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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 9, 2002.—Referred to the Committee on the Judiciary and ordered to be printed

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LETTER OF SUBMITTAL

SUPREME COURT OF THE UNITED STATES,
Washington, DC, April 25, 2005.

Hon. J. DENNIS HASTERT,
Speaker of the House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: 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 Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

WILLIAM H. REHNQUIST,
Chief Justice.

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 12.2, 29, 32.1, 33, 34, 45, and new Rule 59.

[See infra., pp. __ __ __.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2005, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings 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.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 12.2. Notice of an Insanity Defense; Mental Examination

* * * * *

(d) Failure to Comply.

(1) ***Failure to Give Notice or to Submit to Examination.*** The court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt or the issue of punishment in a capital case if the defendant fails to:

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

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

(2) ***Failure to Disclose.*** The court may exclude any expert evidence for which the defendant has failed to

comply with the disclosure requirement of Rule 12.2(c)(3).

* * * * *

Rule 29. Motion for a Judgment of Acquittal

* * * * *

(c) After Jury Verdict or Discharge.

(1) ***Time for a Motion.*** A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later.

* * * * *

Rule 32.1. Revoking or Modifying Probation or Supervised Release

* * * * *

(b) Revocation.

* * * * *

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

(A) written notice of the alleged violation;

(B) disclosure of the evidence against the person;

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

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

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

(c) Modification.

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

* * * * *

Rule 33. New Trial

* * * * *

(b) Time to File.

* * * * *

(2) ***Other Grounds.*** Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty.

Rule 34. Arresting Judgment

* * * * *

(b) Time to File. The defendant must move to arrest judgment within 7 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere.

Rule 45. Computing and Extending Time

* * * * *

(b) Extending Time.

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

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

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

(2) ***Exception.*** The court may not extend the time to take any action under Rule 35, except as stated in that rule.

* * * * *

Rule 59. Matters Before a Magistrate Judge

(a) Nondispositive Matters. A district judge may refer to a magistrate judge for determination any matter that does not dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record an oral or written order stating the determination. A party may serve and file objections to the order within 10 days after being served with a copy of a written order or after the oral order is stated on the record, or at some other time the court sets. The district judge must consider timely objections and modify or set aside any part of the order that is contrary to law or clearly erroneous. Failure to

object in accordance with this rule waives a party's right to review.

(b) Dispositive Matters.

(1) ***Referral to Magistrate Judge.*** A district judge may refer to a magistrate judge for recommendation a defendant's motion to dismiss or quash an indictment or information, a motion to suppress evidence, or any matter that may dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings. A record must be made of any evidentiary proceeding and of any other proceeding if the magistrate judge considers it necessary. The magistrate judge must enter on the record a recommendation for disposing of the matter, including any proposed findings of fact. The clerk must immediately serve copies on all parties.

(2) ***Objections to Findings and Recommendations.*** Within 10 days after being served with a copy of the recommended disposition, or at some other time the court sets, a party may serve and file specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient. Failure to object in accordance with this rule waives a party's right to review.

(3) ***De Novo Review of Recommendations.*** The district judge must consider de novo any objection to the magistrate judge's recommendation. The district judge may accept, reject, or modify the recommendation, receive further evidence, or

resubmit the matter to the magistrate judge with instructions.

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

October 27, 2004

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 consideration of the Court proposed amendments to Rules 12.2, 29, 32.1, 33, 34, 45, and new Rule 59 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 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
Secretary

Attachments

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

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

* * * * *

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Rules 12.2, 29, 32,* 32.1, 33, 34, 45, and new Rule 59 with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments were circulated to the bench and bar for comment in August 2003. The scheduled public hearing on the proposed rules amendments was canceled because no one asked to testify.

The proposed amendments to Rule 12.2 authorize a court to exclude expert evidence on the issue of the defendant's mental disease, mental defect, or any other mental condition if the evidence is not timely disclosed or if the defendant fails to submit to an examination in accordance with the rule.

The proposed amendments to Rules 29, 33, and 34 permit a court to extend the time for filing the post-trial motion designated in the respective rule, even if the court rules on the extension request after the expiration of the seven days specified in the rule, as long as the motion for an extension is filed within the prescribed seven-day period. Rule 45 would be amended consistent with the proposed amendments to Rules 29, 33, and 34. The amendments remedy the problem caused when a judge fails to act within the specified time period even though the party had filed a timely motion.

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*The Judicial Conference withdrew the proposed amendment to Rule 32 after Congress passed the Justice for All Act of 2004. The Act superseded the provisions proposed in the amendment.

The proposed amendments to Rule 32 extend the right of allocution to a victim of a felony offense not involving violence or sexual abuse, permitting the victim to address the court or submit a statement in written form. The amendments provide the court with discretion to limit the number of victims who may address the court in cases involving multiple victims. The advisory committee recognizes that legislation extending the right of allocution to all victims of offenses, including misdemeanor and petty offenses, was passed by the Senate and is pending in the House (H.R. 4342, 108th Cong., 2d Sess.). The advisory committee determined that the best course of action was to proceed in accordance with the rulemaking process. The proposed amendment should be withdrawn prior to the September Judicial Conference session if the pending legislation were to be enacted in the meantime.

The proposed amendment to Rule 32.1 provides the defendant with a right of allocution to speak in mitigation of the penalty to be imposed in a revocation hearing, or a modification hearing in which the terms or conditions of the defendant's probation or supervised release may be modified. The amendment was initially suggested in an opinion by the Eleventh Circuit Court of Appeals, *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002).

Proposed new Rule 59 parallels provisions in Civil Rule 72 for handling and appealing a decision by a magistrate judge. The new rule codifies statutory law, case law, and the practices of the courts dealing with the assignment, disposition, and appeal of non-dispositive and dispositive matters handled by a magistrate judge. The new rule was suggested in an opinion by the Ninth Circuit Court of Appeals, *United States v. Abonce-Barrera*, 257 F.3d 959 (9th Cir. 2001). Although the rule distinguishes between "dispositive" and "non-dispositive" matters, it does not attempt to define or otherwise catalog motions that fall within either category.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rules 12.2, 29, 32,** 32.1, 33, 34, 45, and new Rule 59 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Criminal Procedure are in Appendix D with an excerpt from the advisory committee report.

* * * * *

**The Judicial Conference later withdrew the proposed amendment to Rule 32.

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

DAVID F. LEVI
CHAIR

PETER G. McCABE
SECRETARY

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EDWARD E. CARNES
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

TO: **Hon. David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

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

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

DATE: **May 18, 2004**

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on May 6-7, 2004 in Monterey, California and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Minutes of that meeting are included at Appendix G.

This Report addresses a number of action items: approval of published Rules 12.2, 29, 32,* 32.1, 33, 34, 45, and new Rule 59 for transmission to the Judicial Conference and approval for publication and comment on proposed amendments to Rules 5, 32.1, 40, 41, and 58.

II. Action Items—Summary and Recommendations.

The Advisory Committee on the Criminal Rules met on May 6 and 7, 2004, in Monterey, California, and took action on a number of proposed amendments. This report addresses matters discussed by the Committee at that meeting. First, the Committee considered public comments on proposed amendments to the following Rules:

*The Judicial Conference withdrew the proposed amendment to Rule 32 after Congress passed the Justice for All Act of 2004. The Act superseded the provisions proposed in the amendment.

- Rule 12.2. Notice of Insanity Defense; Mental Examination; Sanction for Failure to Disclose.
- Rules 29, 33, 34 and 45. Proposed Amendments Re Rulings by Court on Motions to Extend Time for Filing Motions Under Those Rules.
- Rule 32, Sentencing; Proposed Amendment Re Allocution Rights of Victims of Non-Violent and Non-Sexual Abuse Felonies.
- Rule 32.1, Revoking or Modifying Probation or Supervised Release. Proposed Amendment Concerning Defendant's Right of Allocution.
- Rule 59; Proposed New Rule Concerning Rulings by Magistrate Judges.

As noted in the following discussion, the Advisory Committee proposes that those 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 2003 meeting, the Standing Committee approved the publication of proposed amendments to Rule 12.2, 29, 32, 32.1, 33, 34, 45, and New Rule 58. The comment period for the proposed amendments was closed on February 15, 2004. The Advisory Committee received written comments from several persons and organizations commenting on all or some of the proposed amendments to the rules. The Committee has made several minor changes to rules 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 12.2; Proposed Amendment Regarding Sanction for Failure to Produce Results of Examination.

The amendment to Rule 12.2 is intended to fill a perceived gap. Although the rule contains a sanctions provision for failing to comply with most of the requirements of the rule, there is no provision stating possible sanctions if the defendant does not comply with Rule 12.2(c)(3), which requires the defendant to disclose to the government the results and reports of the defendant's expert examination. The Committee received four comments on the published amendment. One of the commentators, the Federal Bar Association, believes that the rule goes too far from a practical perspective and would prefer that it be left to the court in each case to decide an appropriate remedy, e.g., by providing the government with an ample opportunity to test the defendant.

Following consideration of the comments, the Committee unanimously approved the amendment, as published. A copy of the rule is at Appendix A.

Recommendation—The Advisory Committee recommends that the amendments to Rule 12.2 be approved and forwarded to the Judicial Conference.

2. ACTION ITEM—Rules 29, 33, 34 and 45; Proposed Amendments Regarding Time for Ruling on Motions Under Those Rules.

In June 2003, the Standing Committee approved for publication amendments to Rules 29, 33, 34, and 45 that would address the timing of rulings on motions filed under Rules 29, 33, and 34 and make a conforming amendment to Rule 45. In Rules 29, 33, and 34 the court is required to rule on any motion for an extension of time, within the seven-day period specified for filing the underlying motion. Failure to do so deprives the court of the jurisdiction to consider an underlying motion that is filed after the seven-day period. Accordingly, if a defendant moves for an extension of time to file a motion for a judgment of acquittal within the seven-day period, the judge must rule on that extension motion within the same seven-day period. If for some reason the court does not act on the motion for extension within the seven days, the court lacks jurisdiction to act on the underlying substantive motion. The amendments are designed to remedy that problem.

The Advisory Committee received four written comments, which supported the change, and made a minor clarifying change to the Committee Note. A copy of the rules is at Appendix B.

Recommendation—The Advisory Committee recommends that the amendments to Rules 29, 33, 34, and 45 be approved and forwarded to the Judicial Conference.

3. ACTION ITEM—Rule 32; Proposed Amendment Regarding Allocution by Victims of Felonies.**

In June 2003, the Standing Committee approved publication of a proposed amendment to Rule 32, which would expand victim allocution to victims of non-sexual abuse and non-violent felonies. The Advisory Committee received four written comments from members of the public and also some suggested style changes from the Style Subcommittee. The public comments were mixed. Three supported the change with some reservations about implementing the rule. One commentator opposed the change. After the comment period closed, the Committee learned that Congress was in the process of

**The Judicial Conference later withdrew the proposed amendment to Rule 32.

considering the Victims' Right Act, which would implement a number of significant changes in federal criminal practice relating to victims of crime.

At its May 2004 meeting, the Advisory Committee considered the written comments, and the text of the pending Victims' Right Act. The Committee determined that the most appropriate course of action at this point would be to proceed with the proposed amendment to Rule 32, with the recommendation that if the Victims' Right Act is enacted, the proposed amendment be withdrawn. In that case, the Advisory Committee envisions that not only Rule 32, but other rules as well, would be examined with a view toward making changes that conform to the Act. The Committee approved the rule by a vote of 9 to 2. A copy of the rule is at Appendix C.

Recommendation—The Advisory Committee recommends that the amendment to Rule 32 be approved and forwarded to the Judicial Conference, with the understanding that if the Victims' Right Act is enacted, that the proposed amendment be withdrawn.

4. Action Item—Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed Amendments Concerning Defendant's Right of Allocution.

The amendment to Rule 32.1 would provide a person facing revocation or modification of probation or supervised release with a right of allocution. The amendment followed a suggestion in *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002), where the court observed that there is no explicit provision in Rule 32.1 giving the defendant a right to allocution. The Standing Committee approved publication of the proposed amendment in June 2003; the comment period ended on February 16, 2004. The Advisory Committee received only two written comments on the amendment; both supported the change. The Committee approved the amendment, as published, by a unanimous vote.

A copy of the rule and Committee Note are at Appendix D.

Recommendation—The Committee recommends that the amendment to Rule 32.1 be approved and forwarded to the Judicial Conference.

5. ACTION ITEM—New Rule 59; Proposed Rule Concerning Rulings by Magistrate Judges.

Proposed new Rule 59, which would parallel Civil Rule 72, is a response to a suggestion made by the Ninth Circuit Court of Appeals in *United States v. Abonce-Barerra*, 257 F.3d 959, 969 (9th Cir. 2001). The new rule addresses procedures for appealing decisions by magistrate judges. In June 2003, the Committee approved

publication of the proposed new rule for public comment. The Criminal Rules Committee received three comments on the rule.

Based upon those recommendations, and several suggestions from the Style Subcommittee, the Advisory Committee made a number of minor clarifying changes to both the Rule and the Committee Note, and approved the new rule by a vote of 10 to 1. A copy of the rule and Committee Note are at Appendix E.

Recommendation—The Committee recommends that new Rule 59 be approved and forwarded to the Judicial Conference.

* * * * *

Attachments:

Appendix A. Rule 12.2.
Appendix B. Rules 29, 33, 34 and 45.
* * *
Appendix D. Rule 32.1.
Appendix E. New Rule 59.

APPENDIX A

RULE 12.2. NOTICE OF AN INSANITY DEFENSE; MENTAL EXAMINATION

- **Copy of Rule**
- **Committee Note**
- **Changes Made After Publication and Comment**

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 12.2. Notice of an Insanity Defense; Mental Examination

1 * * * * *

2 **(d) Failure to Comply.**

3 (1) ***Failure to Give Notice or to Submit to***

4 ***Examination.*** ~~If the defendant fails to give~~

5 ~~notice under Rule 12.2(b) or does not submit to~~

6 ~~an examination when ordered under Rule~~

7 ~~12.2(c), the~~ The court may exclude any expert

8 evidence from the defendant on the issue of the

9 defendant's mental disease, mental defect, or any

10 other mental condition bearing on the

11 defendant's guilt or the issue of punishment in a

12 capital case~~.~~ if the defendant fails to:

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

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

14 (B) submit to an examination when ordered

15 under Rule 12.2(c).

16 (2) ***Failure to Disclose.*** The court may exclude any

17 expert evidence for which the defendant has failed to

18 comply with the disclosure requirement of Rule

19 12.2(c)(3).

20 * * * * *

COMMITTEE NOTE

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

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

exclusion of "any" expert evidence, even evidence unrelated to the results and reports that were not disclosed, as required in Rule 12.2(c)(3).

The rule assumes that the sanction of exclusion will result only where there has been a complete failure to disclose the report. If the report is disclosed, albeit in an untimely fashion, other relief may be appropriate, for example, granting a continuance to the government to review the report.

Changes Made After Publication and Comment—RULE 12.2

The Committee made no additional changes to Rule 12.2, following publication.

APPENDIX B

RULES 29, 33, 34 & 45.

- **Copy of Rules**
- **Committee Notes**
- **Changes Made After Publication and Comment**

Rule 29. Motion for a Judgment of Acquittal

1 * * * * *

2 **(c) After Jury Verdict or Discharge.**

3 **(1)** ***Time for a Motion.*** A defendant may move for a

4 judgment of acquittal, or renew such a motion, within

5 7 days after a guilty verdict or after the court

6 discharges the jury, whichever is later~~, or within any~~

7 ~~other time the court sets during the 7-day period~~.

8 * * * * *

COMMITTEE NOTE

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

Currently, Rule 29(c) requires the defendant to move for a judgment of acquittal within seven days of the guilty verdict, or after the court discharges the jury, whichever occurs later, or some other time set by the court in an order issued within that same seven-day period. Similar provisions exist in Rules 33 and 34. Courts have held that the seven-day rule is jurisdictional. Thus, if a defendant files a request for an extension of time to file a motion

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

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

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

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

Rule 33. New Trial

1 * * * * *

2 **(b) Time to File.**

3 * * * * *

4 **(2)** ***Other Grounds.*** Any motion for a new trial

5 grounded on any reason other than newly discovered

6 evidence must be filed within 7 days after the verdict

7 or finding of guilty~~, or within such further time as the~~

8 ~~court sets during the 7 day period~~.

COMMITTEE NOTE

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

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

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

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

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

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

Rule 34. Arresting Judgment

1 * * * * *

2 **(b) Time to File.** The defendant must move to arrest

3 judgment within 7 days after the court accepts a verdict or

4 finding of guilty, or after a plea of guilty or nolo

5 contendere~~, or within such further time as the court sets~~

6 ~~during the 7-day period~~.

COMMITTEE NOTE

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

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

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

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

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

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

Rule 45. Computing and Extending Time

1 * * * * *

2 **(b) Extending Time.**

3 **(1)** ***In General.*** When an act must or may be done

4 within a specified period, the court on its own may

5 extend the time, or for good cause may do so on a

6 party's motion made:

7 (A) before the originally prescribed or

8 previously extended time expires; or

9 (B) after the time expires if the party failed to

10 act because of excusable neglect.

11 **(2)** ***~~Exceptions~~*** ***Exception.*** The court may not extend

12 the time to take any action under Rule ~~Rules 29, 33,~~

13 ~~34 and~~ 35, except as stated in ~~those rules~~ that rule.

14 * * * * *

COMMITTEE NOTE

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

Currently, Rules 29(c)(1), 33(b)(2), and 34(b) require the defendant to move for relief under those rules within the seven-day periods specified in those rules or within some other time set by the court in an order issued during that same seven-day period. Courts have held that the seven-day rule is jurisdictional. Thus, for example, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal or a motion for new trial within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request for an extension of time within the seven days, the court loses jurisdiction to act on the underlying substantive motion. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to . . . fix a new time for filing a motion for a new trial within seven days of the verdict").

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

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

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

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

Changes Made After Publication and Comment—Rules 29, 33, 34, & 45

The Committee made no substantive changes to Rules 29, 33, 34, and 45 following publication.

APPENDIX D

RULE 32.1. REVOKING OR MODIFYING PROBATION OR SUPERVISED RELEASE

- **Copy of Rule**
- **Committee Note**
- **Changes Made After Publication and Comment**

Rule 32.1. Revoking or Modifying Probation or Supervised Release

1 * * * * *

2 **(b) Revocation.**

3 * * * * *

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

8 (A) written notice of the alleged violation;

9 (B) disclosure of the evidence against the
10 person;

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

15 (D) notice of the person's right to retain counsel
16 or to request that counsel be appointed if the
17 person cannot obtain counsel ~~.~~ ; and
18 (E) an opportunity to make a statement and
19 present any information in mitigation.
20 **(c) Modification.**
21 **(1)** ***In General.*** Before modifying the conditions of
22 probation or supervised release, the court must hold a
23 hearing, at which the person has the right to counsel ~~.~~
24 and an opportunity to make a statement and present
25 any information in mitigation.
26 * * * * *

COMMITTEE NOTE

The amendments to Rule 32.1(b) and (c) are intended to address a gap in the rule. As noted by the court in *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002) (per curiam), there is no explicit provision in current Rule 32.1 for allocution rights for a person upon revocation of supervised release. In that case the court noted that several circuits had concluded that the right to allocution in Rule 32 extended to supervised release revocation

hearings. *See United States v. Patterson*, 128 F.3d 1259, 1261 (8th Cir. 1997) (Rule 32 right to allocution applies); *United States v. Rodriguez*, 23 F.3d 919, 921 (5th Cir. 1997) (right of allocution, in Rule 32, applies at revocation proceeding). But the court agreed with the Sixth Circuit that the allocution right in Rule 32 was not incorporated into Rule 32.1. *See United States v. Waters*, 158 F.3d 933 (6th Cir. 1998) (allocution right in Rule 32 does not apply to revocation proceedings). The *Frazier* court observed that the problem with the incorporation approach is that it would require application of other provisions specifically applicable to sentencing proceedings under Rule 32, but not expressly addressed in Rule 32.1. 283 F.3d at 1245. The court, however, believed that it would be "better practice" for courts to provide for allocution at revocation proceedings and stated that "[t]he right of allocution seems both important and firmly embedded in our jurisprudence." *Id.*

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

Changes Made After Publication and Comment— RULE 32.1

The Committee made no changes to Rule 32.1 following publication.

APPENDIX E

NEW RULE 59. MATTERS BEFORE A MAGISTRATE JUDGE

- **Copy of Rule**
- **Committee Note**
- **Changes Made After Publication and Comment**

Rule 59. Matters Before a Magistrate Judge

1 **(a) Nondispositive Matters.** A district judge may refer
2 to a magistrate judge for determination any matter that does
3 not dispose of a charge or defense. The magistrate judge
4 must promptly conduct the required proceedings and, when
5 appropriate, enter on the record an oral or written order
6 stating the determination. A party may serve and file
7 objections to the order within 10 days after being served
8 with a copy of a written order or after the oral order is
9 stated on the record, or at some other time the court sets.
10 The district judge must consider timely objections and
11 modify or set aside any part of the order that is contrary to
12 law or clearly erroneous. Failure to object in accordance
13 with this rule waives a party's right to review.
14 **(b) Dispositive Matters.**
15 **(1)** ***Referral to Magistrate Judge.*** A district judge
16 may refer to a magistrate judge for recommendation a

17 defendant's motion to dismiss or quash an indictment
18 or information, a motion to suppress evidence, or any
19 matter that may dispose of a charge or defense. The
20 magistrate judge must promptly conduct the required
21 proceedings. A record must be made of any
22 evidentiary proceeding and of any other proceeding if
23 the magistrate judge considers it necessary. The
24 magistrate judge must enter on the record a
25 recommendation for disposing of the matter, including
26 any proposed findings of fact. The clerk must
27 immediately serve copies on all parties.
28 **(2) *Objections to Findings and Recommendations.***
29 Within 10 days after being served with a copy of the
30 recommended disposition, or at some other time the
31 court sets, a party may serve and file specific written
32 objections to the proposed findings and
33 recommendations. Unless the district judge directs

34 otherwise, the objecting party must promptly arrange
35 for transcribing the record, or whatever portions of it
36 the parties agree to or the magistrate judge considers
37 sufficient. Failure to object in accordance with this
38 rule waives a party's right to review.
39 **(3)** ***De Novo Review of Recommendations.*** The
40 district judge must consider de novo any objection to
41 the magistrate judge's recommendation. The district
42 judge may accept, reject, or modify the
43 recommendation, receive further evidence, or
44 resubmit the matter to the magistrate judge with
45 instructions.

COMMITTEE NOTE

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

The Committee's consideration of a new rule on the subject of review of a magistrate judge's decisions resulted from *United States v. Abonce-Barrera*, 257 F.3d 959 (9th Cir. 2001). In that

case the Ninth Circuit held that the Criminal Rules do not require appeals from nondispositive decisions by magistrate judges to district judges as a requirement for review by a court of appeals. The court suggested that Federal Rule of Civil Procedure 72 could serve as a suitable model for a criminal rule.

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

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

Both Rule 59(a) and (b) contain a provision that explicitly states that failure to file an objection in accordance with the rule amounts to a waiver of the issue. This waiver provision is intended to establish the requirements for objecting in a district court in order to preserve appellate review of magistrate judges' decisions. In *Thomas v. Arn*, 474 U.S. 140, 155 (1985), the Supreme Court approved the adoption of waiver rules on matters for which a magistrate judge had made a decision or recommendation. The Committee believes that the waiver provisions will enhance the ability of a district court to review a magistrate judge's decision or recommendation by requiring a party to promptly file an objection to that part of the decision or recommendation at issue. Further, the Supreme Court has held that a de novo review of a magistrate judge's decision or recommendation is required to satisfy Article III concerns only where there is an objection. *Peretz v. United States*, 501 U.S. 293 (1991).

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

Although the rule distinguishes between "dispositive" and "nondispositive" matters, it does not attempt to define or otherwise catalog motions that may fall within either category. Instead, that task is left to the case law.

Changes Made After Publication and Comment

The Committee adopted almost all of the style suggestions by the Style Subcommittee, and several of the suggestions by the

Federal Magistrate Judges' Association. In particular the Committee adopted a variation of the language suggested by the Association concerning matters disposing of a "charge or defense." The Committee also addressed the issue in Rule 59(a) of clarifying the starting point for the 10 days in which to file objections by changing the word "made" in line 9 to read "stated." In Rule 59(b)(1) the Committee rearranged the order of the sample motions that would be considered "dispositive." Finally, the Committee included a paragraph at the end of the Committee Note, addressing the decision not to further specify in the rule, or the Note, what matters might be dispositive or nondispositive.

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