

important with the passage of the Criminal Justice Act which provides for compensation to the attorney to travel to the place at which the defendant is confined. Whether the court will recommend confinement near the place of trial or place where the appeal is to be heard will depend upon a balancing of convenience against the possible advantage of confinement at a more remote correctional institution where facilities and program may be more adequate.

The amendment to subdivision (a)(4) gives the court discretion in deciding whether to stay the order placing the defendant on probation. It also makes mandatory the fixing of conditions for the stay if a stay is granted. The court cannot release the defendant pending appeal without either placing him on probation or fixing the conditions for the stay under the Bail Reform Act, 18 U.S.C. §3148.

Former rule 38(a)(4) makes mandatory a stay of an order placing the defendant on probation whenever an appeal is noted. The court may or may not impose conditions upon the stay. See rule 46, Federal Rules of Criminal Procedure; and the Bail Reform Act, 18 U.S.C. §3148.

Having the defendant on probation during the period of appeal may serve the objectives of both community protection and defendant rehabilitation. In current practice, the order of probation is sometimes stayed for an appeal period as long as two years. In a situation where the appeal is unsuccessful, the defendant must start under probation supervision after so long a time that the conditions of probation imposed at the time of initial sentencing may no longer appropriately relate either to the defendant's need for rehabilitation or to the community's need for protection. The purposes of probation are more likely to be served if the judge can exercise discretion, in appropriate cases, to require the defendant to be under probation during the period of appeal. The American Bar Association Project on Standards for Criminal Justice takes the position that prompt imposition of sentence aids in the rehabilitation of defendants. ABA Standards Relating to Pleas of Guilty §1.8(a)(i), Commentary p. 40 (Approved Draft, 1968). See also Sutherland and Cressey, *Principles of Criminology* 336 (1966).

Under 18 U.S.C. §3148 the court now has discretion to impose conditions of release which are necessary to protect the community against danger from the defendant. This is in contrast to release prior to conviction, where the only appropriate criterion is insuring the appearance of the defendant. 18 U.S.C. §3146. Because the court may impose conditions of release to insure community protection, it seems appropriate to enable the court to do so by ordering the defendant to submit to probation supervision during the period of appeal, thus giving the probation service responsibility for supervision.

A major difference between probation and release under 18 U.S.C. §3148 exists if the defendant violates the conditions imposed upon his release. In the event that release is under 18 U.S.C. §3148, the violation of the condition may result in his being placed in custody pending the decision on appeal. If the appeal were unsuccessful, the order placing him on probation presumably would become effective at that time, and he would then be released under probation supervision. If the defendant were placed on probation, his violation of a condition could result in the imposition of a jail or prison sentence. If the appeal were unsuccessful, the jail or prison sentence would continue to be served.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2000 AMENDMENT

The rule is amended to reflect the creation of new Rule 32.2 which now governs criminal forfeiture procedures.

GAP Report—Rule 38. The Committee made no changes to the published draft.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 38 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The reference to Appellate Rule 9(b) is deleted. The Committee believed that the reference was unnecessary and its deletion was not intended to be substantive in nature.

REFERENCES IN TEXT

The Federal Rules of Appellate Procedure, referred to in subs. (c), (e)(1), and (g), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

AMENDMENT BY PUBLIC LAW

1984—Pub. L. 98-473, §215(c)(1), substituted “Stay of Execution” for “Stay of Execution, and Relief Pending Review” in rule catchline.

Subd. (a). Pub. L. 98-473, §215(c)(1), struck out subd. heading “(a) Stay of Execution”.

Pub. L. 98-473, §215(c)(3), (4), redesignated subd. (a)(1) as (a), and inserted “from the conviction or sentence” after “is taken”.

Subd. (b). Pub. L. 98-473, §215(c)(3), (5), redesignated subd. (a)(2) as (b), and inserted “from the conviction or sentence” after “is taken”.

Pub. L. 98-473, §215(c)(2), struck out subd. (b) relating to bail, which had been abrogated Dec. 4, 1967, eff. July 1, 1968.

Subd. (c). Pub. L. 98-473, §215(c)(3), redesignated subd. (a)(3) as (c).

Pub. L. 98-473, §215(c)(2), struck out subd. (c) relating to application for relief pending review, which had been abrogated Dec. 4, 1967, eff. July 1, 1968.

Subd. (d). Pub. L. 98-473, §215(c)(3), (6), redesignated subd. (a)(4) as (d) and amended it generally. Prior to amendment, subd. (a)(4) read as follows: “An order placing the defendant on probation may be stayed if an appeal is taken. If not stayed, the court shall specify when the term of probation shall commence. If the order is stayed the court shall fix the terms of the stay.”

Subds. (e), (f). Pub. L. 98-473, §215(c)(7), added subds. (e) and (f).

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-473 effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of such amendment, see section 235(a)(1) of Pub. L. 98-473, set out as an Effective Date note under section 3551 of this title.

Rule 39. [Reserved]

TITLE VIII. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District

(a) IN GENERAL. A person must be taken without unnecessary delay before a magistrate judge in the district of arrest if the person has been arrested under a warrant issued in another district for:

(i) failing to appear as required by the terms of that person's release under 18 U.S.C. §§3141-3156 or by a subpoena; or

(ii) violating conditions of release set in another district.

(b) PROCEEDINGS. The judge must proceed under Rule 5(c)(3) as applicable.