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 subds. (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

over to the district court in which the prosecution is pending. As ordinarily there are no removal proceedings in State prosecutions as between different parts of the same State, but the accused is transported by virtue of the process under which he was arrested, it seems reasonable that no removal proceedings should be required in the Federal courts as between districts in the same State. The provision as to arrest in another State but at a place less than 100 miles from the place where the prosecution is pending was added in order to preclude obstruction against bringing the defendant a short distance for trial.

In the second group of cases mentioned in the first paragraph, removal proceedings are continued. The practice to be followed in removal hearings will depend on whether the demand for removal is based upon an indictment or upon an information or complaint. In the latter case, proof of identity and proof of reasonable cause to believe the defendant guilty will have to be adduced in order to justify the issuance of a warrant of removal. In the former case, proof of identity coupled with a certified copy of the indictment will be sufficient, as the indictment will be conclusive proof of probable cause. The distinction is based on the fact that in case of an indictment, the grand jury, which is an arm of the court, has already found probable cause. Since the action of the grand jury is not subject to review by a district judge in the district in which the grand jury sits, it seems illogical to permit such review collaterally in a removal proceeding by a judge in another district.

4. For discussions of this rule see, Homer Cummings, 29 A.B.A.Jour. 654, 656; Holtzoff, 3 F.R.D. 445, 450–452; Holtzoff, 12 George Washington L.R. 119, 127–130; Holtzoff, The Federal Bar Journal, October 1944, 18–37; Berge, 42 Mich.L.R. 353, 374; Medalie, 4 Lawyers Guild R. (3)1, 4.

Note to Subdivision (b). The rule provides that all removal hearings shall take place before a United States commissioner or a Federal judge. It does not confer such jurisdiction on State or local magistrates. While theoretically under existing law State and local magistrates have authority to conduct removal hearings, nevertheless as a matter of universal practice, such proceedings are always conducted before a United States commissioner or a Federal judge, 9 Edmunds, Cyclopedia of Federal Procedure 3919.

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

The amendment conforms to the change made in the corresponding procedure in Rule 5(b).

NOTES OF ADVISORY COMMITTEE ON RULES—1972 AMENDMENT

Subdivision (a) is amended to make clear that the person shall be taken before the federal magistrate ''without unnecessary delay.'' Although the former rule was silent in this regard, it probably would have been interpreted to require prompt appearance, and there is therefore advantage in making this explicit in the rule itself. See C. Wright, Federal Practice and Procedure: Criminal §652 (1969, Supp. 1971). Subdivision (a) is amended to also make clear that the person is to be brought before a ''federal magistrate'' rather than a state or local magistrate authorized by 18 U.S.C. §3041. The former rules were inconsistent in this regard. Although rule 40(a) provided that the person may be brought before a state or local officer authorized by former rule 5(a), such state or local officer lacks authority to conduct a preliminary examination under rule 5(c), and a principal purpose of the appearance is to hold a preliminary examination where no prior indictment or information has issued. The Federal Magistrates Act should make it possible to bring a person before a federal magistrate. See C. Wright, Federal Practice and Procedure: Criminal §653, especially n.35 (1969, Supp. 1971).

Subdivision (b)(2) is amended to provide that the federal magistrate should inform the defendant of the fact that he may avail himself of the provisions of rule 20 if applicable in the particular case. However, the failure to so notify the defendant should not invalidate the removal procedure. Although the old rule is silent in this respect, it is current practice to so notify the defendant, and it seems desirable, therefore, to make this explicit in the rule itself.

The requirement that an order of removal under subdivision (b)(3) can be made only by a judge of the United States and cannot be made by a United States magistrate is retained. However, subdivision (b)(5) authorizes issuance of the warrant of removal by a United States magistrate if he is authorized to do so by a rule of district court adopted in accordance with 28 U.S.C. §636(b):

Any district court * * * by the concurrence of a majority of all the judges * * * may establish rules pursuant to which any full-time United States magistrate * * * may be assigned * * * such additional duties as are not inconsistent with the Constitution and laws of the United States.

Although former rule 40(b)(3) required that the warrant of removal be issued by a judge of the United States, there appears no constitutional or statutory prohibition against conferring this authority upon a United States magistrate in accordance with 28 U.S.C. §636(b). The background history is dealt with in detail in 8A J. Moore, Federal Practice ¶¶40.01 and 40.02 (2d ed. Cipes 1970, Supp. 1971).

Subdivision (b)(4) makes explicit reference to provisions of the Bail Reform Act of 1966 by incorporating a cross-reference to 18 U.S.C. §3146 and §3148.

NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

This substantial revision of rule 40 abolishes the present distinction between arrest in a nearby district and arrest in a distant district, clarifies the authority of the magistrate with respect to the setting of bail where bail had previously been fixed in the other district, adds a provision dealing with arrest of a probationer in a district other than the district of supervision, and adds a provision dealing with arrest of a defendant or witness for failure to appear in another district.

Note to Subdivision (a). Under subdivision (a) of the present rule, if a person is arrested in a nearby district (another district in the same state, or a place less than 100 miles away), the usual rule 5 and 5.1 preliminary proceedings are conducted. But under subdivision (b) of the present rule, if a person is arrested in a distant district, then a hearing leading to a warrant of removal is held. New subdivision (a) would make no distinction between these two situations and would provide for rule 5 and 5.1 proceedings in all instances in which the arrest occurs outside the district where the warrant issues or where the offense is alleged to have been committed.

This abolition of the distinction between arrest in a nearby district and arrest in a distant district rests upon the conclusion that the procedures prescribed in rules 5 and 5.1 are adequate to protect the rights of an arrestee wherever he might be arrested. If the arrest is without a warrant, it is necessary under rule 5 that a complaint be filed forthwith complying with the requirements of rule 4(a) with respect to the showing of probable cause. If the arrest is with a warrant, that warrant will have been issued upon the basis of an indictment or of a complaint or information showing probable cause, pursuant to rules 4(a) and 9(a). Under rule 5.1 dealing with the preliminary examination, the defendant is to be held to answer only upon a showing of probable cause that an offense has been committed and that the defendant committed it.

Under subdivision (a), there are two situations in which no preliminary examination will be held. One is where ''an indictment has been returned or an information filed,'' which pursuant to rule 5(c) obviates the need for a preliminary examination. The order is where ''the defendant elects to have the preliminary examina-

tion conducted in the district in which the prosecution is pending.'' A defendant might wish to elect that alternative when, for example, the law in that district is that the complainant and other material witnesses may be required to appear at the preliminary examination and give testimony. See *Washington v. Clemmer*, 339 F.2d 715 (D.C. Cir. 1964).

New subdivision (a) continues the present requirement that if the arrest was without a warrant a warrant must thereafter issue in the district in which the offense is alleged to have been committed. This will ensure that in the district of anticipated prosecution there will have been a probable cause determination by a magistrate or grand jury.

Note to Subdivision (b). New subdivision (b) follows existing subdivision (b)(2) in requiring the magistrate to inform the defendant of the provisions of rule 20 applicable in the particular case. Failure to so notify the defendant should not invalidate the proceedings.

Note to Subdivision (c). New subdivision (c) follows existing subdivision (b)(4) as to transmittal of papers.

Note to Subdivision (d). New subdivision (d) has no counterpart in the present rule. It provides a procedure for dealing with the situation in which a probationer is arrested in a district other than the district of supervision, consistent with 18 U.S.C. §3653, which provides in part:

> If the probationer shall be arrested in any district other than that in which he was last supervised, he shall be returned to the district in which the warrant was issued, unless jurisdiction over him is transferred as above provided to the district in which he is found, and in that case he shall be detained pending further proceedings in such district.

One possibility, provided for in subdivision (d)(1), is that of transferring jurisdiction over the probationer to the district in which he was arrested. This is permissible under the aforementioned statute, which provides in part:

> Whenever during the period of his probation, a probationer heretofore or hereafter placed on probation, goes from the district in which he is being supervised to another district, jurisdiction over him may be transferred, in the discretion of the court, from the court for the district from which he goes to the court for the other district, with the concurrence of the latter court. Thereupon the court for the district to which jurisdiction is transferred shall have all power with respect to the probationer that was previously possessed by the court for the district from which the transfer is made, except that the period of probation shall not be changed without the consent of the sentencing court. This process under the same conditions may be repeated whenever during the period of this probation the probationer goes from the district in which he is being supervised to another district.

Such transfer may be particularly appropriate when it is found that the probationer has now taken up residence in the district where he was arrested or where the alleged occurrence deemed to constitute a violation of probation took place in the district of arrest. In current practice, probationers arrested in a district other than that of their present supervision are sometimes unnecessarily returned to the district of their supervision, at considerable expense and loss of time, when the more appropriate course of action would have been transfer of probation jurisdiction.

Subdivision (d)(2) and (3) deal with the situation in which there is not a transfer of probation jurisdiction to the district of arrest. If the alleged probation violation occurred in the district of arrest, then, under subdivision (d)(2), the preliminary hearing provided for in rule 32.1(a)(1) is to be held in that district. This is consistent with the reasoning in *Morrissey v. Brewer*, 408 U.S. 471 (1972), made applicable to probation cases in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), where the Court stressed that often a parolee ''is arrested at a place distant from the state institution, to which he may be returned before the final decision is made concerning revocation,'' and cited this as a factor contributing to the conclusion that due process requires ''that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available.'' As later noted in *Gerstein v. Pugh*, 420 U.S. 103 (1975):

> In *Morrissey v. Brewer* * * * and *Gagnon v. Scarpelli* * * * we held that a parolee or probationer arrested prior to revocation is entitled to an informal preliminary hearing at the place of arrest, with some provision for live testimony. * * * That preliminary hearing, more than the probable cause determination required by the Fourth Amendment, serves the purpose of gathering and preserving live testimony, since the final revocation hearing frequently is held at some distance from the place where the violation occurred.

However, if the alleged violation did not occur in that district, then first-hand testimony concerning the violation is unlikely to be available there, and thus the reasoning of *Morrissey* and *Gerstein* does not call for holding the preliminary hearing in that district. In such a case, as provided in subdivision (d)(3), the probationer should be held to answer in the district court of the district having probation jurisdiction. The purpose of the proceeding there provided for is to ascertain the identity of the probationer and provide him with copies of the warrant and the application for the warrant. A probationer is subject to the reporting condition at all times and is also subject to the continuing power of the court to modify such conditions. He therefore stands subject to return back to the jurisdiction district without the necessity of conducting a hearing in the district of arrest to determine whether there is probable cause to revoke his probation.

Note to Subdivision (e). New subdivision (e) has no counterpart in the present rule. It has been added because some confusion currently exists as to whether present rule 40(b) is applicable to the case in which a bench warrant has issued for the return of a defendant or witness who has absented himself and that person is apprehended in a distant district. In *Bandy v. United States*, 408 F.2d 518 (8th Cir. 1969), a defendant, who had been released upon his personal recognizance after conviction and while petitioning for certiorari and who failed to appear as required after certiorari was denied, objected to his later arrest in New York and removal to Leavenworth without compliance with the rule 40 procedures. The court concluded:

> The short answer to *Bandy's* first argument is found in *Rush v. United States*, 290 F.2d 709, 710 (5 Cir. 1961): ''The provisions of Rules 5 and 40, Federal Rules of Criminal Procedure, 18 U.S.C.A. may not be availed of by a prisoner in escape status * * *.'' As noted by Holtzoff, ''Removal of Defendants in Federal Criminal Procedure'', 4 F.R.D. 455, 458 (1946):
>
> > ''Resort need not be had, however, to this [removal] procedure for the purpose of returning a prisoner who has been recaptured after an escape from custody. It has been pointed out that in such a case the court may summarily direct his return under its general power to issue writs not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction and agreeable to the usages and principles of law. In fact, in such a situation no judicial process appears necessary. The prisoner may be retaken and administratively returned to the custody from which he escaped.''
>
> Bandy's arrest in New York was pursuant to a bench warrant issued by the United States District Court for the District of North Dakota on May 1, 1962, when Bandy failed to surrender himself to commence service of his sentence on the conviction for filing false income tax refunds. As a fugitive from justice, Bandy was not entitled upon apprehension to a removal hearing, and he was properly removed to the United States Penitentiary at Leavenworth, Kansas to commence service of sentence.

Consistent with Bandy, new subdivision (e) does not afford such a person all of the protections provided for in

subdivision (a). However, subdivision (e) does ensure that a determination of identity will be made before that person is held to answer in the district of arrest.

Note to Subdivision (f). Although the matter of bail is dealt with in rule 46 and 18 U.S.C. §§3146 and 3148, new subdivision (f) has been added to clarify the situation in which a defendant makes his initial appearance before the United States magistrate and there is a warrant issued by a judge of a different district who has endorsed the amount of bail on the warrant. The present ambiguity of the rule is creating practical administrative problems. If the United States magistrate concludes that a lower bail is appropriate, the judge who fixed the original bail on the warrant has, on occasion, expressed the view that this is inappropriate conduct by the magistrate. If the magistrate, in such circumstances, does not reduce the bail to the amount supported by all of the facts, there may be caused unnecessary inconvenience to the defendant, and there would arguably be a violation of at least the spirit of the Bail Reform Act and the Eighth Amendment.

The Procedures Manual for United States Magistrates, issued under the authority of the Judicial Conference of the United States, provides in ch. 6, pp. 8–9:

> Where the arrest occurs in a ''distant'' district, the rules do not expressly limit the discretion of the magistrate in the setting of conditions of release. However, whether or not the magistrate in the district of arrest has authority to set his own bail under Rule 40, considerations of propriety and comity would dictate that the magistrate should not attempt to set bail in a lower amount than that fixed by a judge in another district. If an unusual situation should arise where it appears from all the information available to the magistrate that the amount of bail endorsed on the warrant is excessive, he should consult with a judge of his own district or with the judge in the other district who fixed the bail in order to resolve any difficulties. (Where an amount of bail is merely recommended on the indictment by the United States attorney, the magistrate has complete discretion in setting conditions of release.)

Rule 40 as amended would encourage the above practice and hopefully would eliminate the present confusion and misunderstanding.

The last sentence of subdivision (f) requires that the magistrate set forth the reasons for his action in writing whenever he fixes bail in an amount different from that previously fixed. Setting forth the reasons for the amount of bail fixed, certainly a sound practice in all circumstances, is particularly appropriate when the bail differs from that previously fixed in another district. The requirement that reasons be set out will ensure that the ''considerations of propriety and comity'' referred to above will be specifically taken into account.

CONGRESSIONAL MODIFICATION OF PROPOSED 1979 AMENDMENT

Pub. L. 96–42, §1(2), July 31, 1979, 93 Stat. 326 [set out as a note under section 2074 of Title 28, Judiciary and Judicial Procedure], provided in part that the amendment proposed by the Supreme Court [in its order of Apr. 30, 1979] affecting rule 40 of the Federal Rules of Criminal Procedure [this rule] would take effect on Aug. 1, 1979, as amended by that section. See 1979 Amendment note below.

NOTES OF ADVISORY COMMITTEE ON RULES—1982 AMENDMENT

The amendment to 40(d) is intended to make it clear that the transfer provisions therein apply whenever the arrest occurs other than in the district of probation jurisdiction, and that if probable cause is found at a preliminary hearing held pursuant to Rule 40(d)(2) the probationer should be held to answer in the district having probation jurisdiction.

On occasion, the district of probation supervision and the district of probation jurisdiction will not be the same. See, e.g., *Cupp v. Byington*, 179 F.Supp. 669 (S.D.Ind. 1960) (supervision in Southern District of Indiana, but jurisdiction never transferred from District of Nevada). In such circumstances, it is the district having *jurisdiction* which may revoke the defendant's probation. *Cupp v. Byington*, supra; 18 U.S.C. §3653 (''the court for the district having jurisdiction over him * * * may revoke the probation''; if probationer goes to another district, ''jurisdiction over him may be transferred,'' and only then does ''the court for the district to which jurisdiction is transferred * * * have all the power with respect to the probationer that was previously possessed by the court for the district from which the transfer was made''). That being the case, that is the jurisdiction to which the probationer should be transferred as provided in Rule 40(d).

Because Rule 32.1 has now taken effect, a cross-reference to those provisions has been made in subdivision (d)(1) so as to clarify how the magistrate is to proceed if jurisdiction is transferred.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1989 AMENDMENT

The amendments recognize that convicted defendants may be on supervised release as well as on probation. See 18 U.S.C. §§3583, and 3624(e).

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

The amendment to subdivision (a) is intended to expedite determining where a defendant will be held to answer by permitting facsimile transmission of a warrant or a certified copy of the warrant. The amendment recognizes an increased reliance by the public in general, and the legal profession in particular, on accurate and efficient transmission of important legal documents by facsimile machines.

The Rule is also 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.

NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT

The amendment to subdivision (d) is intended to clarify the authority of a magistrate judge to set conditions of release in those cases where a probationer or supervised releasee is arrested in a district other than the district having jurisdiction. As written, there appeared to be a gap in Rule 40, especially under (d)(1) where the alleged violation occurs in a jurisdiction other than the district having jurisdiction.

A number of rules contain references to pretrial, trial, and post-trial release or detention of defendants, probationers and supervised releasees. Rule 46, for example, addresses the topic of release from custody. Although Rule 46(c) addresses custody pending sentencing and notice of appeal, the rule makes no explicit provision for detaining or releasing probationers or supervised releasees who are later arrested for violating terms of their probation or release. Rule 32.1 provides guidance on proceedings involving revocation of probation or supervised release. In particular, Rule 32.1(a)(1) recognizes that when a person is held in custody on the ground that the person violated a condition of probation or supervised release, the judge or United States magistrate judge may release the person under Rule 46(c), pending the revocation proceeding. But no other explicit reference is made in Rule 32.1 to the authority of a judge or magistrate judge to determine conditions of release for a probationer or supervised releasee who is arrested in a district other than the district having jurisdiction.

The amendment recognizes that a judge or magistrate judge considering the case of a probationer or supervised releasee under Rule 40(d) has the same authority vis a vis decisions regarding custody as a judge or magistrate judge proceeding under Rule 32.1(a)(1). Thus, regardless of the ultimate disposition of an arrested probationer or supervised releasee under Rule 40(d), a judge or magistrate judge acting under that rule may rely upon Rule 46(c) in determining whether custody should be continued and if not, what conditions, if any, should be placed upon the person.

NOTES OF ADVISORY COMMITTEE ON RULES—1995 AMENDMENT

The amendment to Rule 40(a) is a technical, conforming change to reflect an amendment to Rule 5, which recognizes a limited exception to the general rule that all arrestees must be taken before a federal magistrate judge.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 40 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 40 has been completely revised. The Committee believed that it would be much clearer and more helpful to locate portions of Rule 40 in Rules 5 (initial appearances), 5.1 (preliminary hearings), and 32.1 (revocation or modification of probation or supervised release). Accordingly, current Rule 40(a) has been relocated in Rules 5 and 5.1. Current Rule 40(b) has been relocated in Rule 5(c)(2)(B) and current Rule 40(c) has been moved to Rule 5(c)(2)(F).

Current Rule 40(d) has been relocated in Rule 32.1(a)(5). The first sentence of current Rule 40(e) is now located in revised Rule 40(a). The second sentence of current Rule 40(e) is now in revised Rule 40(b) and current Rule 40(f) is revised Rule 40(c).

COMMITTEE NOTES ON RULES—2006 AMENDMENT

Subdivision (a). Rule 40 currently refers only to a person arrested for failing to appear in another district. The amendment is intended to fill a perceived gap in the rule that a magistrate judge in the district of arrest lacks authority to set release conditions for a person arrested only for violation of conditions of release. *See, e.g., United States v. Zhu*, 215 F.R.D. 21, 26 (D. Mass. 2003). The Committee believes that it would be inconsistent for the magistrate judge to be empowered to release an arrestee who had failed to appear altogether, but not to release one who only violated conditions of release in a minor way. Rule 40(a) is amended to expressly cover not only failure to appear, but also violation of any other condition of release.

Changes Made After Publication and Comment. The Committee made minor clarifying changes in the published rule at the suggestion of the Style Committee.

COMMITTEE NOTES ON RULES—2011 AMENDMENT

Subdivision (d). The amendment provides for video teleconferencing in order to bring the rule into conformity with Rule 5(f).

Changes Made to Proposed Amendment Released for Public Comment. The amendment was rephrased to track precisely the language of Rule 5(f), on which it was modeled.

AMENDMENT BY PUBLIC LAW

1984—Subd. (d)(1). Pub. L. 98–473, §215(d), substituted ''3605'' for ''3653''.

Subd. (f). Pub. L. 98–473, §209(c), substituted ''Release or Detention'' for ''Bail'' as the subdivision heading and, in text, substituted ''If a person was previously detained or conditionally released, pursuant to chapter 207 of title 18, United States Code,'' for ''If bail was previously fixed'', ''decision previously made'' for ''amount of bail previously fixed'', ''by that decision'' for ''by the amount of bail previously fixed'', and ''amends the release or detention decision or alters the conditions of release'' for ''fixes bail different from that previously fixed''.

1979—Subd. (d)(1). Pub. L. 96–42, §1(2)(A), struck out ''in accordance with Rule 32.1(a)'' after ''Proceed in''.

Subd. (d)(2). Pub. L. 96–42, §1(2)(B), struck out ''in accordance with Rule 32.1(a)(1)'' after ''Hold a prompt preliminary hearing''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by section 215(d) of 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 41. Search and Seizure

(a) SCOPE AND DEFINITIONS.

(1) *Scope*. This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.

(2) *Definitions*. The following definitions apply under this rule:

(A) ''Property'' includes documents, books, papers, any other tangible objects, and information.

(B) ''Daytime'' means the hours between 6:00 a.m. and 10:00 p.m. according to local time.

(C) ''Federal law enforcement officer'' means a government agent (other than an attorney for the government) who is engaged in enforcing the criminal laws and is within any category of officers authorized by the Attorney General to request a search warrant.

(D) ''Domestic terrorism'' and ''international terrorism'' have the meanings set out in 18 U.S.C. §2331.

(E) ''Tracking device'' has the meaning set out in 18 U.S.C. §3117(b).

(b) AUTHORITY TO ISSUE A WARRANT. At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge with authority in the district—or if none is reasonably available, a judge of a state court of record in the district—has authority to issue a warrant to search for and seize a person or property located within the district;

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed;

(3) a magistrate judge—in an investigation of domestic terrorism or international terrorism—with authority in any district in which activities related to the terrorism may have occurred has authority to issue a warrant for a person or property within or outside that district;

(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both; and