAL. Except as otherwise
4 provided in this rule, ~~An~~ an officer
5 making an arrest under a warrant issued
6 upon a complaint or any person making an
7 arrest without a warrant ~~shall~~ must take
8 the arrested person without unnecessary
9 delay before the nearest available
10 federal magistrate judge or, ~~in the~~
11 ~~event that~~ if a federal magistrate judge
12 is not reasonably available, before a
13 state or local judicial officer
14 authorized by 18 U.S.C. § 3041. If a
15 person arrested without a warrant is
16 brought before a magistrate judge, a
17 complaint, satisfying the probable cause
18 requirements of Rule 4(a), must be

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*New matter is underlined, matter to be omitted is lined through. In its April 27, 1995 transmittal of the amendments to Congress the Supreme Court substituted the word "shall" for the word "must" throughout the amendments.

19 promptly filed ~~shall be filed forthwith~~
20 ~~which shall comply with the requirements~~
21 ~~of Rule 4(a) with respect to the showing~~
22 ~~of probable cause~~. When a person,
23 arrested with or without a warrant or
24 given a summons, appears initially
25 before the magistrate judge, the
26 magistrate judge ~~shall~~ must proceed in
27 accordance with the applicable
28 subdivisions of this rule. An officer
29 making an arrest under a warrant issued
30 upon a complaint charging solely a
31 violation of 18 U.S.C. § 1073 need not
32 comply with this rule if the person
33 arrested is transferred without
34 unnecessary delay to the custody of
35 appropriate state or local authorities
36 in the district of arrest and an
37 attorney for the government moves
38 promptly, in the district in which the

39 warrant was issued, to dismiss the

40 complaint.

41 * * * * *

COMMITTEE NOTE

The amendment to Rule 5 is intended to address the interplay between the requirements for a prompt appearance before a magistrate judge and the processing of persons arrested for the offense of unlawfully fleeing to avoid prosecution under 18 U.S.C. § 1073, when no federal prosecution is intended. Title 18 U.S.C. § 1073 provides in part:

> Whoever moves or travels in interstate or foreign commerce with intent...to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees...shall be fined not more than $5,000 or imprisoned not more than five years, or both.
>
> Violations of this section may be prosecuted...only upon formal approval in writing by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated.

In enacting § 1073, Congress apparently intended to provide assistance to state

criminal justice authorities in an effort to apprehend and prosecute state offenders. It also appears that by requiring permission of high ranking officials, Congress intended that prosecutions be limited in number. In fact, prosecutions under this section have been rare. The purpose of the statute is fulfilled when the person is apprehended and turned over to state or local authorities. In such cases the requirement of Rule 5 that any person arrested under a federal warrant must be brought before a federal magistrate judge becomes a largely meaningless exercise and a needless demand upon federal judicial resources.

In addressing this problem, several options are available to federal authorities when no federal prosecution is intended to ensue after the arrest. First, once federal authorities locate a fugitive, they may contact local law enforcement officials who make the arrest based upon the underlying out-of-state warrant. In that instance, Rule 5 is not implicated and the United States Attorney in the district issuing the § 1073 complaint and warrant can take action to dismiss both. In a second scenario, the fugitive is arrested by federal authorities who, in compliance with Rule 5, bring the person before a federal magistrate judge. If local law enforcement officers are present, they can take custody, once the United States Attorney informs the magistrate judge that there will be no prosecution under § 1073. Depending on the availability of state or local officers, there may be some delay in the Rule 5 proceedings; any delays following release to local officials, however, would not be a function of Rule 5. In a third situation, federal authorities arrest the

fugitive but local law enforcement authorities are not present at the Rule 5 appearance. Depending on a variety of practices, the magistrate judge may calendar a removal hearing under Rule 40, or order that the person be held in federal custody pending further action by the local authorities.

Under the amendment, officers arresting a fugitive charged only with violating § 1073 need not bring the person before a magistrate judge under Rule 5(a) if there is no intent to actually prosecute the person under that charge. Two requirements, however, must be met. First, the arrested fugitive must be transferred without unnecessary delay to the custody of state officials. Second, steps must be taken in the appropriate district to dismiss the complaint alleging a violation of § 1073. The rule continues to contemplate that persons arrested by federal officials are entitled to prompt handling of federal charges, if prosecution is intended, and prompt transfer to state custody if federal prosecution is not contemplated.

1 Rule 40. Commitment to Another District

2 (a) APPEARANCE BEFORE FEDERAL

3 MAGISTRATE JUDGE. If a person is

4 arrested in a district other than that

5 in which the offense is alleged to have

6 been committed, that person must be

7 taken without unnecessary delay before

8 the nearest available federal magistrate
9 judge~~,~~ , in accordance with the
10 provisions of Rule 5. Preliminary
11 proceedings concerning the defendant
12 must be conducted in accordance with
13 Rules 5 and 5.1, except that if no
14 preliminary examination is held because
15 an indictment has been returned or an
16 information filed or because the
17 defendant elects to have the preliminary
18 examination conducted in the district in
19 which the prosecution is pending, the
20 person must be held to answer upon a
21 finding that such person is the person
22 named in the indictment, information or
23 warrant. If held to answer, the
24 defendant must be held to answer in the
25 district court in which the prosecution
26 is pending -- provided that a warrant is
27 issued in that district if the arrest

28 was made without a warrant -- upon
29 production of the warrant or a certified
30 copy thereof. The warrant or certified
31 copy may be produced by facsimile
32 transmission.
33 * * * * *

COMMITTEE NOTE

The amendment to Rule 40(a) is a technical, conforming change to reflect an amendment to Rule 5, which recognizes a limited exception to the general rule that all arrestees must be taken before a federal magistrate judge.

1 Rule 43. Presence of the Defendant
2 (a) PRESENCE REQUIRED. The
3 defendant ~~shall~~ must be present at the
4 arraignment, at the time of the plea, at
5 every stage of the trial including the
6 impaneling of the jury and the return of
7 the verdict, and at the imposition of
8 sentence, except as otherwise provided
9 by this rule.

FEDERAL RULES OF CRIMINAL PROCEDURE

(b) CONTINUED PRESENCE NOT REQUIRED. The further progress of the trial to and including the return of the verdict, and the imposition of sentence, will ~~shall~~ not be prevented and the defendant will ~~shall~~ be considered to have waived the right to be present whenever a defendant, initially present at trial, or having pleaded guilty or nolo contendere,

(1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), ~~or~~

(2) in a noncapital case, is voluntarily absent at the imposition of sentence, or

~~(2)~~(3) after being warned by

30 the court that disruptive conduct
31 will cause the removal of the
32 defendant from the courtroom,
33 persists in conduct which is such
34 as to justify exclusion from the
35 courtroom.
36 (c) PRESENCE NOT REQUIRED. A
37 defendant need not be present ~~in the~~
38 ~~following situations~~:
39 (1) ~~A corporation may appear~~
40 ~~by counsel for all purposes.~~ when
41 represented by counsel and the
42 defendant is an organization, as
43 defined in 18 U.S.C. § 18;
44 (2) ~~In prosecutions for~~
45 ~~offenses~~ when the offense is
46 punishable by fine or by
47 imprisonment for not more than one
48 year or both, and the court, with
49 the written consent of the

50 defendant, ~~may permit~~ permits
51 arraignment, plea, trial, and
52 imposition of sentence in the
53 defendant's absence~~,~~;
54 (3) ~~At~~ when the proceeding
55 involves only a conference or
56 ~~argument~~ hearing upon a question of
57 law~~,~~; or
58 (4) ~~At~~ when the proceeding
59 involves a correction ~~reduction~~ of
60 sentence under Rule 35.

COMMITTEE NOTE

The revisions to Rule 43 focus on two areas. First, the amendments make clear that a defendant who, initially present at trial or who has entered a plea of guilty or nolo contendere, but who voluntarily flees before sentencing, may nonetheless be sentenced in absentia. Second, the rule is amended to extend to organizational defendants. In addition, some stylistic changes have been made.

Subdivision (a). The changes to subdivision (a) are stylistic in nature and the Committee intends no substantive change in the operation of that provision.

Subdivision (b). The changes in subdivision (b) are intended to remedy the situation where a defendant voluntarily flees before sentence is imposed. Without the amendment, it is doubtful that a court could sentence a defendant who had been present during the entire trial but flees before sentencing. Delay in conducting the sentencing hearing under such circumstances may result in difficulty later in gathering and presenting the evidence necessary to formulate a guideline sentence.

The right to be present at court, although important, is not absolute. The caselaw, and practice in many jurisdictions, supports the proposition that the right to be present at trial may be waived through, inter alia, the act of fleeing. *See generally Crosby v. United States*, 113 S.Ct. 748, ____ U.S. ____ (1993). The amendment extends only to noncapital cases and applies only where the defendant is voluntarily absent after the trial has commenced or where the defendant has entered a plea of guilty or nolo contendere. The Committee envisions that defense counsel will continue to represent the interests of the defendant at sentencing.

The words "at trial, or having pleaded guilty or nolo contendere" have been added at the end of the first sentence to make clear that the trial of an absent defendant is possible only if the defendant was previously present at the trial or has entered a plea of guilty or nolo contendere. *See Crosby v. United States, supra*.

Subdivision (c). The change to subdivision (c) is technical in nature and replaces the word "corporation" with a

reference to "organization," as that term is defined in 18 U.S.C. § 18 to include entities other than corporations.

1 **Rule 49. Service and Filing of Papers**

2 * * * * *

3 ~~(e) FILING OF DANGEROUS OFFENDER~~

4 ~~NOTICE. A filing with the court~~

5 ~~pursuant to 18 U.S.C. § 3575(a) or 21~~

6 ~~U.S.C. § 849(a) shall be made by filing~~

7 ~~the notice with the clerk of the court.~~

8 ~~The clerk shall transmit the notice to~~

9 ~~the chief judge or, if the chief judge~~

10 ~~is the presiding judge in the case, to~~

11 ~~another judge or United States~~

12 ~~magistrate judge in the district, except~~

13 ~~that in a district having a single judge~~

14 ~~and no United States magistrate judge,~~

15 ~~the clerk shall transmit the notice to~~

16 ~~the court only after the time for~~

17 ~~disclosure specified in the~~

18 ~~aforementioned statutes and shall seal~~

19 ~~the notice as permitted by local rule.~~

COMMITTEE NOTE

Subdivision (e) has been deleted because both of the statutory provisions cited in the rule have been abrogated.

1 Rule 57. Rules by District Courts

2 (a) IN GENERAL.

3 (1) Each district court ~~by~~

4 ~~action of~~ acting by a majority of ~~the~~

5 its district judges ~~thereof~~ may ~~from~~

6 ~~time to time~~, after giving appropriate

7 public notice and an opportunity to

8 comment, make and amend rules governing

9 its practice ~~not inconsistent with these~~

10 ~~rules~~. A local rule must be consistent

11 with -- but not duplicative of -- Acts

12 of Congress and rules adopted under 28

13 U.S.C. § 2072 and must conform to any

14 uniform numbering system prescribed by

15 the Judicial Conference of the United

16 States.

17 (2) A local rule imposing a
18 requirement of form must not be enforced
19 in a manner that causes a party to lose
20 rights because of a nonwillful failure
21 to comply with the requirement.
22 (b) PROCEDURE WHEN THERE IS NO
23 CONTROLLING LAW. A judge may regulate
24 practice in any manner consistent with
25 federal law, these rules, and local
26 rules of the district. No sanction or
27 other disadvantage may be imposed for
28 noncompliance with any requirement not
29 in federal law, federal rules, or the
30 local district rules unless the alleged
31 violator has been furnished in the
32 particular case with actual notice of
33 the requirement.
34 (c) EFFECTIVE DATE AND NOTICE. A
35 local rule so adopted shall take effect
36 upon the date specified by the district

37 court and shall remain in effect unless
38 amended by the district court or
39 abrogated by the judicial council of the
40 circuit in which the district is
41 located. Copies of the rules and
42 amendments so made by any district court
43 ~~shall~~ must upon their promulgation be
44 furnished to the judicial council and
45 the Administrative Office of the United
46 States Courts and ~~shall~~ must be made
47 available to the public. ~~In all cases~~
48 ~~not provided for by rule, the district~~
49 ~~judges and magistrate judges may~~
50 ~~regulate their practice in any manner~~
51 ~~not inconsistent with these rules or~~
52 ~~those of the district in which they act.~~

COMMITTEE NOTE

Subdivision (a). This rule is amended to reflect the requirement that local rules be consistent not only with the national rules but also with Acts of Congress. The amendment also states that local rules should not repeat national rules and Acts of

Congress.

The amendment also requires that the numbering of local rules conform with any numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform numbering system would make it easier for an increasingly national bar to locate a local rule that applies to a particular procedural issue.

Paragraph (2) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. The proscription of paragraph (2) is narrowly drawn -- covering only nonwillful violations and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney stubbornly or repeatedly violates a local rule, even one involving merely a matter of form. Nor does it affect the court's power to enforce local rules that involve more than mere matters of form -- for example, a local rule requiring that the defendant waive a jury trial within a specified time.

Subdivision (b). This rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under 28 U.S.C. § 2072, and with the district's local rules. This rule recognizes that courts rely on multiple directives to control practice. Some courts regulate

practice through the published Federal Rules and the local rules of the court. Some courts also have used internal operating procedures, standing orders, and other internal directives. Although such directives continue to be authorized, they can lead to problems. Counsel or litigants may be unaware of the various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally, counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, the amendment disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violator has been furnished in a particular case with actual notice of the requirement.

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular judge unless the party or attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the judge's practices -- or attaching instructions to a notice setting a case for conference or trial -- would suffice to give actual notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained.