

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.

(c) RELEASE OR DETENTION ORDER. The judge may modify any previous release or detention order issued in another district, but must state in writing the reasons for doing so.

(d) VIDEO TELECONFERENCING. Video teleconferencing may be used to conduct an appearance under this rule if the defendant consents.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 30, 1979, eff. Aug. 1, 1979; Pub. L. 96-42, §1(2), July 31, 1979, 93 Stat. 326; Apr. 28, 1982, eff. Aug. 1, 1982; Pub. L. 98-473, title II, §§209(c), 215(d), Oct. 12, 1984, 98 Stat. 1986, 2016; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 26, 2011, eff. Dec. 1, 2011.)

NOTES OF ADVISORY COMMITTEE ON RULES—1944

1. This rule modifies and revamps existing procedure. The present practice has developed as a result of a series of judicial decisions, the only statute dealing with the subject being exceedingly general, 18 U.S.C. 591 [now 3041] (Arrest and removal for trial):

For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any United States commissioner, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. * * * Where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

The scope of a removal hearing, the issues to be considered, and other similar matters are governed by judicial decisions, *Beavers v. Henkel*, 194 U.S. 73; *Tinsley v. Treat*, 205 U.S. 20; *Henry v. Henkel*, 235 U.S. 219; *Rodman v. Pothier*, 264 U.S. 399; *Morse v. United States*, 267 U.S. 80; *Fetters v. United States ex rel. Cunningham*, 283 U.S. 638; *United States ex rel. Kassin v. Mulligan*, 295 U.S. 396; see, also, 9 Edmunds, *Cyclopedia of Federal Procedure* 39053, *et seq.*

2. The purpose of removal proceedings is to accord safeguards to a defendant against an improvident removal to a distant point for trial. On the other hand, experience has shown that removal proceedings have at times been used by defendants for dilatory purposes and in attempting to frustrate prosecution by preventing or postponing transportation even as between adjoining districts and between places a few miles apart. The object of the rule is adequately to meet each of these two situations.

3. For the purposes of removal, all cases in which the accused is apprehended in a district other than that in which the prosecution is pending have been divided into two groups: first, those in which the place of arrest is either in another district of the same State, or if in another State, then less than 100 miles from the place where the prosecution is pending; and second, cases in which the arrest occurs in a State other than that in which the prosecution is pending and the place of arrest is 100 miles or more distant from the latter place.

In the first group of cases, removal proceedings are abolished. The defendant’s right to the usual preliminary hearing is, of course, preserved, but the committing magistrate, if he holds defendant would bind him