

adoption of that rule in 1937. Today it bears no relationship to actual costs. The amended rule would leave the question of the need for a bond for costs and its amount in the discretion of the court.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 8. Stay or Injunction Pending Appeal

(a) MOTION FOR STAY.

(1) *Initial Motion in the District Court.* A party must ordinarily move first in the district court for the following relief:

(A) a stay of the judgment or order of a district court pending appeal;

(B) approval of a supersedeas bond; or

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.

(2) *Motion in the Court of Appeals; Conditions on Relief.* A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.

(A) The motion must:

(i) show that moving first in the district court would be impracticable; or

(ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.

(B) The motion must also include:

(i) the reasons for granting the relief requested and the facts relied on;

(ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and

(iii) relevant parts of the record.

(C) The moving party must give reasonable notice of the motion to all parties.

(D) A motion under this Rule 8(a)(2) must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge.

(E) The court may condition relief on a party's filing a bond or other appropriate security in the district court.

(b) *PROCEEDING AGAINST A SURETY.* If a party gives security in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the district clerk as the surety's agent on whom any papers affecting the surety's liability on the bond or undertaking may be served. On motion, a surety's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly mail a copy to each surety whose address is known.

(c) *STAY IN A CRIMINAL CASE.* Rule 38 of the Federal Rules of Criminal Procedure governs a stay in a criminal case.

(As amended Mar. 10, 1986, eff. July 1, 1986; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Subdivision (a). While the power of a court of appeals to stay proceedings in the district court during the pendency of an appeal is not explicitly conferred by statute, it exists by virtue of the all writs statute, 28 U.S.C. §1651. *Eastern Greyhound Lines v. Fusco*, 310 F.2d 632 (6th Cir., 1962); *United States v. Lynd*, 301 F.2d 818 (5th Cir., 1962); *Public Utilities Commission of Dist. of Col. v. Capital Transit Co.*, 94 U.S.App.D.C. 140, 214 F.2d 242 (1954). And the Supreme Court has termed the power "inherent" (*In re McKenzie*, 180 U.S. 536, 551, 21 S.Ct. 468, 45 L.Ed. 657 (1901)) and "part of its (the court of appeals) traditional equipment for the administration of justice." (*Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 9-10, 62 S.Ct. 875, 86 L.Ed. 1229 (1942)). The power of a single judge of the court of appeals to grant a stay pending appeal was recognized in *In re McKenzie*, *supra*. *Alexander v. United States*, 173 F.2d 865 (9th Cir., 1949) held that a single judge could not stay the judgment of a district court, but it noted the absence of a rule of court authorizing the practice. FRCP 62(g) adverts to the grant of a stay by a single judge of the appellate court. The requirement that application be first made to the district court is the case law rule. *Cumberland Tel. & Tel. Co. v. Louisiana Public Service Commission*, 260 U.S. 212, 219, 43 S.Ct. 75, 67 L.Ed. 217 (1922); *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62 (9th Cir., 1951); *United States v. Hansell*, 109 F.2d 613 (2d Cir., 1940). The requirement is explicitly stated in FRCP 38(c) and in the rules of the First, Third, Fourth and Tenth Circuits. See also Supreme Court Rules 18 and 27.

The statement of the requirement in the proposed rule would work a minor change in present practice. FRCP 73(e) requires that if a bond for costs on appeal or a supersedeas bond is offered after the appeal is docketed, leave to file the bond must be obtained from the court of appeals. There appears to be no reason why matters relating to supersedeas and cost bonds should not be initially presented to the district court whenever they arise prior to the disposition of the appeal. The requirement of FRCP 73(e) appears to be a concession to the view that once an appeal is perfected, the district court loses all power over its judgment. See *In re Federal Facilities Trust*, 227 F.2d 651 (7th Cir., 1955) and cases—cited at 654-655. No reason appears why all questions related to supersedeas or the bond for costs on appeal should not be presented in the first instance to the district court in the ordinary case.

Subdivision (b). The provisions respecting a surety upon a bond or other undertaking are based upon FRCP 65.1.

NOTES OF ADVISORY COMMITTEE ON RULES—1986

AMENDMENT

The amendments to Rule 8(b) are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1995

AMENDMENT

Subdivision (c). The amendment conforms subdivision (c) to previous amendments to Fed. R. Crim. P. 38. This amendment strikes the reference to subdivision (a) of Fed. R. Crim. P. 38 so that Fed. R. App. P. 8(c) refers instead to all of Criminal Rule 38. When Rule 8(c) was adopted Fed. R. Crim. P. 38(a) included the procedures for obtaining a stay of execution when the sentence in question was death, imprisonment, a fine, or probation. Criminal Rule 38 was later amended and now addresses those topics in separate subdivisions. Subdivision 38(a) now addresses only stays of death sentences. The proper cross reference is to all of Criminal Rule 38.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition

to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

REFERENCES IN TEXT

Rule 38 of the Federal Rules of Criminal Procedure, referred to in subd. (c), are set out in the Appendix to Title 18, Crimes and Criminal Procedure.

Rule 9. Release in a Criminal Case

(a) RELEASE BEFORE JUDGMENT OF CONVICTION.

(1) The district court must state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case. A party appealing from the order must file with the court of appeals a copy of the district court's order and the court's statement of reasons as soon as practicable after filing the notice of appeal. An appellant who questions the factual basis for the district court's order must file a transcript of the release proceedings or an explanation of why a transcript was not obtained.

(2) After reasonable notice to the appellee, the court of appeals must promptly determine the appeal on the basis of the papers, affidavits, and parts of the record that the parties present or the court requires. Unless the court so orders, briefs need not be filed.

(3) The court of appeals or one of its judges may order the defendant's release pending the disposition of the appeal.

(b) RELEASE AFTER JUDGMENT OF CONVICTION.

A party entitled to do so may obtain review of a district-court order regarding release after a judgment of conviction by filing a notice of appeal from that order in the district court, or by filing a motion in the court of appeals if the party has already filed a notice of appeal from the judgment of conviction. Both the order and the review are subject to Rule 9(a). The papers filed by the party seeking review must include a copy of the judgment of conviction.

(c) CRITERIA FOR RELEASE. The court must make its decision regarding release in accordance with the applicable provisions of 18 U.S.C. §§3142, 3143, and 3145(c).

(As amended Apr. 24, 1972, eff. Oct. 1, 1972; Pub. L. 98-473, title II, §210, Oct. 12, 1984, 98 Stat. 1987; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Subdivision (a). The appealability of release orders entered prior to a judgment of conviction is determined by the provisions of 18 U.S.C. §3147, as qualified by 18 U.S.C. §3148, and by the rule announced in *Stack v. Boyle*, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951), holding certain orders respecting release appealable as final orders under 28 U.S.C. §1291. The language of the rule, “(an) appeal authorized by law from an order refusing or imposing conditions of release,” is intentionally broader than that used in 18 U.S.C. §3147 in describing orders made appealable by that section. The summary procedure ordained by the rule is intended to apply to all appeals from orders respecting release, and it would appear that at least some orders not made appealable by 18 U.S.C. §3147 are nevertheless appealable under the *Stack v. Boyle* rationale. See, for example, *United States v. Foster*, 278 F.2d 567 (2d Cir., 1960), holding appealable an order refusing to extend bail limits. Note also the provisions of 18 U.S.C. §3148, which after withdrawing

from persons charged with an offense punishable by death and from those who have been convicted of an offense the right of appeal granted by 18 U.S.C. §3147, expressly preserves “other rights to judicial review of conditions of release or orders of detention.”

The purpose of the subdivision is to insure the expeditious determination of appeals respecting release orders, an expedition commanded by 18 U.S.C. §3147 and by the Court in *Stack v. Boyle*, supra. It permits such appeals to be heard on an informal record without the necessity of briefs and on reasonable notice. Equally important to the just and speedy disposition of these appeals is the requirement that the district court state the reasons for its decision. See *Jones v. United States*, 358 F.2d 543 (D.C. Cir., 1966); *Rhodes v. United States*, 275 F.2d 78 (4th Cir., 1960); *United States v. Williams*, 253 F.2d 144 (7th Cir., 1958).

Subdivision (b). This subdivision regulates procedure for review of an order respecting release at a time when the jurisdiction of the court of appeals has already attached by virtue of an appeal from the judgment of conviction. Notwithstanding the fact that jurisdiction has passed to the court of appeals, both 18 U.S.C. §3148 and FRCrP 38(c) contemplate that the initial determination of whether a convicted defendant is to be released pending the appeal is to be made by the district court. But at this point there is obviously no need for a separate appeal from the order of the district court respecting release. The court of appeals or a judge thereof has power to effect release on motion as an incident to the pending appeal. See FRCrP 38(c) and 46(a)(2). But the motion is functionally identical with the appeal regulated by subdivision (a) and requires the same speedy determination if relief is to be effective. Hence the similarity of the procedure outlined in the two subdivisions.

NOTES OF ADVISORY COMMITTEE ON RULES—1972 AMENDMENT

Subdivision (c) is intended to bring the rule into conformity with 18 U.S.C. §3148 and to allocate to the defendant the burden of establishing that he will not flee and that he poses no danger to any other person or to the community. The burden is placed upon the defendant in the view that the fact of his conviction justifies retention in custody in situations where doubt exists as to whether he can be safely released pending disposition of his appeal. Release pending appeal may also be denied if “it appears that an appeal is frivolous or taken for delay.” 18 U.S.C. §3148. The burden of establishing the existence of these criteria remains with the government.

NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT

Rule 9 has been entirely rewritten. The basic structure of the rule has been retained. Subdivision (a) governs appeals from bail decisions made before the judgment of conviction is entered at the time of sentencing. Subdivision (b) governs review of bail decisions made after sentencing and pending appeal.

Subdivision (a). The subdivision applies to appeals from “an order regarding release or detention” of a criminal defendant before judgment of conviction, i.e., before sentencing. See Fed.R.Crim.P. 32. The old rule applied only to a defendant's appeal from an order “refusing or imposing conditions of release.” The new broader language is needed because the government is now permitted to appeal bail decisions in certain circumstances. 18 U.S.C. §§3145 and 3731. For the same reason, the rule now requires a district court to state reasons for its decision in all instances, not only when it refuses release or imposes conditions on release.

The rule requires a party appealing from a district court's decision to supply the court of appeals with a copy of the district court's order and its statement of reasons. In addition, an appellant who questions the factual basis for the district court's decision must file a transcript of the release proceedings, if possible. The