

v. Booker, 543 U.S. 220 (2005). In *Booker* the Court held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. §3553(b)(1), violates the Sixth Amendment right to jury trial. With this provision severed and excised, the Court held, the Sentencing Reform Act “makes the Guidelines effectively advisory,” and “requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. §3553(a)(4) (Supp. 2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see §3553(a) (Supp. 2004).” *Id.* at 245–46. Subdivision (b)(1)(B) has been deleted because it treats the guidelines as mandatory.

Changes Made to Proposed Amendment Released for Public Comment. No changes were made to the text of the proposed amendment as released for public comment, but one change was made in the Committee Note. Here—as in the other *Booker* rules—the Committee deleted the reference to the Fifth Amendment from the description of the Supreme Court’s decision in *Booker*.

COMMITTEE NOTES ON RULES—2009 AMENDMENT

Former Rule 35 permitted the correction of arithmetic, technical, or clear errors within 7 days of sentencing. In light of the increased complexity of the sentencing process, the Committee concluded it would be beneficial to expand this period to 14 days, including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a). Extension of the period in this fashion will cause no jurisdictional problems if an appeal has been filed, because Federal Rule of Appellate Procedure 4(b)(5) expressly provides that the filing of a notice of appeal does not divest the district court of jurisdiction to correct a sentence under Rule 35(a).

AMENDMENT BY PUBLIC LAW

1986—Subd. (b). Pub. L. 99-570 substituted “in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. The court’s authority to lower a sentence under this subdivision includes the authority to lower such sentence to a level below that established by statute as a minimum sentence” for “to the extent that such assistance is a factor in applicable guidelines or policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)”.

1984—Pub. L. 98-473 amended Rule 35 generally. Prior to amendment, rule read as follows:

“Rule 35. Correction or Reduction of Sentence

“(a) CORRECTION OF SENTENCE. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

“(b) REDUCTION OF SENTENCE. A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.”

EFFECTIVE DATE OF 1986 AMENDMENT

Pub. L. 99-570, title I, §1009(b), Oct. 27, 1986, 100 Stat. 3207-8, provided that: “The amendment made by this section [amending this rule] shall take effect on the date of the taking effect of rule 35(b) of the Federal Rules of Criminal Procedure, as amended by section 215(b) of the Comprehensive Crime Control Act of 1984 [section 215(b) of Pub. L. 98-473, effective Nov. 1, 1987].”

EFFECTIVE AND TERMINATION DATES OF 1985 AMENDMENTS

Section 2 of the Order of the Supreme Court dated Apr. 29, 1985, provided: “That the foregoing amend-

ments to the Federal Rules of Criminal Procedure [amending Rules 6, 11, 12.1, 12.2, 35, 45, 49, and 57] shall take effect on August 1, 1985 and shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases then pending. The amendment to Rule 35(b) shall be effective until November 1, 1986, when Section 215(b) of the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, approved October 12, 1984, 98 Stat. 2015, goes into effect.” See section 22 of Pub. L. 100-182, set out below, for application of Rule 35(b) to conduct occurring before effective date of sentencing guidelines.

Pub. L. 98-473, title II, §235(a)(1), Oct. 12, 1984, 98 Stat. 2031, which originally provided for an effective date of Nov. 1, 1986 for the amendment to Rule 35 by section 215(b) of Pub. L. 98-473, was later amended to provide for an effective date of Nov. 1, 1987, with applicability only to offenses committed after the taking effect of such amendment. See Effective Date note set out under section 3551 of this title.

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.

APPLICATION OF RULE 35(b) TO CONDUCT OCCURRING BEFORE EFFECTIVE DATE OF SENTENCING GUIDELINES

Pub. L. 100-182, §22, Dec. 7, 1987, 101 Stat. 1271, provided that: “The amendment to rule 35(b) of the Federal Rules of Criminal Procedure made by the order of the Supreme Court on April 29, 1985, shall apply with respect to all offenses committed before the taking effect of section 215(b) of the Comprehensive Crime Control Act of 1984 [section 215(b) of Pub. L. 98-473, effective Nov. 1, 1987].”

AUTHORITY TO LOWER A SENTENCE BELOW STATUTORY MINIMUM FOR OLD OFFENSES

Subd. (b) of this rule as amended by section 215(b) of Pub. L. 98-473 and subd. (b) of this rule as in effect before the taking effect of the initial set of guidelines promulgated by the United States Sentencing Commission pursuant to chapter 58 (§991 et seq.) of Title 28, Judiciary and Judicial Procedure, applicable in the case of an offense committed before the taking effect of such guidelines notwithstanding section 235 of Pub. L. 98-473, see section 24 of Pub. L. 100-182, set out as a note under section 3553 of this title.

Rule 36. Clerical Error

After giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission.

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

NOTES OF ADVISORY COMMITTEE ON RULES—1944

This rule continues existing law. *Rupinski v. United States*, 4 F.2d 17 (C.C.A. 6th). The rule is similar to Rule 60(a) of the Federal Rules of Civil Procedure [28 U.S.C., Appendix].

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 36 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 37. Indicative Ruling on a Motion for Relief That Is Barred by a Pending Appeal

(a) RELIEF PENDING APPEAL. If a timely motion is made for relief that the court lacks au-

thority to grant because of an appeal that has been docketed and is pending, the court may:

- (1) defer considering the motion;
- (2) deny the motion; or
- (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) NOTICE TO THE COURT OF APPEALS. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) REMAND. The district court may decide the motion if the court of appeals remands for that purpose.

(Added Apr. 23, 2012, eff. Dec. 1, 2012.)

COMMITTEE NOTES ON RULES—2012

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the court of appeals remands for that purpose or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an “indicative ruling.” (Federal Rule of Appellate Procedure 4(b)(3) lists three motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the judgment of conviction is entered and the last such motion is ruled upon. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

The procedure formalized by Federal Rule of Appellate Procedure 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (see *United States v. Cronin*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c). Rule 37 does not attempt to define the circumstances in which an appeal limits or defeats the district court’s authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appellate jurisdiction. Rule 37 applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue. Remand is in the court of appeals’ discretion under Federal Rule of Appellate Procedure 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the court of appeals remands for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be pre-

sented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

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

Rule 38. Staying a Sentence or a Disability

(a) DEATH SENTENCE. The court must stay a death sentence if the defendant appeals the conviction or sentence.

(b) IMPRISONMENT.

(1) *Stay Granted.* If the defendant is released pending appeal, the court must stay a sentence of imprisonment.

(2) *Stay Denied; Place of Confinement.* If the defendant is not released pending appeal, the court may recommend to the Attorney General that the defendant be confined near the place of the trial or appeal for a period reasonably necessary to permit the defendant to assist in preparing the appeal.

(c) FINE. If the defendant appeals, the district court, or the court of appeals under Federal Rule of Appellate Procedure 8, may stay a sentence to pay a fine or a fine and costs. The court may stay the sentence on any terms considered appropriate and may require the defendant to:

- (1) deposit all or part of the fine and costs into the district court’s registry pending appeal;
- (2) post a bond to pay the fine and costs; or
- (3) submit to an examination concerning the defendant’s assets and, if appropriate, order the defendant to refrain from dissipating assets.

(d) PROBATION. If the defendant appeals, the court may stay a sentence of probation. The court must set the terms of any stay.

(e) RESTITUTION AND NOTICE TO VICTIMS.

(1) *In General.* If the defendant appeals, the district court, or the court of appeals under Federal Rule of Appellate Procedure 8, may stay—on any terms considered appropriate—any sentence providing for restitution under 18 U.S.C. § 3556 or notice under 18 U.S.C. § 3555.

(2) *Ensuring Compliance.* The court may issue any order reasonably necessary to ensure compliance with a restitution order or a notice order after disposition of an appeal, including:

- (A) a restraining order;
- (B) an injunction;
- (C) an order requiring the defendant to deposit all or part of any monetary restitution into the district court’s registry; or
- (D) an order requiring the defendant to post a bond.

(f) FORFEITURE. A stay of a forfeiture order is governed by Rule 32.2(d).

(g) DISABILITY. If the defendant’s conviction or sentence creates a civil or employment disability under federal law, the district court, or the court of appeals under Federal Rule of Appellate Procedure 8, may stay the disability pending ap-