NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

The amendment to rule 7(c)(2) is intended to clarify its meaning. Subdivision (c)(2) was added in 1972, and, as noted in the Advisory Committee Note thereto, was ''intended to provide procedural implementation of the recently enacted criminal forfeiture provision of the Organized Crime Control Act of 1970, Title IX, §1963, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II, §408(a)(2).'' These provisions reestablished a limited common law criminal forfeiture, necessitating the addition of subdivision (c)(2) and corresponding changes in rules 31 and 32, for at common law the defendant in a criminal forfeiture proceeding was entitled to notice, trial, and a special jury finding on the factual issues surrounding the declaration of forfeiture which followed his criminal conviction.

Although there is some doubt as to what forfeitures should be characterized as ''punitive'' rather than ''remedial,'' see Note, 62 Cornell L.Rev. 768 (1977), subdivision (c)(2) is intended to apply to those forfeitures which are criminal in the sense that they result from a special verdict under rule 31(e) and a judgment under rule 32(b)(2), and not to those resulting from a separate in rem proceeding. Because some confusion in this regard has resulted from the present wording of subdivision (c)(2), *United States v. Hall*, 521 F.2d 406 (9th Cir. 1975), a clarifying amendment is in order.

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 new Rule 32.2, which now governs criminal forfeiture procedures.

GAP Report—Rule 7. The Committee initially made no changes to the published draft of the Rule 7 amendment. However, because of changes to Rule 32.2(a), discussed *infra*, the proposed language has been changed to reflect that the indictment must provide notice of an intent to seek forfeiture.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 7 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.

The Committee has deleted the references to ''hard labor'' in the rule. This punishment is not found in current federal statutes.

The Committee added an exception for criminal contempt to the requirement in Rule 7(a)(1) that a prosecution for felony must be initiated by indictment. This is consistent with case law, *e.g.*, *United States v. Eichhorst*, 544 F.2d 1383 (7th Cir. 1976), which has sustained the use of the special procedures for instituting criminal contempt proceedings found in Rule 42. While indictment is not a required method of bringing felony criminal contempt charges, however, it is a permissible one. *See United States v. Williams*, 622 F.2d 830 (5th Cir. 1980). No change in practice is intended.

The title of Rule 7(c)(3) has been amended. The Committee believed that potential confusion could arise with the use of the term ''harmless error.'' Rule 52, which deals with the issues of harmless error and plain error, is sufficient to address the topic. Potentially, the topic of harmless error could arise with regard to any of the other rules and there is insufficient need to highlight the term in Rule 7. Rule 7(c)(3), on the other hand, focuses specifically on the effect of an error in the citation of authority in the indictment. That material remains but without any reference to harmless error.

COMMITTEE NOTES ON RULES—2009 AMENDMENT

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Rule 45(a).

Subdivision (c). The provision regarding forfeiture is obsolete. In 2000 the same language was repeated in subdivision (a) of Rule 32.2, which was intended to consolidate the rules dealing with forfeiture.

AMENDMENT BY PUBLIC LAW

2003—Subd. (c)(1). Pub. L. 108–21 inserted at end ''For purposes of an indictment referred to in section 3282 of title 18, United States Code, for which the identity of the defendant is unknown, it shall be sufficient for the indictment to describe the defendant as an individual whose name is unknown, but who has a particular DNA profile, as that term is defined in that section 3282.''

Rule 8. Joinder of Offenses or Defendants

(a) JOINDER OF OFFENSES. The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged—whether felonies or misdemeanors or both—are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.

(b) JOINDER OF DEFENDANTS. The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

(As amended Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1944

Note to Subdivision (a). This rule is substantially a restatement of existing law, 18 U.S.C. [former] 557 (Indictments and presentments; joinder of charges).

Note to Subdivision (b). The first sentence of the rule is substantially a restatement of existing law, 9 Edmunds, *Cyclopedia of Federal Procedure* (2d Ed.) 4116. The second sentence formulates a practice now approved in some circuits. *Caringella v. United States*, 78 F.2d 563, 567 (C.C.A. 7th).

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 8 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.

Rule 9. Arrest Warrant or Summons on an Indictment or Information

(a) ISSUANCE. The court must issue a warrant—or at the government's request, a summons—for each defendant named in an indictment or named in an information if one or more affidavits accompanying the information establish probable cause to believe that an offense has been committed and that the defendant committed it. The court may issue more than one warrant or summons for the same defendant. If a defendant fails to appear in response to a summons, the court may, and upon request of an attorney for the government must, issue a warrant. The court must issue the arrest warrant to an officer authorized to execute it or the summons to a person authorized to serve it.

(b) FORM.

(1) *Warrant.* The warrant must conform to Rule 4(b)(1) except that it must be signed by the clerk and must describe the offense charged in the indictment or information.

(2) *Summons*. The summons must be in the same form as a warrant except that it must require the defendant to appear before the court at a stated time and place.

(c) EXECUTION OR SERVICE; RETURN; INITIAL APPEARANCE.

(1) *Execution or Service*.

(A) The warrant must be executed or the summons served as provided in Rule 4(c)(1), (2), and (3).

(B) The officer executing the warrant must proceed in accordance with Rule 5(a)(1).

(2) *Return*. A warrant or summons must be returned in accordance with Rule 4(c)(4).

(3) *Initial Appearance*. When an arrested or summoned defendant first appears before the court, the judge must proceed under Rule 5.

(d) WARRANT BY TELEPHONE OR OTHER MEANS. In accordance with Rule 4.1, a magistrate judge may issue an arrest warrant or summons based on information communicated by telephone or other reliable electronic means.

(As amended Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975; Pub. L. 94–64, §3(4), July 31, 1975, 89 Stat. 370; Pub. L. 94–149, §5, Dec. 12, 1975, 89 Stat. 806; Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 28, 1982, eff. Aug. 1, 1982; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 26, 2011, eff. Dec. 1, 2011.)

NOTES OF ADVISORY COMMITTEE ON RULES—1944

1. See Note to Rule 4, *supra*.

2. The provision of Rule 9(a) that a warrant may be issued on the basis of an information only if the latter is supported by oath is necessitated by the Fourth Amendment to the Constitution of the United States. See *Albrecht v. United States*, 273 U.S. 1, 5.

3. The provision of Rule 9(b)(1) that the amount of bail may be fixed by the court and endorsed on the warrant states a practice now prevailing in many districts and is intended to facilitate the giving of bail by the defendant and eliminate delays between the arrest and the giving of bail, which might ensue if bail cannot be fixed until after arrest.

NOTES OF ADVISORY COMMITTEE ON RULES—1972 AMENDMENT

Subdivision (b) is amended to make clear that the person arrested shall be brought before a United States magistrate if the information or indictment charges a ''minor offense'' triable by the United States magistrate.

Subdivision (c) is amended to reflect the office of United States magistrate.

Subdivision (d) is new. It provides for a remand to the United States magistrate of cases in which the person is charged with a ''minor offense.'' The magistrate can then proceed in accordance with rule 5 to try the case if the right to trial before a judge of the district court is waived.

NOTES OF ADVISORY COMMITTEE ON RULES—1974 AMENDMENT

Rule 9 is revised to give high priority to the issuance of a summons unless a ''valid reason'' is given for the issuance of an arrest warrant. See a comparable provision in rule 4.

Under the rule, a summons will issue by the clerk unless the attorney for the government presents a valid reason for the issuance of an arrest warrant. Under the old rule, it has been argued that the court must issue an arrest warrant if one is desired by the attorney for the government. See authorities listed in Frankel, Bench Warrants Upon the Prosecutor's Demand: A View From the Bench, 71 Colum.L.Rev. 403, 410 n. 25 (1971). For an expression of the view that this is undesirable policy, see Frankel, *supra*, pp. 410–415.

A summons may issue if there is an information supported by oath. The indictment itself is sufficient to establish the existence of probable cause. See C. Wright, Federal Practice and Procedure: Criminal §151 (1969); 8 J. Moore, Federal Practice ¶9.02[2] at p. 9–4 (2d ed.) Cipes (1969); *Giordenello v. United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed. 2d 1503 (1958). This is not necessarily true in the case of an information. See C. Wright, *supra*, §151; 8 J. Moore, *supra*, ¶9.02. If the government requests a warrant rather than a summons, good practice would obviously require the judge to satisfy himself that there is probable cause. This may appear from the information or from an affidavit filed with the information. Also a defendant can, at a proper time, challenge an information issued without probable cause.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94–247; 1975 AMENDMENT

A. Amendments Proposed by the Supreme Court. Rule 9 of the Federal Rules of Criminal Procedure is closely related to Rule 4. Rule 9 deals with arrest procedures after an information has been filed or an indictment returned. The present rule gives the prosecutor the authority to decide whether a summons or a warrant shall issue.

The Supreme Court's amendments to Rule 9 parallel its amendments to Rule 4. The basic change made in Rule 4 is also made in Rule 9.

B. Committee Action. For the reasons set forth above in connection with Rule 4, the Committee endorses and accepts the basic change in Rule 9. The Committee made changes in Rule 9 similar to the changes it made in Rule 4.

NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

Subdivision (a) is amended to make explicit the fact that a warrant may issue upon the basis of an information only if the information or an affidavit filed with the information shows probable cause for the arrest. This has generally been assumed to be the state of the law even though not specifically set out in rule 9; see C. Wright, Federal Practice and Procedure: Criminal §151 (1969); 8 J. Moore, Federal Practice par. 9.02[2] (2d ed. 1976).

In *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Supreme Court rejected the contention ''that the prosecutor's decision to file an information is itself a determination of probable cause that furnishes sufficient reason to detain a defendant pending trial,'' commenting:

> Although a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment. Indeed, we think the Court's previous decisions compel disapproval of [such] procedure. In *Albrecht v. United States*, 273 U.S. 1, 5, 47 S.Ct. 250, 251, 71 L.Ed. 505 (1927), the Court held that an arrest warrant issued solely upon a United States Attorney's information was invalid because the accompanying affidavits were defective. Although the Court's opinion did not explicitly state that the prosecutor's official oath could not furnish probable cause, that conclusion was implicit in the judgment that the arrest was illegal under the Fourth Amendment.

No change is made in the rule with respect to warrants issuing upon indictments. In *Gerstein*, the Court indicated it was not disturbing the prior rule that ''an indictment, 'fair upon its face,' and returned by a 'properly constituted grand jury' conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry.'' See *Ex parte United States*, 287 U.S. 241, 250 (1932).

The provision to the effect that a summons shall issue ''by direction of the court'' has been eliminated

because it conflicts with the first sentence of the rule, which states that a warrant ''shall'' issue when requested by the attorney for the government, if properly supported. However, an addition has been made providing that if the attorney for the government does not make a request for either a warrant or summons, then the court may in its discretion issue either one. Other stylistic changes ensure greater consistency with comparable provisions in rule 4.

NOTES OF ADVISORY COMMITTEE ON RULES—1982 AMENDMENT

Note to Subdivision (a). The amendment of subdivision (a), by reference to Rule 5, clarifies what is to be done once the defendant is brought before the magistrate. This means, among other things, that no preliminary hearing is to be held in a Rule 9 case, as Rule 5(c) provides that no such hearing is to be had ''if the defendant is indicted or if an information against the defendant is filed.''

Note to Subdivision (b). The amendment of subdivision (b) conforms Rule 9 to the comparable provisions in Rule 4(c)(1) and (2).

Note to Subdivision (c). The amendment of subdivision (c) conforms Rule 9 to the comparable provisions in Rules 4(d)(4) and 5(a) concerning return of the warrant.

Note to Subdivision (d). This subdivision, incorrect in its present form in light of the recent amendment of 18 U.S.C. §3401(a), has been abrogated as unnecessary in light of the change to subdivision (a).

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

The Rule is amended to conform to the Judicial Improvements Act of 1990 [P.L. 101–650, Title III, Section 321] which provides that each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 9 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, except as noted below.

Rule 9 has been changed to reflect its relationship to Rule 4 procedures for obtaining an arrest warrant or summons. Thus, rather than simply repeating material that is already located in Rule 4, the Committee determined that where appropriate, Rule 9 should simply direct the reader to the procedures specified in Rule 4.

Rule 9(a) has been amended to permit a judge discretion whether to issue an arrest warrant when a defendant fails to respond to a summons on a complaint. Under the current language of the rule, if the defendant fails to appear, the judge must issue a warrant. Under the amended version, if the defendant fails to appear and the government requests that a warrant be issued, the judge must issue one. In the absence of such a request, the judge has the discretion to do so. This change mirrors language in amended Rule 4(a).

A second amendment has been made in Rule 9(b)(1). The rule has been amended to delete language permitting the court to set the amount of bail on the warrant. The Committee believes that this language is inconsistent with the 1984 Bail Reform Act. *See United States v. Thomas*, 992 F. Supp. 782 (D.V.I. 1998) (bail amount endorsed on warrant that has not been determined in proceedings conducted under Bail Reform Act has no bearing on decision by judge conducting Rule 40 hearing).

The language in current Rule 9(c)(1), concerning service of a summons on an organization, has been moved to Rule 4.

COMMITTEE NOTES ON RULES—2011 AMENDMENT

Subdivision (d). Rule 9(d) authorizes a court to issue an arrest warrant or summons electronically on the return of an indictment or the filing of an information. In large judicial districts the need to travel to the courthouse to obtain an arrest warrant in person can be burdensome, and advances in technology make the secure transmission of a reliable version of the warrant or summons possible. This change works in conjunction with the amendment to Rule 6 that permits the electronic return of an indictment, which similarly eliminates the need to travel to the courthouse.

Changes Made to Proposed Amendment Released for Public Comment. No changes were made in the amendment as published.

AMENDMENT BY PUBLIC LAW

1975—Subd. (a). Pub. L. 94–64 amended subd. (a) generally.

Subd. (b)(1). Pub. L. 94–149 substituted reference to ''rule 4(c)(1)'' for ''rule 4(b)(1)''.

Subd. (c)(1). Pub. L. 94–149 substituted reference to ''rule 4(d)(1), (2), and (3)'' for ''rule 4(c)(1), (2), and (3)''.

EFFECTIVE DATE OF AMENDMENTS PROPOSED APRIL 22, 1974; EFFECTIVE DATE OF 1975 AMENDMENTS

Amendments of this rule embraced in the order of the United States Supreme Court on Apr. 22, 1974, and the amendments of this rule made by section 3 of Pub. L. 94–64, effective Dec. 1, 1975, see section 2 of Pub. L. 94–64, set out as a note under rule 4 of these rules.

TITLE IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

Rule 10. Arraignment

(a) IN GENERAL. An arraignment must be conducted in open court and must consist of:

(1) ensuring that the defendant has a copy of the indictment or information;

(2) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and then

(3) asking the defendant to plead to the indictment or information.

(b) WAIVING APPEARANCE. A defendant need not be present for the arraignment if:

(1) the defendant has been charged by indictment or misdemeanor information;

(2) the defendant, in a written waiver signed by both the defendant and defense counsel, has waived appearance and has affirmed that the defendant received a copy of the indictment or information and that the plea is not guilty; and

(3) the court accepts the waiver.

(c) VIDEO TELECONFERENCING. Video teleconferencing may be used to arraign a defendant if the defendant consents.

(As amended Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1944

1. The first sentence states the prevailing practice.

2. The requirement that the defendant shall be given a copy of the indictment or information before he is called upon to plead, contained in the second sentence, is new.

3. Failure to comply with arraignment requirements has been held not to be jurisdictional, but a mere technical irregularity not warranting a reversal of a conviction, if not raised before trial, *Garland v. State of Washington*, 232 U.S. 642.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.