105th Congress, 2d Session – – – – – – – – – – – – House Document 105–267

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. 2074

MAY 5, 1998.—Referred to the Committee on the Judiciary and ordered to be printed

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

CHAMBERS OF
THE CHIEF JUSTICE

April 24, 1998

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

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,

William H. Rehnquist

SUPREME COURT OF THE UNITED STATES

April 24, 1998

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 5.1, 26.2, 31, 33, 35, and 43.

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

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 1998, 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 5.1. Preliminary Examination

* * * * *

(d) PRODUCTION OF STATEMENTS.

(1) *In General.* Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the court, for good cause shown, rules otherwise in a particular case.

(2) *Sanctions for Failure to Produce Statement.* If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.

Rule 26.2. Production of Witness Statements

* * * * *

(g) SCOPE OF RULE. This rule applies at a suppression hearing conducted under Rule 12, at trial under this rule, and to the extent specified:

(1) in Rule 32(c)(2) at sentencing;

(2) in Rule 32.1(c) at a hearing to revoke or modify probation or supervised release;

(3) in Rule 46(i) at a detention hearing;

(4) in Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255; and

(5) in Rule 5.1 at a preliminary examination.

Rule 31. Verdict

* * * * *

(d) POLL OF JURY. After a verdict is returned but before the jury is discharged, the court shall, on a party's request, or may on its own motion, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.

* * * * *

Rule 33. New Trial

On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require. If trial was by the court without a jury, the court may—on defendant's motion for new trial—vacate the judgment, take additional testimony, and direct the entry of a new judgment. A motion for new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty. But if an appeal is pending, the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds may be made only within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

Rule 35. Correction or Reduction of Sentence

* * * * *

(b) REDUCTION OF SENTENCE FOR SUBSTANTIAL ASSISTANCE. If the Government so moves within one year after the sentence is imposed, the court may reduce a sentence to reflect a defendant's subsequent substantial assistance in investigating or prosecuting another person, in accordance with the guidelines and policy statements issued by the Sentencing Commission under 28 U.S.C. § 994. The court may consider a government motion to reduce a sentence made one year or more after the sentence is imposed if the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after sentence is imposed. In evaluating whether substantial assistance has been rendered, the court may consider the defendant's pre-sentence assistance. In applying this subdivision, the

court may reduce the sentence to a level below that established by statute as a minimum sentence.

* * * * *

Rule 43. Presence of the Defendant

* * * * *

(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 reduction or correction of sentence under Rule 35(b) or (c) or 18 U.S.C. § 3582(c).

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

November 12, 1997

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 5.1, 26.2, 31, 33, 35, and 43 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.

Leonidas Ralph Mecham

Attachments

EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
SEPTEMBER 1997

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

* * * * *

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Federal Rules of Criminal Procedure 5.1, 26.2, 31, 33, 35, and 43 together with Committee Notes explaining their purpose and intent. The proposed amendments had been circulated to the bench and bar for comment in August 1996. A public hearing was scheduled for Oakland, California, but no witnesses requested to testify.

The proposed amendments to Rule 5.1 (Preliminary Examination) would require production of a witness statement after the witness has testified at a preliminary examination hearing. The proposal is similar to current provisions in other rules that require production of a witness statement at other pretrial proceedings.

Rule 26.2 (Production of Witness Statements) would be amended to include a cross-reference to the proposed amendment to Rule 5.1, extending the requirement to produce a witness statement to a preliminary examination.

The proposed amendment to Rule 31 (Verdict) would require individual polling of jurors when polling occurs after the verdict, either at a party's request or on the court's own motion. The amendment confirms the existing practice of most courts.

Rule 33 (New Trial) would be amended to require that a motion for a new trial based on newly discovered evidence be filed within three years after the date of the "verdict or finding of

guilty." The current rule uses "final judgment" as the triggering event, but courts have reached different conclusions on when a final judgment is entered. As a result of the disparate practices, the time to file the motion has varied among the districts. The published version of the proposed amendment fixed a clear starting point to begin the time period and set two years as the outside limit. The advisory committee was persuaded by the public comment, however, that an additional year was necessary. Defense attorneys often concentrate their available time and resources prosecuting an appeal immediately after the verdict or finding of guilty and only begin considering filing a motion for a new trial when they have completed the appeal.

Rule 35 (Correction or Reduction of Sentence) would be amended to permit a court to aggregate a defendant's assistance in the prosecution or investigation of another offense rendered before and after sentencing in determining whether a defendant's assistance is "substantial" as required under Rule 35(b). The proposed amendment is intended to recognize a defendant's significant assistance rendered before and after sentencing, either of which viewed alone would be insufficient to meet the "substantial" level.

The proposed amendment to Rule 43 (Presence of the Defendant) would clarify that a defendant need not be present: (1) at a Rule 35(b) reduction of sentence proceeding for substantial assistance rendered by the defendant; (2) at a Rule 35(c) correction of sentence proceeding for a technical, arithmetical, or other clear error; or (3) at a 18 U.S.C. § 3582(c) resentencing modifying an imposed term of imprisonment. In virtually all these proceedings, the modification of a sentence can only inure to the benefit of the defendant, and the defendant's attendance is not necessary. The court does, however, retain the power to require or permit a defendant to attend any of these proceedings in its discretion. A defendant's presence would still be required at a resentencing to correct an invalid sentence following a remand under Rule 35(a).

The Standing Rules Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Criminal Procedure, as recommended by your Committee, are in Appendix D with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rules 5.1, 26.2, 31, 33, 35, and 43 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.

* * * * *

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

Agenda F-18 (Appendix D)
Rules
September 1997

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

FERN M. SMITH
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 the Advisory Committee on Criminal Rules**

DATE: **May 12, 1997**

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on April 7, 1997 in Washington, D.C. and took action on a number of proposed amendments. * * * * * First, the Committee considered public comments on proposed amendments to the following Rules:

- Rule 5.1. Preliminary Examination (Production of Witness Statements)
- Rule 26.2. Production of Witness Statements
- Rule 31. Verdict (Polling the Jurors Individually)
- Rule 33. New Trial (Time for Filing)
- Rule 35(b). Correction or Reduction of Sentence (Substantial Assistance)
- Rule 43. Presence of Defendant (Presence at Reduction or Correction of

In discussing those rules, the Committee also considered the suggestions of the Subcommittee on Style. As noted in the following discussion, the Advisory Committee proposes that these amendments be approved by the Committee and forwarded to the Judicial Conference.

* * * * *

II. Action Items--Recommendations to Forward Amendments to the Judicial Conference

A. Summary and Recommendations

At its June 1996 meeting, the Standing Committee approved the publication of proposed amendments to six rules for public comment from the bench and bar. In response, the Advisory Committee received written comments from 20 persons or organizations commenting on all or some of the Committee's proposed amendments to the rules. In addition, the Committee received suggested changes from the Style Subcommittee. The Committee has considered those comments and recommends that all of the proposed amendments be forwarded to the Judicial Conference for approval and transmittal to the Supreme Court. The following discussion briefly summarizes the proposed amendments.

1. ACTION ITEM--Rule 5.1. Preliminary Examination (Production of Witness Statements)

The proposed amendment to Rule 5.1 would extend the requirements of Rule 26.2, regarding the production of a witness' statements, to preliminary examinations. Under the amendment, a party would be required to produce its witness' prior statements once the witness had personally testified at a preliminary examination. Of the 12 commentators who submitted written comments, 11 favored the proposed amendment. The Advisory Committee considered the suggested style changes of the Style Subcommittee and decided to forward the amendment as published. That version of the rule was intended to follow the language and format of similar amendments made to Rules 32, 32.1, 46 and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255. The Committee believed that departing from that language, without also changing those rules, might lead to confusion and uncertainty in the rule.

Recommendation--The Committee recommends that the amendment be approved and forwarded to the Judicial Conference.

2. ACTION ITEM--Rule 26.2. Production of Witness Statements

The proposed amendment to Rule 26.2(g) parallels the amendment to Rule 5.1, supra and extends the rule's requirement to produce a witness' statement to preliminary examinations. Again, 11 of the 12 commentators favored the amendment. The Committee considered the proposed style changes but decided to forward the amendment as published; the Committee noted that the rule generally needs to be restructured and decided that it would be better to wait with that task until the Criminal Rules are restyled.

Recommendation--The Committee recommends that the amendment to Rule 26(g) be approved and forwarded to the Judicial Conference.

3. ACTION ITEM--Rule 31. Verdict (Polling the Jurors Individually)

The proposed amendment to Rule 31 would require the court to conduct an individual poll of each juror anytime a poll is requested or ordered sua sponte by the court. Of the eight comments received on the proposed amendment, only one of them recommended complete rejection of the proposal. In addition to making suggested style changes, the Committee also changed the rule to indicate that any poll of the jury must occur before the jury is discharged--as opposed to before the verdict is recorded--as currently provided. That change was suggested by one of the commentators who noted the problems of interpreting when a verdict is recorded. *See United States v. Marinari*, 32 F.3d 1209 (7th Cir. 1994).

Recommendation--The Committee recommends that the amendment be approved and forwarded to the Judicial Conference.

4. ACTION ITEM--Rule 33. New Trial (Time for Filing Motion)

The proposed amendment to Rule 33 was intended to provide consistency in the timing requirements for filing motions for new trial by making the verdict or finding of guilty the starting point for both types of motions for new trial--motions based on newly discovered evidence and motions based on other grounds. While two commentators favored the amendment, ten commentators were opposed, primarily because the amendment would effectively reduce the overall time available to a defendant to file a motion for new trial based upon newly discovered evidence. Upon further consideration, the Committee decided to increase the total amount of time in which to file the motion from two years to three years. The Committee also included the suggested style changes.

Recommendation--The Committee recommends that the amendment to Rule 33 be approved and forwarded to the Judicial Conference.

5. ACTION ITEM--Rule 35(b). Correction or Reduction of Sentence (Substantial Assistance)

The proposed change to Rule 35(b) is intended to fill a gap in current practice where a defendant has, considering the aggregate of both pre-sentence and post sentence cooperation, provided substantial assistance to the Government. But because of the provisions in the current Rule 35(b), he or she is not entitled to any sentencing relief as a result of that cooperation. All eight commentators favored the change. The Committee has incorporated the Style Subcommittee's suggested changes.

Recommendation--The Committee recommends that the amendment to Rule 35(b) be approved and forwarded to the Judicial Conference.

6. ACTION ITEM--Rule 43. Presence of Defendant (Presence at Reduction or Correction of Sentence)

The proposed change to Rule 43(c)(4) was intended to correct an inconsistency created by the amendments to the Rule several years ago. Under the current rule it would possible to require the defendant's presence at a reduction of sentence hearing under Rule 35(b) but not at a correction of sentence hearing under Rule 35(c). Of the nine comments received, seven favored the proposed change. The Committee considered the suggested style changes and decided to forward the amendment as published. The current version of Rule 43(c) was restyled just several years earlier and the Committee believed that any other style changes could await the restyling of the Criminal Rules.

Recommendation--The Committee recommends that the amendment to Rule 43(c) be approved and forwarded to the Judicial Conference.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 5.1. Preliminary Examination

1 * * * * *

2 (d) PRODUCTION OF STATEMENTS.

3 (1) *In General.* Rule 26.2(a)-(d) and (f) applies at any

4 hearing under this rule, unless the court, for good cause

5 shown, rules otherwise in a particular case.

6 (2) *Sanctions for Failure to Produce Statement.* If a party

7 elects not to comply with an order under Rule 26.2(a) to

8 deliver a statement to the moving party, the court may not

9 consider the testimony of a witness whose statement is

10 withheld.

COMMITTEE NOTE

The addition of subdivision (d) mirrors similar amendments made in 1993 which extended the scope of Rule 26.2 to Rules 32, 32.1, 46 and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255. As indicated in the Committee Notes accompanying those amendments, the primary reason for extending the coverage of

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

Rule 26.2 rested heavily upon the compelling need for accurate information affecting a witness' credibility. That need, the Committee believes, extends to a preliminary examination under this rule where both the prosecution and the defense have high interests at stake.

A witness' statement must be produced only after the witness has personally testified.

Changes Made to Rule 5.1 After Publication ("GAP Report")

The Committee made no changes to the published draft.

Rule 26.2. Production of Witness Statements

1 * * * * *

2 (g) SCOPE OF RULE. This rule applies at a suppression hearing

3 conducted under Rule 12, at trial under this rule, and to the

4 extent specified:

5 (1) in Rule ~~32(c)~~ 32(c)(2) at sentencing;

6 (2) in Rule 32.1(c) at a hearing to revoke or modify

7 probation or supervised release;

8 (3) in Rule 46(i) at a detention hearing; ~~and~~

9 (4) in Rule 8 of the Rules Governing Proceedings

10 under 28 U.S.C. § 2255; and

11 (5) in Rule 5.1 at a preliminary examination.

COMMITTEE NOTE

The amendment to subdivision (g) mirrors similar amendments made in 1993 to this rule and to other Rules of Criminal Procedure which extended the application of Rule 26.2 to other proceedings, both pretrial and post-trial. This amendment extends the requirement of producing a witness' statement to preliminary examinations conducted under Rule 5.1.

Subdivision (g)(1) has been amended to reflect changes to Rule 32.

Changes Made to Rule 26.2 After Publication ("GAP Report")

The Committee made no changes to the published draft.

Rule 31. Verdict

1 * * * * *

2 (d) POLL OF JURY. ~~When~~ After a verdict is returned ~~and~~ but

3 before ~~it is recorded~~ the jury is discharged, the court shall, on

4 a party's request, or may on its own motion, poll the jurors

individually. ~~jury shall be polled at the request of any party or upon the court's own motion.~~ If ~~upon~~ the poll reveals a lack of unanimity ~~there is not unanimous concurrence~~, the court may direct the jury ~~may be directed~~ to deliberate ~~retire for~~ further ~~deliberations~~ or may declare a mistrial ~~be discharged~~ and discharge the jury.

* * * * *

COMMITTEE NOTE

The right of a party to have the jury polled is an "undoubted right." *Humphries v. District of Columbia*, 174 U.S. 190, 194 (1899). Its purpose is to determine with certainty that "each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent." *Id.*

Currently, Rule 31(d) is silent on the precise method of polling the jury. Thus, a court in its discretion may conduct the poll collectively or individually. As one court has noted, although the prevailing view is that the method used is a matter within the discretion of the trial court, *United States v. Miller*, 59 F.3d 417, 420 (3d Cir. 1995) (citing cases), the preference, nonetheless of the appellate and trial courts, seems to favor individual polling. *Id.* (citing cases). That is the position taken in the American Bar Association Standards for Criminal Justice § 15-4.5. Those sources favoring individual polling observe that conducting a poll of the jurors collectively saves little time and does not always adequately

insure that an individual juror who has been forced to join the majority during deliberations will voice dissent from a collective response. On the other hand, an advantage to individual polling is the "likelihood that it will discourage post-trial efforts to challenge the verdict on allegations of coercion on the part of some of the jurors." *Miller, Id.* at 420 (citing *Audette v. Isaksen Fishing Corp.*, 789 F.2d 956, 961, n. 6 (1st Cir. 1986)).

The Committee is persuaded by the authorities and practice that there are advantages of conducting an individual poll of the jurors. Thus, the rule requires that the jurors be polled individually when a polling is requested, or when polling is directed sua sponte by the court. The amendment, however, leaves to the court the discretion as to whether to conduct a separate poll for each defendant, each count of the indictment or complaint, or on other issues.

Changes Made to Rule 31 After Publication ("GAP Report")

The Committee changed the rule to require that any polling of the jury must be done before the jury is discharged and it incorporated suggested style changes submitted by the Style Subcommittee.

Rule 33. New Trial.

1 On a defendant's motion, the court ~~The court on~~

2 ~~motion of a defendant~~ may grant a new trial to that defendant

3 if ~~required in the interest of justice.~~ the interests of justice so

4 require. If trial was by the court without a jury, the court
5 may—on defendant's motion for new trial—~~motion of a~~
6 ~~defendant for a new trial may~~ vacate the judgment, ~~if entered~~,
7 take additional testimony, and direct the entry of a new
8 judgment. A motion for new trial based on ~~the ground of~~
9 newly discovered evidence may be made only ~~before or~~
10 within three ~~two~~ years after ~~final judgment,~~ the verdict or
11 finding of guilty. ~~but~~ But if an appeal is pending, the court
12 may grant the motion only on remand of the case. A motion
13 for a new trial based on any other grounds ~~shall~~ may be made
14 only within 7 days after the verdict or finding of guilty or
15 within such further time as the court may fix during the 7-day
16 period.

COMMITTEE NOTE

As currently written, the time for filing a motion for new trial on the ground of newly discovered evidence runs from the "final judgment." The courts, in interpreting that language, have uniformly concluded that that language refers to the action of the Court of

Appeals. *See, e.g.*, *United States v. Reyes*, 49 F.3d 63, 66 (2d Cir. 1995)(citing cases). It is less clear whether that action is the appellate court's judgment or the issuance of its mandate. In *Reyes*, the court concluded that it was the latter event. In either case, it is clear that the present approach of using the appellate court's final judgment as the triggering event can cause great disparity in the amount of time available to a defendant to file timely a motion for new trial. This would be especially true if, as noted by the Court in *Reyes*, *supra* at 67, an appellate court stayed its mandate pending review by the Supreme Court. *See also Herrera v. Collins*, 506 U.S. 390, 410-412 (1993) (noting divergent treatment by States of time for filing motions for new trial).

It is the intent of the Committee to remove that element of inconsistency by using the trial court's verdict or finding of guilty as the triggering event. The change also furthers internal consistency within the rule itself; the time for filing a motion for new trial on any other ground currently runs from that same event.

Finally, the time to file a motion for new trial based upon newly discovered evidence is increased to three years to compensate for what would have otherwise resulted in less time than that currently contemplated in the rule for filing such motions.

Changes Made to Rule 33 After Publication ("GAP Report")

The Advisory Committee changed the proposed amendment to require that any motions for new trials based upon newly discovered evidence must be filed within *three* years, instead of two years, from the date of the verdict. The Committee also incorporated changes offered by the Style Subcommittee.

8 FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 35. Correction or Reduction of Sentence

1 * * * * *

2 (b) REDUCTION OF SENTENCE FOR SUBSTANTIAL
3 ASSISTANCE ~~CHANGED CIRCUMSTANCES~~. ~~The court, on~~
4 ~~motion of~~ If the Government so moves ~~made~~ within one year
5 after ~~the imposition of~~ the sentence~~,~~ is imposed, the court may
6 reduce a sentence to reflect a defendant's subsequent
7 substantial assistance in ~~the investigation or prosecution of~~
8 investigating or prosecuting another person, ~~who has~~
9 ~~committed an offense,~~ in accordance with the guidelines and
10 policy statements issued by the Sentencing Commission under
11 28 U.S.C. § 994. ~~pursuant to section 994 of title 28, United~~
12 ~~States Code.~~ The court may consider a government motion to
13 reduce a sentence made one year or more after ~~imposition of~~
14 the sentence is imposed if ~~where~~ the defendant's substantial
15 assistance involves information or evidence not known by the
16 defendant until one year or more after ~~imposition of~~ sentence

17 is imposed. In evaluating whether substantial assistance has
18 been rendered, the court may consider the defendant's pre-
19 sentence assistance. ~~The court's authority to reduce a~~
20 ~~sentence under this subsection includes the authority to~~ In
21 applying this subdivision, the court may reduce ~~such~~ the
22 sentence to a level below that established by statute as a
23 minimum sentence.
24 * * * * *

COMMITTEE NOTE

The amendment to Rule 35(b) is intended to fill a gap in current practice. Under the Sentencing Reform Act and the applicable guidelines, a defendant who has provided "substantial" assistance to the Government before sentencing may receive a reduced sentence under United States Sentencing Guideline § 5K1.1. In addition, a defendant who provides substantial assistance after the sentence has been imposed may receive a reduction of the sentence if the Government files a motion under Rule 35(b). In theory, a defendant who has provided substantial assistance both before and after sentencing could benefit from both § 5K1.1 and Rule 35(b). But a defendant who has provided, on the whole, substantial assistance may not be able to benefit from either provision because each provision requires "substantial assistance." As one court has noted, those two provisions contain distinct "temporal boundaries." *United States v. Drown*, 942 F.2d 55, 59 (1st Cir. 1991).

Although several decisions suggest that a court may aggregate the defendant's pre-sentencing and post-sentencing assistance in determining whether the "substantial assistance" requirement of Rule 35(b) has been met, *United States v. Speed*, 53 F.3d 643, 647-649 (4th Cir. 1995)(Ellis, J. concurring), there is no formal mechanism for doing so. The amendment to Rule 35(b) is designed to fill that need. Thus, the amendment permits the court to consider, in determining the substantiality of post-sentencing assistance, the defendant's pre-sentencing assistance, irrespective of whether that assistance, standing alone, was substantial.

The amendment, however, is not intended to provide a double benefit to the defendant. Thus, if the defendant has already received a reduction of sentence under U.S.S.G. § 5K1.1 for substantial pre-sentencing assistance, he or she may not have that assistance counted again in a post-sentence Rule 35(b) motion.

Changes Made to Rule 35 After Publication ("GAP Report")

The Committee incorporated the Style Subcommittee's suggested changes.

Rule 43. Presence of the Defendant

1 * * * * *

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

3 present:

4 (1) when represented by counsel and the defendant is
5 an organization, as defined in 18 U.S.C. § 18;
6 (2) when the offense is punishable by fine or by
7 imprisonment for not more than one year or both, and the
8 court, with the written consent of the defendant, permits
9 arraignment, plea, trial, and imposition of sentence in the
10 defendant's absence;
11 (3) when the proceeding involves only a conference or
12 hearing upon a question of law; or
13 (4) when the proceeding involves a reduction or
14 correction of sentence under Rule ~~35~~ 35(b) or (c) or 18 U.S.C.
15 § 3582(c).

COMMITTEE NOTE

The amendment to Rule 43(c)(4) is intended to address two issues. First, the rule is rewritten to clarify whether a defendant is entitled to be present at resentencing proceedings conducted under Rule 35. As a result of amendments over the last several years to Rule 35, implementation of the Sentencing Reform Act, and caselaw interpretations of Rules 35 and 43, questions had been raised whether the defendant had to be present at those proceedings. Under the

present version of the rule, it could be possible to require the defendant's presence at a "reduction" of sentence hearing conducted under Rule 35(b), but not a "correction" of sentence hearing conducted under Rule 35(a). That potential result seemed at odds with sound practice. As amended, Rule 43(c)(4) would permit a court to reduce or correct a sentence under Rule 35(b) or (c), respectively, without the defendant being present. But a sentencing proceeding being conducted on remand by an appellate court under Rule 35(a) would continue to require the defendant's presence. *See, e.g., United States v. Moree*, 928 F.2d 654, 655-656 (5th Cir. 1991)(noting distinction between presence of defendant at modification of sentencing proceedings and those hearings that impose new sentence after original sentence has been set aside).

The second issue addressed by the amendment is the applicability of Rule 43 to resentencing hearings conducted under 18 U.S.C. § 3582(c). Under that provision, a resentencing may be conducted as a result of retroactive changes to the Sentencing Guidelines by the United States Sentencing Commission or as a result of a motion by the Bureau of Prisons to reduce a sentence based on "extraordinary and compelling reasons." The amendment provides that a defendant's presence is not required at such proceedings. In the Committee's view, those proceedings are analogous to Rule 35(b) as it read before the Sentencing Reform Act of 1984, where the defendant's presence was not required. Further, the court may only reduce the original sentence under these proceedings.

Changes Made to Rule 43 After Publication ("GAP Report")

The Committee made no changes to the draft amendment as published.

○