

(3) *De Novo Review of Recommendations.* The district judge must consider de novo any objection to the magistrate judge's recommendation. The district judge may accept, reject, or modify the recommendation, receive further evidence, or resubmit the matter to the magistrate judge with instructions.

(Added Apr. 25, 2005, eff. Dec. 1, 2005; amended Mar. 26, 2009, eff. Dec. 1, 2009.)

COMMITTEE NOTES ON RULES—2002

Rule 59, which dealt with the effective date of the Federal Rules of Criminal Procedure, is no longer necessary and has been deleted.

COMMITTEE NOTES ON RULES—2005

Rule 59 is a new rule that creates a procedure for a district judge to review nondispositive and dispositive decisions by magistrate judges. The rule is derived in part from Federal Rule of Civil Procedure 72.

The Committee's consideration of a new rule on the subject of review of a magistrate judge's decisions resulted from *United States v. Abonce-Barrera*, 257 F.3d 959 (9th Cir. 2001). In that case the Ninth Circuit held that the Criminal Rules do not require appeals from nondispositive decisions by magistrate judges to district judges as a requirement for review by a court of appeals. The court suggested that Federal Rule of Civil Procedure 72 could serve as a suitable model for a criminal rule.

Rule 59(a) sets out procedures to be used in reviewing nondispositive matters, that is, those matters that do not dispose of the case. The rule requires that if the district judge has referred a matter to a magistrate judge, the magistrate judge must issue an oral or written order on the record. To preserve the issue for further review, a party must object to that order within 10 days after being served with a copy of the order or after the oral order is stated on the record or at some other time set by the court. If an objection is made, the district court is required to consider the objection. If the court determines that the magistrate judge's order, or a portion of the order, is contrary to law or is clearly erroneous, the court must set aside the order, or the affected part of the order. *See also* 28 U.S.C. §636(b)(1)(A).

Rule 59(b) provides for assignment and review of recommendations made by magistrate judges on dispositive matters, including motions to suppress or quash an indictment or information. The rule directs the magistrate judge to consider the matter promptly, hold any necessary evidentiary hearings, and enter his or her recommendation on the record. After being served with a copy of the magistrate judge's recommendation, under Rule 59(b)(2), the parties have a period of 10 days to file any objections. If any objections are filed, the district court must consider the matter de novo and accept, reject, or modify the recommendation, or return the matter to the magistrate judge for further consideration.

Both Rule 59(a) and (b) contain a provision that explicitly states that failure to file an objection in accordance with the rule amounts to a waiver of the issue. This waiver provision is intended to establish the requirements for objecting in a district court in order to preserve appellate review of magistrate judges' decisions. In *Thomas v. Arn*, 474 U.S. 140, 155 (1985), the Supreme Court approved the adoption of waiver rules on matters for which a magistrate judge had made a decision or recommendation. The Committee believes that the waiver provisions will enhance the ability of a district court to review a magistrate judge's decision or recommendation by requiring a party to promptly file an objection to that part of the decision or recommendation at issue. Further, the Supreme Court has held that a de novo review of a magistrate judge's decision or recommendation is required to satisfy Article III concerns only where there is an objection. *Peretz v. United States*, 501 U.S. 293 (1991).

Despite the waiver provisions, the district judge retains the authority to review any magistrate judge's decision or recommendation whether or not objections are timely filed. This discretionary review is in accord with the Supreme Court's decision in *Thomas v. Arn*, *supra*, at 154. *See also Matthews v. Weber*, 423 U.S. 261, 270-271 (1976).

Although the rule distinguishes between "dispositive" and "nondispositive" matters, it does not attempt to define or otherwise catalog motions that may fall within either category. Instead, that task is left to the case law.

*Changes Made After Publication and Comment.* The Committee adopted almost all of the style suggestions by the Style Subcommittee, and several of the suggestions by the Federal Magistrate Judges' Association. In particular the Committee adopted a variation of the language suggested by the Association concerning matters disposing of a "charge or defense." The committee also addressed the issue in Rule 59(a) of clarifying the starting point for the 10 days in which to file objections by changing the word "made" in line 9 to read "stated." In Rule 59(b)(1) the Committee rearranged the order of the sample motions that would be considered "dispositive." Finally, the Committee included a paragraph at the end of the Committee Note, addressing the decision not to further specify in the rule, or the Note, what matters might be dispositive or nondispositive.

COMMITTEE NOTES ON RULES—2009 AMENDMENT

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

**Rule 60. Victim's Rights**

(a) IN GENERAL.

(1) *Notice of a Proceeding.* The government must use its best efforts to give the victim reasonable, accurate, and timely notice of any public court proceeding involving the crime.

(2) *Attending the Proceeding.* The court must not exclude a victim from a public court proceeding involving the crime, unless the court determines by clear and convincing evidence that the victim's testimony would be materially altered if the victim heard other testimony at that proceeding. In determining whether to exclude a victim, the court must make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to exclusion. The reasons for any exclusion must be clearly stated on the record.

(3) *Right to Be Heard on Release, a Plea, or Sentencing.* The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning release, plea, or sentencing involving the crime.

(b) ENFORCEMENT AND LIMITATIONS.

(1) *Time for Deciding a Motion.* The court must promptly decide any motion asserting a victim's rights described in these rules.

(2) *Who May Assert the Rights.* A victim's rights described in these rules may be asserted by the victim, the victim's lawful representative, the attorney for the government, or any other person as authorized by 18 U.S.C. §3771(d) and (e).

(3) *Multiple Victims.* If the court finds that the number of victims makes it impracticable to accord all of them their rights described in these rules, the court must fashion a reasonable procedure that gives effect to these rights without unduly complicating or prolonging the proceedings.

(4) *Where Rights May Be Asserted.* A victim's rights described in these rules must be asserted in the district where a defendant is being prosecuted for the crime.

(5) *Limitations on Relief.* A victim may move to reopen a plea or sentence only if:

(A) the victim asked to be heard before or during the proceeding at issue, and the request was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 10 days after the denial, and the writ is granted; and

(C) in the case of a plea, the accused has not pleaded to the highest offense charged.

(6) *No New Trial.* A failure to afford a victim any right described in these rules is not grounds for a new trial.

(Added Apr. 23, 2008, eff. Dec. 1, 2008.)

#### COMMITTEE NOTES ON RULES—2008

This rule implements several provisions of the Crime Victims' Rights Act, codified at 18 U.S.C. §3771, in judicial proceedings in the federal courts.

*Subdivision (a)(1).* This subdivision incorporates 18 U.S.C. §3771(a)(2), which provides that a victim has a "right to reasonable, accurate, and timely notice of any public court proceeding. . . ." The enactment of 18 U.S.C. §3771(a)(2) supplemented an existing statutory requirement that all federal departments and agencies engaged in the detection, investigation, and prosecution of crime identify victims at the earliest possible time and inform those victims of various rights, including the right to notice of the status of the investigation, the arrest of a suspect, the filing of charges against a suspect, and the scheduling of judicial proceedings. See 42 U.S.C. §10607(b) & (c)(3)(A)–(D).

*Subdivision (a)(2).* This subdivision incorporates 18 U.S.C. §3771(a)(3), which provides that the victim shall not be excluded from public court proceedings unless the court finds by clear and convincing evidence that the victim's testimony would be materially altered by attending and hearing other testimony at the proceeding, and 18 U.S.C. §3771(b), which provides that the court shall make every effort to permit the fullest possible attendance by the victim.

Rule 615 of the Federal Rules of Evidence addresses the sequestration of witnesses. Although Rule 615 requires the court upon the request of a party to order the witnesses to be excluded so they cannot hear the testimony of other witnesses, it contains an exception for "a person authorized by statute to be present." Accordingly, there is no conflict between Rule 615 and this rule, which implements the provisions of the Crime Victims' Rights Act.

*Subdivision (a)(3).* This subdivision incorporates 18 U.S.C. §3771(a)(4), which provides that a victim has the "right to be reasonably heard at any public proceeding in the district court involving release, plea, [or] sentencing. . . ."

*Subdivision (b).* This subdivision incorporates the provisions of 18 U.S.C. §3771(d)(1), (2), (3), and (5). The statute provides that the victim, the victim's lawful representative, and the attorney for the government, and any other person as authorized by 18 U.S.C. §3771(d) and (e) may assert the victim's rights. In referring to the victim and the victim's lawful representative, the committee intends to include counsel. 18 U.S.C. §3771(e) makes provision for the rights of victims who are incompetent, incapacitated, or deceased, and 18 U.S.C. §3771(d)(1) provides that "[a] person accused of the crime may not obtain any form of relief under this chapter."

The statute provides that those rights are to be asserted in the district court where the defendant is

being prosecuted (or if no prosecution is underway, in the district where the crime occurred). Where there are too many victims to accord each the rights provided by the statute, the district court is given the authority to fashion a reasonable procedure to give effect to the rights without unduly complicating or prolonging the proceedings.

Finally, the statute and the rule make it clear that failure to provide relief under the rule never provides a basis for a new trial. Failure to afford the rights provided by the statute and implementing rules may provide a basis for re-opening a plea or a sentence, but only if the victim can establish all of the following: the victim asserted the right before or during the proceeding, the right was denied, the victim petitioned for mandamus within 10 days as provided by 18 U.S.C. §3771(d)(5)(B), and—in the case of a plea—the defendant did not plead guilty to the highest offense charged.

*Changes Made to Proposed Amendment Released for Public Comment.* Subdivision (a)(2) was revised to make it clear that the duty to permit fullest attendance arises in the context of the victim's possible exclusion.

Subdivision(b)(2) was revised to respond to concerns that the amendments did not clearly state that the victim's lawful representative could assert the victim's rights. The Committee Note makes it clear that a victim or the lawful representative of a victim may generally participate through counsel, and provides that any other person authorized by 18 U.S.C. §3771(d) and (e) may assert the victim's rights, such as persons authorized to raise the rights of victims who are minors or are incompetent.

References throughout subdivision (b) were revised to indicate that they were applicable to the victim's rights described in the Federal Rules of Criminal Procedure, not merely subdivision (a) of Rule 60.

Other minor changes were made at the suggestion of the Style Consultant to improve clarity.

#### Rule 61. Title

These rules may be known and cited as the Federal Rules of Criminal Procedure.

(As amended Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 23, 2008, eff. Dec. 1, 2008.)

#### SHORT TITLE OF 1975 AMENDMENT

Pub. L. 94-64, §1, July 31, 1975, 89 Stat. 370, provided: "That this Act [amending rules 4, 9, 11, 12, 12.1, 12.2, 15, 16, 17, 20, 32 and 43 of these rules and enacting provisions set out as a note under rule 4] may be cited as the 'Federal Rules of Criminal Procedure Amendments Act of 1975'."

#### NOTES OF ADVISORY COMMITTEE ON RULES—1944

This rule is similar to Rule 85 of the Federal Rules of Civil Procedure [28 U.S.C., Appendix], which reads as follows:

These rules may be known and cited as the Federal Rules of Civil Procedure.

#### COMMITTEE NOTES ON RULES—2002 AMENDMENT

No changes have been made to Rule 60, as a result of the general restyling of the Criminal Rules.

#### COMMITTEE NOTES ON RULES—2008 AMENDMENT

*Excerpt from Report of the Advisory Committee on Federal Rules of Criminal Procedure.* This amendment renumbers current Rule 60 as Rule 61 to accommodate the new victims' rights rule.

*Changes Made to Proposed Amendment Released for Public Comment.* No changes were made.