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A Synopsis of the 1979 Amendments to the Federal Rules of Criminal Procedure

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A SYNOPSIS OF THE 1979 AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

I. INTRODUCTION

On April 30, 1979, the Supreme Court of the United States ordered the amendment of the Federal Rules of Criminal Procedure.[1] The modifications ordered by the Court promise to bring about significant changes in the Rules,[2] clarify ambiguous sections,[3] eliminate confusion in application,[4] and bring the Rules into conformity with recent case law.[5]

The process of amending the Federal Rules of Criminal Procedure began with the Advisory Committee on Criminal Rules of the Judicial Conference of the United States. The Advisory Committee was responsible for drafting the text of the proposed amendments and submitting explanatory comments.[6] The proposed changes and additions were then sent to the Committee on Rules of Practice and Procedure of the Judicial Conference,[7] which solicited comments from the bench and bar before submitting the amendments to the Judicial Conference.[8] Subsequently, the Judicial Conference approved the proposed amend-

1. Order Amending the Federal Rules of Criminal Procedure, 441 U.S. 989 (1979). The Supreme Court ordered the amendment of rules 6(e), 7(c)(2), 9(a), 11(e)(2), 11(e)(6), 17(h), 18, 32(c)(3)(E), 32(f), 35, 40, 41(a), (b), and (c), and 44(c). Additionally, two new rules were proposed: 26.2 and 32.1.

2. The original Federal Rules of Criminal Procedure were transmitted to Congress by the Attorney General of the United States, on January 3, 1945. Advisory Committee Notes were recommended shortly thereafter. The Rules were enacted to govern the procedure in all criminal proceedings in the United States District Courts, the United States Courts of Appeals, and the United States Supreme Court. FED. R. CRIM. P. 54.

3. *See, e.g.*, notes 45-67 and accompanying text *infra* for the clarification of FED. R. CRIM. P. 11 (1979).

4. *See, e.g.*, FED. R. CRIM. P. 40 (1979), Notes of the Advisory Committee on Rules.

5. *See, e.g.*, notes 100-152 and accompanying text *infra* for a discussion of the enactment of FED. R. CRIM. P. 32.1 (1979).

6. *See* U.S.C.A., pamphlet no. 2 (Sept. 1979) for the text and comments of the amendments which are already in effect. The text and comments of the amendments which have been delayed by Congress can be found in West's *Federal Rules* 1979.

7. The Committee on Rules of Practice and Procedure did not publish any written materials on these amendments.

8. The Judicial Conference of the United States, created pursuant to 28 U.S.C. § 331 (1976), carries on a continuous study of the general rules of practice and procedure used in courts of the United States. The Conference recommends necessary changes to the Supreme Court. *Id.*

ments and transmitted them to the Supreme Court.[9] The Supreme Court then ordered these amendments to take effect on August 1, 1979.[10]

Upon receipt by Congress, the amendments to the Rules were referred to the House Subcommittee on Criminal Justice. Currently engaged in a major effort to overhaul the Federal Criminal Code, the Subcommittee was unable to study the proposed changes in detail. Consequently, the Subcommittee acted to delay the passage of those amendments that it regarded as particularly controversial or far-reaching.[11] Accordingly, Congress delayed the effective dates of the modifications to rules 11(e)(6), 17(h), 32(f), and 44(c) and the enactment of rules 26.2 and 32.1 until a study of the changes could be made, or until December 1, 1980, whichever comes first.[12]

This comment will analyze the changes made in the Federal Rules, particularly noting the rationale for the various amendments and the intended effects of those changes.

II. ANALYSIS

A. Amendment to Rule 6(e): Grand Jury Secrecy

The amendment to rule 6(e) of the Federal Rules of Criminal Procedure mandates the recording of all federal grand jury proceedings.[13]

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9. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (Sept. 21-22, 1978).

10. The order, which authorized the amendment of 12 of the procedural rules and the addition of 2 new rules, was made pursuant to 18 U.S.C. §§ 3771-72 (1976). Section 3771 empowers the Supreme Court to prescribe the rules of pleading, practice, and procedure for criminal proceedings, prior to and including the verdict, in United States District Courts. This section further states that the rules of pleading, practice, and procedure shall not take effect until the Chief Justice of the Supreme Court reports the rules to Congress. Section 3772 empowers the Supreme Court to prescribe the rules of practice and procedure with respect to proceedings after the verdict. The Supreme Court is authorized under this section to fix the dates when the rules are to take effect.

11. *See* H.R. 4712, 96th Cong., 1st Sess. (1979).

12. *Id.*

13. FED. R. CRIM. P. 6(e) (1979). Rule 6(e) reads:

Recording and Disclosure of Proceedings.

(1) Recording of Proceedings.-All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

(2) General Rule of Secrecy.-A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under

Formerly held to be permissive,[14] the new recordation requirement exempts only those portions of the grand jury proceedings when the jurors are deliberating or voting.[15] In effect, the amendment to this rule codifies changes that many commentators and courts have long advocated.[16] Additionally, many have felt these changes to be necessary prerequisites to the safeguarding of defendants' rights and the prevention of possible prosecutorial abuse.[17]

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paragraph (3) (A) (ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A) (ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminary to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(4) Sealed Indictments. The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

14. FED. R. CRIM. P. 6(e) (1979), Notes of the Advisory Committee. *See also* United States v. Aloisio, 440 F.2d 705 (7th Cir.), *cert. denied,* 404 U.S. 824 (1971).

15. FED. R. CRIM. P. 6(e)(1) (1979).

16. 8 MOORE'S FEDERAL PRACTICE ¶ 6.02[2][d] (2d ed. 1965); 1 WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 103 (1969); SPECIAL COMMITTEE ON FEDERAL RULES OF PROCEDURE, 52 F.R.D. 90, 94-95 (1971). *Cf.* United States v. Aloisio, 440 F.2d 705 (7th Cir.), *cert. denied,* 404 U.S. 824 (1971).

17. SPECIAL COMMITTEE ON FEDERAL RULES OF PROCEDURE, 52 F.R.D. 90, 94-95 (1971). *See also* cases cited in United States v. Aloisio, 440 F.2d 705 (7th Cir.), *cert. denied,* 404 U.S. 824 (1971).

As outlined in the Advisory Committee Notes to amended rule 6(e), there are several benefits to be derived from the new recording requirement. Of primary importance, the recording requirement ensures that both a defendant and the prosecutor have the opportunity to impeach a witness on the basis of any prior inconsistent statements made to the grand jury.[18] Secondly, the recording requirement lends greater assurance that the testimony received by the grand jury is trustworthy.[19] Additionally, the recordation of grand jury proceedings is an effective means of restraining possible prosecutorial abuses.[20]

The first benefit derived from the amendment of rule 6(e), that either party may impeach the testimony of an opponent's witness based on that witness' prior statements to the grand jury, results from the "growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."[21] This is particularly important from the viewpoint of the defense. Before the amendment to this rule, a defendant was entitled to examine the grand jury testimony against him, but there was no guarantee that there would, in fact, be a record, either stenographic or electronic, of that testimony.[22] With the change in the rule, however, a defendant is at least assured that there is a record of the grand jury proceedings. Further, a defendant is assured that there is a possibility of access to testimony adduced before that normally secretive body.[23] The prosecution is no longer given "exclusive access to a storehouse of relevant fact."[24] Armed with a record of the proceeding before the grand jury, the resourceful attorney can now use the mandated record to bring out possible inconsistencies in a damaging witness' testimony.

The trustworthiness of testimony given before the grand jury is a second benefit to be derived from the amendment of rule 6(e). As noted in a second circuit decision,

> [t]he recording of testimony is in a very real sense a circumstantial guaranty of trustworthiness. Without the restraint of being subject to

18. FED. R. CRIM. P. 6(e) (1979), Notes of the Advisory Committee.
19. *Id.*
20. *Id.*
21. Dennis v. United States, 384 U.S. 855, 870 (1966).
22. *Id. See also* United States v. Aloisio, 440 F.2d 705 (7th Cir.), *cert. denied,* 404 U.S. 824 (1971).
23. FED. R. CRIM. P. 6(e)(3)(C)(ii) (1979) provides that a defendant's access to grand jury testimony is to be determined by the court, at the court's discretion. *See* United States v. Penrod, 609 F.2d 1092, 1097 (4th Cir. 1979), *cert. denied,* 100 S.Ct. 1850 (1980).
24. Dennis v. United States, 384 U.S. 855, 873 (1966).

> prosecution for perjury, a restraint which is wholly meaningless or nonexistent if the testimony is unrecorded, a witness may make baseless accusations founded on hearsay or false accusations, all resulting in the indictment of a fellow citizen for a crime.[25]

The recordation requirement, then, provides an incentive or impetus to a grand jury witness to give testimony that is truthful. A witness who knows that his statements are being transcribed or recorded might think twice before giving inaccurate or deceitful testimony.[26]

The recording requirement further acts as a restraint on possible prosecutorial abuse of the grand jury system. In fact, recordation of the proceedings is probably the most effective curb on such potential abuse.[27] The very nature of grand jury proceedings allows for a strong bond or relationship to develop between the sixteen to twenty-three federal grand jurors. Because no defense attorney is allowed in the grand jury room, there is no counter balance to the tactics, approach, or charisma utilized by the prosecutor. The grand jury does not have two attorney's personalities to analyze or choose from, but only one—the prosecutor. The rapport or dependency which can develop between the prosecutor and the grand jurors "can easily be turned into an instrument of influence on grand jury deliberations."[28] All this can work to the great disadvantage of a defendant. The amendment to rule 6(e) can counteract the potential "dependency relationship"; a prosecutor interested in exploiting the relationship will not be so likely to do so given the fact that a record of the proceedings is being kept. Rather, the prosecutor, like the grand jury witnesses, will be inclined to act and speak in a manner that would give no hint of a possible exploitation of the dependency relationship or other abuse.

B. Amendment to Rule 7(c)(2): Indictment and Information; Criminal Forfeiture

The amendment to rule 7(c)(2)[29] is intended to clarify its meaning.

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25. United States v. Cramer, 447 F.2d 210, 222 (2d Cir. 1971), *cert. denied,* 404 U.S. 1024 (1972).

26. *Id.*

27. United States v. Gramolini, 301 F. Supp. 39, 41-42 (D.R.I. 1969).

28. *Id.* at 41. *See also* United States v. Cathey, 591 F.2d 268 (5th Cir. 1979) where the court of appeals held that inflammatory remarks made by a government agent in front of the grand jury justified dismissal of an indictment. (In *Cathey* the government's agent had told the grand jury that the defendant was "caught with his hand in the cookie jar."); United States v. Polizzi, 500 F.2d 856 (9th Cir. 1974), *cert. denied,* 419 U.S. 1120 (1975).

29. FED. R. CRIM. P. 7(c)(2) (1979) reads as follows: "(2) Criminal Forfeiture. No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture."

The amended rule mandates that no judgment of forfeiture may be entered in a criminal proceeding unless the indictment or information spells out "the extent of the interest or property subject to forfeiture."[30] Thus, where a defendant in a criminal proceeding stands to lose property by virtue of a forfeiture statute,[31] amended rule 7(c)(2) provides him with notice at the earliest possible time in that proceeding that a criminal conviction could well cause him to lose property as well as his freedom.

Subsection (c)(2) was added to rule 7 in 1972. The current amendment of this subsection removes any ambiguity as to when the indictment or information must allege the extent of the property or interest subject to possible forfeiture.[32] The modification is in response to some confusion as to the application of the 1972 version[33] and does not apply to separate *in rem* proceedings.[34] By amending rule 7(c)(2), the Advisory Committee has brought the procedure for dealing with indictments and informations fully into conformance with the common law notion of forfeiture, as a defendant is given notice, a trial, and a special jury finding on the issues surrounding the forfeiture following a conviction.[35]

C. *Amendment to Rule 9(a): Warrant or Summons Upon Indictment or Information*

The amendment to rule 9(a) of the Federal Rules of Criminal Procedure makes explicit the requirement that a warrant for a defendant named in an information be issued only upon a showing that the information is supported by probable cause.[36] The amended rule codifies

30. *Id.*

31. For an explanation and analysis of the development of forfeiture statutes in this country *see* Note, 62 CORNELL L. REV. 768 (1977).

32. Compare the language in the 1972 version of 7(c)(2): "When an offense charged *may* result in a criminal forfeiture . . . .", with the amended rule 7(c)(2): "No judgment of forfeiture may be entered . . . *unless* . . . ." (emphases added).

33. *See* United States v. Hall, 521 F.2d 406 (9th Cir. 1975).

34. FED. R. CRIM. P. 7(c)(2) (1979), Notes of the Advisory Committee.

35. *See* FED. R. CRIM. P. 31(e) and 32(b)(2) (1979).

36. FED. R. CRIM. P. 9(a) (1979) reads as follows:

Warrant or Summons upon Indictment or Information.

(a) Issuance. Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in an information *supported by a showing of probable cause under oath as is required by Rule 4 (a),* or in an indictment. Upon the request of the attorney for the government a summons instead of a warrant shall issue. If no request is made, the court may issue either a warrant or a summons in its discretion. More than one warrant or summons may issue for the same defendant. The clerk shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue. *Id.* (Italics indicate new

changes which have generally been assumed to be the state of the law. A prosecutor's statement that an information should be issued against a particular defendant must now be supported by a showing of probable cause; a prosecutor's statement, standing alone, is not sufficient.[37]

The amendment to rule 9(a) does not affect the requirements for obtaining a warrant based upon an indictment. Indeed, in *Gerstein v. Pugh*[38] the Supreme Court indicated that the rule that an information-based warrant should issue only upon a judicial determination of probable cause does not disturb 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."[39] The warrant which is issued pursuant to an indictment is based upon the grand jury's, and not the prosecutor's, determination of probable cause.[40] The amendment to the rule affects only those warrants or summonses issued pursuant to an information.

A finding of probable cause is necessary to ensure that the Fourth Amendment guarantee against unfounded invasions of liberty and privacy are protected.[41] The amended version of rule 9(a) safeguards those individual rights by demanding that probable cause be found in an information-based warrant. The prosecution must now establish to a court or magistrate that there is a "reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged."[42] The requirement thus safeguards an individual from false or malicious accusations.[43] Fourth Amendment interests are protected, as the new standard represents a necessary accommodation between a suspect's right to liberty and the state's duty to control crime.[44]

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material. Other stylistic changes not the subject of this analysis are not underlined.)

37. *See* Gerstein v. Pugh, 420 U.S. 103 (1975).

38. *Id.*

39. *Id.* at 117 n. 19 (citing *Ex parte* United States, 287 U.S. 241, 250 (1932)).

40. *See* Giordinello v. United Staes, 357 U.S. 480 (1958).

41. Gerstein v. Pugh, 420 U.S. 103 (1975); Johnson v. United States, 333 U.S. 10 (1948). *See also* United States v. United States Dist. Court for the E. Dist. of Mich., 407 U.S. 297 (1972) where the Court found that "the judgment of the magistrate that collected evidence is sufficient to justify invasion of a citizen's private premises" is a necessary prerequisite to the issuance of an arrest warrant. *Id.* at 316.

42. Stacey v. Emery, 97 U.S. 642, 645 (1878).

43. Giordenello v. United States, 357 U.S. 480 (1958); United States v. Morgan, 222 U.S. 274 (1911).

44. Gerstein v. Pugh, 420 U.S. 103 (1975).

D. Amendments to Rule 11(e): Plea Discussions

The amendments to rule 11(e) reflect needed changes in the procedures surrounding plea negotiations. The modifications are designed to clarify those situations when a defendant can withdraw his guilty plea and when evidence or testimony adverse to a defendant may be admitted against him.

The amendment to rule 11(e)(2)[45] clarifies the circumstances under which a court can accept or reject a plea agreement fashioned by the prosecution and the defense.[46] The new version attempts to eliminate inconsistent application of the rules regarding bargained for plea agreements.[47] While retaining the major provisions of the old rule, the amended version specifies those instances when a defendant may withdraw his plea, regardless of the treatment given by the court to the proposed plea agreement.

Rule 11(e)(1) provides three options from which the government's attorney can choose in plea negotiations with the defendant. The government can:

> (A) move for a dismissal of the charges; or
> (B) make a recommendation, or agree not to oppose a defendant's request, for a particular sentence, with the understanding that the recommendation or request shall not be binding on the court; or
> (C) agree that a specific sentence is the appropriate disposition of the case.[48]

Ultimately, no agreement made between the prosecution and the defense is binding on the court.[49] Options (A) and (C) involve an affirmative act by the prosecution insofar as they require the government to

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45. FED. R. CRIM. P. 11(e)(2) (1979), reads as follows:

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. *If the agreement is of the type specified in subdivision (e) (1) (A) or (C),* the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. *If the agreement is of the type specified in subdivision (e) (1) (B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea. See* note 48 and accompanying text *infra* for the text of rule 11(e)(1). (Italics indicate new material).

46. FED. R. CRIM. P. 11(e)(2) (1979), Notes of the Advisory Committee. These changes conform to the proposed amendments to FED. R. EVID. 410 which also deals with the admissibility of plea agreements.

47. *See* United States v. Sarubbi, 416 F. Supp. 633 (D.N.J. 1976).

48. FED. R. CRIM. P. 11(e)(1).

49. Santobello v. New York, 404 U.S. 257 (1971).

request a specific disposition to the court. These types of agreements are complete when the defendant receives the contemplated charge, dismissal or sentence. An option (B) agreement is of a different nature, however, because the completion of that bargain is not dependent upon ultimate acceptance or rejection by the court. Rather, the defense prosecution bargain is satisfied in an option (B) agreement when the prosecutor performs as agreed. The defendant's status is, at that point, still undetermined.

The amendment to rule 11(e)(2) specifies that the court may accept or reject a type (A) or (C) agreement. Further, the amended version provides that the court may defer its decision on those types of agreements until it has had an opportunity to review presentence reports.[50] These provisions, carried over from the former rule 11(e)(2), require ultimate "acceptance or rejection by the court . . . so that it may be determined whether the defendant shall receive the bargained for concessions or shall instead be afforded an opportunity to withdraw his plea."[51]

A type (B) agreement requires no such ultimate acceptance or rejection by the court. Nonacceptance of a request for a particular sentence does not necessarily imply a rejection of the plea agreement itself.[52] The defendant can still plead in accordance with his deal with the prosecutor, and both sides can thus fulfill their part of the bargain. In imposing a sentence other than that which is recommended or requested, the court is accepting the plea while rejecting the suggestions of the prosecutor or the exhortations of the defendant as to a specific sentence.[53]

A type (B) plea imposes the duty upon the court to inform the defendant that he has no right to withdraw his plea if the court does not accept the recommendation or request for a particular sentence.[54] Thus, given a warning by the court concerning the nature of the plea and the inability of the accused to withdraw that plea once entered, a defendant will not be heard to complain that he was led to believe that

50. FED. R. CRIM. P. 11(e)(2) (1979).

51. FED. R. CRIM. P. 11(e)(2) (1979), Notes of the Advisory Committee. Withdrawal of a guilty plea is not a matter of right, and the court is not bound by any agreement worked out between the prosecutor and a defendant. *See* Santobello v. New York, 404 U.S. 257 (1971); Tucker v. United States, 470 F.2d 220 (8th Cir. 1972), *cert. denied,* 412 U.S. 929 (1973). Rather, the withdrawal of a plea is at the discretion of the court. United States v. Tabory, 462 F.2d 355 (4th Cir. 1972).

52. United States v. Sarubbi, 416 F. Supp. 633 (D.N.J. 1976).

53. *See* United States v. Henderson, 565 F.2d 1119 (9th Cir. 1977); United States v. Savage, 561 F.2d 554 (4th Cir. 1977).

54. *See* note 45 *supra.* This brings the rule into conformity with the ABA STANDARDS RELATING TO PLEAS OF GUILTY, § 1.5 (Approved Draft, 1968).

the court would definitely impose a stipulated sentence.[55] Further, such a warning by the court allows the defendant the opportunity to weigh all options before entering the plea, including the possibility of proceeding with a trial rather than agreeing to a potentially "dangerous" deal.

This is especially necessary in cases where a defendant is faced with several counts or charges, and the plea agreements do not fall entirely within any of the three classifications of rule 11(e)(1). As the Advisory Committee noted:

> Sometimes a plea agreement will be partially but not entirely of the (B) type, as where a defendant, charged with counts 1, 2, and 3, enters into an agreement with the attorney for the government wherein it is agreed that if the defendant pleads guilty to count 1, the prosecutor will recommend a certain sentence as to that count and will move for a dismissal of counts 2 and 3. In such a case, the court must take particular care to ensure that the defendant understands which components of the agreement involve only a (B) type recommendation . . . . If counts 2 and 3 are dismissed and the sentence recommendation is made, then the defendant is not entitled to withdraw his plea even if the sentence recommendation is not accepted by the court, for the defendant received all he was entitled to under the various components of the plea agreement.[56]

An additional amendment to rule 11(e) involves the inadmissibility of pleas, plea discussions, and related statements made during plea negotiations against a defendant who later withdraws a plea of guilty or who has entered a plea of nolo contendere.[57] Although its im-

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55. United States v. Savage, 561 F.2d 554 (4th Cir. 1977); United States v. Henderson, 565 F.2d 1119 (9th Cir. 1977); United States v. Sarubbi, 416 F. Supp. 633 (D.N.J. 1976).

56. FED. R. CRIM. P. 11(e)(2) (1979), Notes of the Advisory Committee.

57. FED. R. CRIM. P. 11(e)(6). The amendment to subsection (e)(6), transmitted by the Supreme Court to Congress on April 30, 1979, to become effective on August 1, 1979, was postponed by Congress via Pub. L. No. 96-42, July 31, 1979, 93 Stat. 326, until December 1, 1980, or until approved by Congress, whichever comes first. The amendment reads:

> Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
> (A) a plea of guilty which was later withdrawn;
> (B) a plea of nolo contendere;
> (C) any statement made in the course of any proceeding under this rule regarding either of the foregoing pleas; or
> (D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fair-

plementation was postponed,[58] the primary purpose of the amendment to rule 11(e)(6) is "to describe more precisely what evidence relating to pleas or plea discussions is inadmissible."[59] Presumably, the rule is not limited to statements by the defendant, but also covers statements made by defense counsel regarding the defendant's admissions to him.[60]

The amendment to rule 11(e)(6) is designed to promote the disposition of criminal cases through plea bargaining. "Unrestrained candor" between the prosecution and the defense is encouraged as 11(e)(6) specifically enumerates those instances when plea negotiations are inadmissible.[61] Thus, the prevalent view that plea bargaining discussions must be protected so as to ensure meaningful dialogue and fruitful negotiations is fostered.[62] For plea bargaining to work effectively, a defendant must be free to negotiate without fear that his statements, whether to the prosecutor or to his own attorney, will later be used against him:

> If, as the Supreme Court said in *Santobello,* plea bargaining is an essential component of justice and . . . is to be encouraged, it is immediately apparent that no defendant or his counsel will pursue such an effort if the remarks uttered during the course of it are to be admitted in evidence as proof of guilt. Moreover, it is inherently unfair to engage in such an activity, only to use it as a weapon against the defendant when negotiations fail.[63]

The proposed version of 11(e)(6) further amends the old rule to provide that a plea discussion statement may be admissible against a defendant if that defendant first introduces contemporaneous

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ness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

58. Pub. L. No. 96-42, 93 Stat. 326 (1979).

59. *See Reports and Proposals,* 25 Crim. L. Rep. 2256 (June 13, 1979) (BNA).

60. *Id.* It should be noted that although no case law has been found to support this statement, the wording of the proposed amendment, insofar as it reads "*any* statement made in the course of plea discussions with an attorney for the government" supports such an interpretation (emphasis added).

61. FED. R. CRIM. P. 11(e)(6) (1979), Notes of the Advisory Committee.

62. Santobello v. New York, 404 U.S. 257 (1971) (plea bargaining as an essential element in the administration of justice). In *United States v. Herman,* 544 F.2d 791 (5th Cir. 1977) the import of plea negotiations was again emphasized as the rule against the admissibility of a defendant's plea negotiation statements was logically extended to include statements made to postal inspectors who had no authority to conduct plea negotiations.

63. United States v. Ross, 493 F.2d 771, 774 (5th Cir. 1979) (citing Santobello v. New York, 404 U.S. 257 (1971)). *See also* United States v. Smith, 525 F.2d 1017 (10th Cir. 1975).

statements favorable to his cause.[64] Fairness dictates that such statements be admissible, for if a defendant is allowed to introduce certain statements made in plea negotiations which are favorable to him, other relevant statements made in that negotiation session should also be admissible.[65] This exception to the general rule against admissibility of plea bargaining statements is predicated on the principle that a right is waived when the holder of that right destroys the basis for which that right is given.[66] Thus, if a defendant has the right under rule 11 not to have certain statements admitted against him, he waives that right by introducing portions of contemporaneous statements or recordings. He has offset the very reason for having the right in the first place: the elimination from evidence of negotiations working toward a just resolution of the matter.

The amendments to rule 11(e) describe in greater detail the ramifications and mechanics of plea agreements and discussions. A framework is provided within which litigants can operate, because the amendments remove some of the inconsistencies and ambiguities of the former rule.[67]

E. Proposed New Rule 17(h): Subpoena

Proposed new subdivision (h) of rule 17[68] is necessitated by the proposed addition to the Federal Rules of Criminal Procedure of rule 26.2[69] which deals with the obtaining of statements of government and defense witnesses. Proposed rule 17(h) provides that statements made by witnesses or prospective witnesses may not be subpoenaed from the government or the defense; rather, the proposed rule mandates that such statements be subject to production in accordance with the provisions of proposed rule 26.2.[70] Assumedly, if rule 26.2 is enacted by

64. FED. R. CRIM. P. 11(e)(6)(D)(i), *effectiveness postponed*, Pub. L. No. 96-42, July 31, 1979, 93 Stat. 326.

65. FED. R. CRIM. P. 11(e)(6) Notes of the Advisory Committee, *effectiveness postponed*, Pub. L. No. 96-42, July 31, 1979, 93 Stat. 326. This rule is consistent with FED. R. EVID. 106 which provides that a party may require an opponent who has introduced a portion of a writing or recorded statement to introduce any other portion of that writing or statement which ought in fairness be considered contemporaneously with it.

66. *See id.*

67. FED. R. CRIM. P. 11(e) (1979), Notes of the Advisory Committee.

68. FED. R. CRIM. P. 17(h), *effectiveness postponed*, Pub. L. No. 42-46, July 31, 1979, 93 Stat. 326, reads: "(h) INFORMATION NOT SUBJECT TO SUBPOENA. Statements made by witnesses or prospective witnesses may not be subpoenaed from the government or the defendant under this rule, but shall be subject to production only in accordance with the provisions of rule 26.2."

69. *See* note 78 and accompanying text *infra*.

70. FED. R. CRIM. P. 17(h), *effectiveness postponed*, Pub. L. No. 42-46, July 31, 1979, 93 Stat. 326.

Congress, rule 17(h) will also become effective.[71] The proposed addition makes it clear that witness statements are subject to the procedural mechanism employed by rule 26.2.

F. *Amendment to Rule 18: Place of Prosecution*

The amendment to rule 18[72] is designed to eliminate an apparent inconsistency[73] between the former rule and the Speedy Trial Act of 1974 regarding proper venue.[74] Rule 18 had been interpreted by several courts as prohibiting trial in a division other than that in which the offense was committed.[75] It should be noted that many districts are divided into divisions. Section 3161(a) of the Speedy Trial Act of 1974 provides, however, that "the appropriate judicial officer . . . set the case for trial . . . at a place within the judicial *district,* so as to assure a speedy trial."[76] Because the Speedy Trial Act provides that venue is proper anywhere within the district where the alleged crime occurred, some confusion resulted as to where venue was proper when a crime was committed in a district with several divisions.[77] By adding "the prompt administration of justice" to the considerations which the court can take into account in determining proper venue, any confusion should be alleviated. Consequently, trial can be had in any division within the appropriate district.

G. *Proposed Rule 26.2: Production of Witness Statements*

Perhaps the most important amendment to the Federal Rules of Criminal Procedure is the proposed new rule 26.2.[78] The new rule pro-

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71. *See* FED. R. CRIM. P. 17(h), Notes of the Advisory Committee, *effectiveness postponed*, Pub. L. No. 42-46, July 31, 1979, 93 Stat. 326.

72. FED. R. CRIM. P. 18 (1979), reads as follows: "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience and the prompt administration of justice."

73. FED. R. CRIM. P. 18 (1979), Notes of the Advisory Committee.

74. 18 U.S.C. § 3161(a) (Supp. 1980).

75. See United States v. Lewis, 504 F.2d 92 (6th Cir. 1974), *cert. denied*, 421 U.S. 975 (1976), and Dupoint v. United States, 388 F.2d 39 (5th Cir. 1968), for a discussion of judicial treatment of venue questions.

76. 18 U.S.C. § 3161(a) (Supp. 1980) (emphasis added).

77. *See* H.R. Rep. No. 93-1508, 93d Cong., 2d Sess. 29 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS, 7401, 7405-06. The United States District Courts are the trial courts within the federal system. Each state has at least one district court; some larger states have several divisions within a single district (e.g., Northern Division Eastern District).

78. FED. R. CRIM. P. 26.2. The enactment of Rule 26.2, transmitted by the Supreme Court to Congress on April 30, 1979, was postponed by Congress via Pub. L. No. 96-42, July 31, 1979, 93 Stat. 326, until December 1, 1980 or until approved by Congress whichever comes first. The Rule reads as follows:

(a) Motion for production. After a witness other than the defendant has

vides for the production of witness' statements to the opposing party relative to the particular subject matter of that witness' testimony on direct examination.[79] The transfer of these statements is accomplished by motion[80] and is subject to the supervision and discretion of the court.[81] In essence, the rule extends the principles of the Jencks Act[82] to provide for the production of defense witness' statements to the prosecution.[83]

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testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the government or the defendant and his attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

(b) Production of entire statement. If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party.

(c) Production of excised statement. If the other party claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over his objection shall be preserved by the attorney for the government and, in the event of a conviction and an appeal by the defendant, shall be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

(d) Recess for examination of statement. Upon delivery of the statement to the moving party, the court, upon application of that party, may recess proceedings in the trial for the examination of such statement and for preparation for its use in the trial.

(e) Sanction for failure to produce statement. If the other party elects not to comply with an order to deliver a statement to the moving party, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the attorney for the government who elects not to comply, shall declare a mistrial if required by the interest of justice.

(f) Definition. As used in this rule, a "statement" of a witness means:

(1) a written statement made by the witness that is signed or otherwise adopted or approved by him;

(2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or

(3) a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.

79. FED. R. CRIM. P. 26.2(a), *effectiveness postponed*, Pub. L. No. 96-42, July 31, 1979, 93 Stat. 326.

80. *Id.*

81. *Id.* at 26.2 (c).

82. 18 U.S.C. § 3500 (1969).

83. 18 U.S.C. § 3500(a) (1969) reads:

In any criminal prosecution brought by the United States, no statement or

Proposed rule 26.2 is aimed at enhancing the search for truth rather than confusing or stifling it.[84] This purpose is affected by requiring the defense to produce the statements of its witnesses for use by the government in the same manner that the government must produce statements of its witnesses as prescribed by the Jencks Act. This results in an opportunity for both sides to compare a witness' testimony at trial with prior statements or testimony. Thus, a witness can be impeached by an opponent in possession of his prior inconsistent statements. Further, the rule codifies the view that the production of statements is a mutual obligation.[85]

Rule 26.2 represents a codification of the rule enunciated by the United States Supreme Court in *United States v. Nobles.*[86] In that case, an investigator hired by the defense to interview prospective prosecution witnesses was not allowed to testify when the defense refused to turn over portions of the investigator's report to the prosecution. The Court concluded that "in a proper case, the prosecution can call upon [the defense] for production of witness statements that facilitate 'full disclosure of all [relevant] facts.' "[87] Rule 26.2, in response to *Nobles,* provides a framework for the development of a compulsory process for the production of evidence needed by either the prosecution or the defense.[88] The integrity of the judicial system, so dependent on the full disclosure of facts and the cooperation of counsel, is protected and enhanced.[89]

Under subsection (c) of the proposed rule, disputes between the parties as to whether the requested statement relates to the witness' testimony are to be resolved by the court through an *in camera* inspection of the statement.[90] Upon inspection of the statement, the court

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report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case. *Id. Compare* the wording of 18 U.S.C. § 3500(a) *with* FED. R. CRIM. P. 26.2, note 78 *supra.*

84. FED. R. CRIM. P. 26.2, Notes of the Advisory Committee, *effectiveness postponed,* Pub. L. No. 46-42, July 31, 1979, 93 Stat. 326.

85. *See also* United States v. Nobles, 422 U.S. 225 (1975); United States v. Pulvirenti, 408 F. Supp. 12 (E.D. Mich. 1976); People v. Sanders, 110 Ill. App. 2d 85, 249 N.E. 2d 124 (1969); State v. Montague, 55 N.J. 387, 262 A.2d 398 (1970); People v. Damon, 24 N.Y. 2d 256, 299 N.Y.S. 2d 830, 247 N.E.2d 651 (1969).

86. 422 U.S. 225 (1975). *See also* Goldberg v. United States, 425 U.S. 94 (1976).

87. 422 U.S. at 231 (1975) (citing United States v. Nixon, 418 U.S. 683, 709 (1975)).

88. 422 U.S. at 230-31.

89. *Id.*

90. FED. R. CRIM. P. 26.2(c), *effectiveness postponed,* Pub. L. No. 46-42, July 31, 1979, 93 Stat. 326.

may excise those portions of it that are deemed immaterial or irrelevant, or it may strike the statement *in toto.*[91] This subsection acts as a "safeguard against abuse and . . . enable[s] a defendant who believes that a demand is being improperly made to secure a swift and just resolution of the issue."[92] The excised portions of the statement, however, are to be retained for possible review by an appellate court.[93]

Additionally, rule 26.2 provides for sanctions in those instances when a party refuses to comply with the ordered disclosure.[94] Upon noncompliance, the court "shall order that the testimony of the witness be stricken from the record," or, in the case of the prosecution, the court may declare a mistrial "if required by the interest of justice."[95] The difference in sanctions is necessary to ensure that the prosecution bears its burden of persuasion. Should the prosecution refuse to turn over materials relevant to one of its witness' testimony, the defense would bear an undue burden in attempting to impeach that witness.[96] Presumably, the possibility of sanctions will aid in the disclosure of relevant facts, which will ultimately lead to a fair trial, free of surprises and inconsistencies.

H. Amendments to Rule 32: Judgment

The 1979 changes in the Federal Rules also included several minor changes to rule 32. Specifically, the recent modification of the rule included changes to both subsections 32(c)(3)(E)[97] and 32(f):[98] realignment of the statutes mentioned in (c)(3)(E)[99] necessitated its change; 32(f) is abrogated in light of the proposed addition of 32.1.

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91. *Id.*

92. FED. R. CRIM. P. 26.2, *effectiveness postponed,* Pub. L. No. 46-42, July 31, 1979, 93 Stat. 326.

93. *Id.*

94. FED. R. CRIM. P. 26.2(e), *effectiveness postponed,* Pub. L. No. 46-42, July 31, 1979, 93 Stat. 326.

95. *Id.*

96. *See* Jencks v. United States, 353 U.S. 657 (1957). *See also* United States v. Nobles, 422 U.S. 225 (1975).

97. FED. R. CRIM. P. 32(c)(3)(E) (1979) reads: "(E) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons or the Parole Commission pursuant to 18 U.S.C. §§ 4205(c), 4252, 5010(e), or 5037(c) shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule."

98. Abrogated FED. R. CRIM. P. 32(f) read: "(f) Revocation of Probation. The court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing."

99. Former 18 U.S.C. § 4208(b) is now, in substance, 18 U.S.C. § 4205(c); former 18 U.S.C. § 5034 is now, in substance, 18 U.S.C. § 5037(c).

I. *Proposed Rule 32.1: Right to a Hearing Before Probation Revocation or Modification*

Proposed new rule 32.1,[100] dealing with a probationer's right to a hearing before the revocation or modification of his probation, is yet another important change in the Federal Rules of Criminal Procedure. Like other additions and amendments to the Rules,[101] proposed rule 32.1 implements changes which clarify and delineate the procedural rights to be accorded an individual in a criminal proceeding.[102] The

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100. FED. R. CRIM. P. 32.1. The enactment of Rule 32.1, transmitted by the Supreme Court to Congress on April 30, 1979, was postponed by Congress via Pub. L. No. 42-46, July 31, 1979, 93 Stat. 326, until December 1, 1980 or until approved by Congress whichever comes first. Rule 32.1 reads as follows:

(a) Revocation of Probation.

(1) Preliminary Hearing. Whenever a probationer is held in custody on the ground that he has violated a condition of his probation, he shall be afforded a prompt hearing before any judge, or a United States magistrate who has been given authority pursuant to 28 U.S.C. § 636 to conduct such hearings, in order to determine whether there is probable cause to hold the probationer for a revocation hearing. The probationer shall be given

(A) notice of the preliminary hearing and its purpose and of the alleged violation of probation;

(B) an opportunity to appear at the hearing and present evidence in his own behalf;

(C) upon request, the opportunity to question witnesses against him unless, for good cause, the federal magistrate decides that justice does not require the appearance of the witness; and

(D) notice of his right to be represented by counsel. The proceedings shall be recorded stenographically or by an electronic recording device. If probable cause is found to exist, the probationer shall be held for a revocation hearing. The probationer may be released pursuant to Rule 46(c) pending the revocation hearing. If probable cause is not found to exist, the proceedings shall be dismissed.

(2) Revocation Hearing. The revocation hearing, unless waived by the probationer, shall be held within a reasonable time in the district of probation jurisdiction. The probationer shall be given

(A) written notice of the alleged violation of probation;

(B) disclosure of the evidence against him;

(C) an opportunity to appear and to present evidence in his own behalf;

(D) the opportunity to question witnesses against him; and

(E) notice of his right to be represented by counsel.

(b) Modification of Probation. A hearing and assistance of counsel are required before the terms or conditions of probation can be modified, unless the relief granted to the probationer upon his request or the court's own motion is favorable to him.

101. *See, e.g.*, the amendments and discussions on Rules 6(e) *supra* at subsection A of this comment, 11(e)(2) and (6) *supra* at subsection D of this comment, 41 *infra* at subsection M of this comment, and 44 *infra* at subsection N of this comment.

102. Rule 32.1, like other changes in the Rules of Criminal Procedure, is a response to developments in recent caselaw. Rule 32.1 formalizes the Supreme Court rulings in Morrissey v. Brewer, 408 U.S. 471 (1972), and Gagnon v. Scarpelli, 411 U.S. 778 (1973).

proposed rule specifies that a probationer, held for an alleged probation violation is entitled to a prompt hearing to determine if there is probable cause for a revocation hearing.[103] Further, the probationer is entitled to present witnesses on his own behalf, the right to counsel, and the right to question witnesses against him.[104]

The genesis of the proposed rule was the Supreme Court's ruling in *Morrissey v. Brewer.*[105] In that case, the Court held a defendant arrested for a parole violation was entitled to a preliminary hearing to determine whether there was probable cause to believe that the defendant had in fact violated his parole.[106] In *Gagnon v. Scarpelli*[107] the Court ruled that the procedural rights granted a parolee under *Morrissey* should be extended to one detained for an alleged probation violation.[108] The Court reasoned that the revocation of probation results in a serious deprivation of liberty, and, at the very least, entitles the probationer to certain Constitutional safeguards.[109] Consistent with *Scarpelli,* subdivision (a)(1) of rule 32.1 provides for a preliminary hearing to determine probable cause whenever the accused is held in custody.[110] If a probation violator is in custody there is an entitlement to a preliminary hearing;[111] custody triggers the procedural protection. Consequently, a preliminary hearing is not required when a probationer voluntarily appears before authorities,[112] or when his appearance in court is required by a show cause order.[113]

In those instances when a preliminary hearing is required such hearing must be held as soon after the probationer's detention as is "promptly convenient."[114] Thus, evidence that is still fresh in the minds of witnesses, and that is readily available can be presented to the

103. FED. R. CRIM. P. 32.1(a)(1), *effectiveness postponed,* Pub. L. No. 46-42, July 31, 1979, 93 Stat. 326.

104. *Id.* at 32.1(a)(1)(A), (B), (C), and (D).

105. 408 U.S. 471 (1972).

106. *Id.*

107. 411 U.S. 778 (1973).

108. *Id.* at 781-82.

109. *Id.*

110. FED. R. CRIM. P. 32.1 (a) (1), *effectiveness postponed,* Pub. L. No. 46-42, July 31, 1979, 93 Stat. 326.

111. United States v. Tucker, 524 F.2d 77 (5th Cir. 1975), *cert. denied,* 424 U.S. 966 (1976).

112. United States v. Strada, 503 F.2d 1081 (8th Cir. 1974).

113. United States v. Langford, 369 F. Supp. 1107 (N.D. Ill. 1973). In *Langford,* the court held that a probationer not deprived of his liberty, who was "merely required" to appear in court to show cause why his probation should not be revoked, was not entitled to a preliminary hearing. The court found *Gagnon v. Scarpelli,* 411 U.S. 778 (1973) inapplicable, because the show cause requirement took the place of the preliminary hearing.

114. Morrissey v. Brewer, 408 U.S. 471, 485 (1972).

court for the probable cause determination. The preliminary hearing requirement of the proposed rule is analogous to an arraignment in a criminal case; the accused is informed of the charge against him and apprised of his rights.

The hearing to which a probationer held in custody is entitled is to determine whether there is probable cause to revoke the probationer's freedom.[115] If the court finds that there is insufficient cause to detain the probationer, he must be released.[116] To adequately present his case, the probationer must be given notice of the preliminary hearing, its purpose, notice of the alleged probation violation, and notice of his right to counsel.[117] The notice must be such that the probationer is apprised "of the conditions of his probation which he is alleged to have violated," as well as the dates and events which support the charge.[118] Additionally, the probationer is entitled to present evidence at the hearing, and to question witnesses, if allowed by the magistrate.[119] The proceedings of the hearing are to be recorded.

If probable cause is found to exist, the probationer is to be held for a revocation hearing.[120] At the revocation hearing, which is an evaluation of all relevant facts regarding the alleged probation violation, the probationer is again entitled to written notice of his alleged violation, the disclosure of the evidence against him, the opportunity to appear and present evidence on his own behalf, the opportunity to question witnesses against him, and notice of his right to be represented by counsel.[121] Rule 32.1(a)(2) mandates that his revocation hearing be held "within a reasonable time" of the preliminary hearing.

Revocation of a defendant's probation is proper if the court finds that the terms of probation have been violated and that revocation appears to be warranted.[122] Revocation is a matter largely within the discretion of the court.[123] The evidence presented at the revocation hearing need not be convincing "beyond a reasonable doubt" in order

115. FED. R. CRIM. P. 32.1(a), *effectiveness postponed*, Pub. L. No. 42-46, July 31, 1979, 93 Stat. 326.

116. *Id.* at 32.1(a)(1).

117. *Id.* at 32.1(a)(1)(A) and (D).

118. Kartman v. Parratt, 397 F. Supp. 531, 534 (D. Neb. 1975), *aff'd*, 535 F.2d 450 (8th Cir. 1976).

119. FED. R. CRIM. P. 32.1 (a)(1)(B), (C), and (D), *effectiveness postponed*, Pub. L. No. 42-46, July 31, 1979, 93 Stat. 326.

120. *Id.* at 32.1 (a)(1).

121. *Id.* at 32.1(a)(2)(A), (B), (C), (D), and (E).

122. FED. R. CRIM. P. 32.1, Notes of the Advisory Committee, *effectiveness postponed*, Pub. L. No. 42-46, July 31, 1979, 93 Stat. 326.

123. *See* ABA STANDARDS RELATING TO PROBATION, § 3.3 (Approved Draft, 1970).

to support a revocation.[124] Rather, "[a]ll that is required is that the evidence and facts be such as to reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of the probation."[125]

The lack of a need for proof beyond a resonable doubt in a revocation hearing lessens the impact of rule 32.1. If, as the Supreme Court reasoned in *Morrissey*[126] and *Scarpelli,*[127] a parolee or probationer must be afforded due process protection against the serious deprivation of liberty,[128] then proof beyond a reasonable doubt should be the standard employed in revocation proceedings. The effect of a probation revocation is the imposition of the sentence originally imposed or a lesser sentence.[129] The deprivation of liberty at this stage is no less than it would have been had the probationer been incarcerated when originally found guilty. Perhaps the only justification for not employing the "beyond a reasonable doubt" standard is that the defendant has already been adjudged guilty at a trial or plea proceeding. It would seem, however, that the rights of a probationer are no less important than those of a defendant.

Rule 32.1 further provides guidelines for modification of probation by requiring a hearing and assistance of counsel.[130] Rule 32.1(b) provides an avenue for the resolution of disputes as to the meaning of ambiguous terms in a probation order[131] so as to avoid a future revocation based upon a violation of that term. Additionally, when a probation officer is overworked or neglectful, or when the probation conditions are unreasonable or outdated, a probationer should have a recourse for modification.[132]

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124. United States v. Francischine, 512 F.2d 827 (5th Cir.), *cert. denied,* 423 U.S. 931 (1975). Proof beyond a reasonable doubt is not deemed necessary because the probationer has already had his day in court and been found guilty of the charges for which he is now on probation. Since probation is in the discretion of the court in the first place, there is no need for a standard which guards the defendant's rights at this stage of the proceedings.

125. *Id.* at 829.

126. 408 U.S. 471 (1972).

127. 411 U.S. 778 (1973).

128. *See* note 92 and accompanying text *supra.*

129. 18 U.S.C. § 3653 (1976) (Probation modification).

130. FED. R. CRIM. P. 32.1(b), *effectiveness postponed,* Pub. L. No 42-46, July 31, 1979, 93 Stat. 326.

131. FED. R. CRIM. P. 32.1(b), Notes of the Advisory Committee, *effectiveness postponed,* Pub. L. No. 42-46, July 31, 1979, 93 Stat. 326.

132. *Id.* A sentencing court must be able to keep up with changes in the law as well as changes in society. Further, the court is under a duty to respond to those changes. The court must be able to respond to changes in a "probationer's circumstances as well as new ideas and methods of rehabilitation." *Id.*

J. *Amendment to Rule 35: Correction or Reduction of Sentence*

The amendment to rule 35[133] confers the discretionary power upon a judge to reduce a sentence from incarceration to probation.[134] This addition represents a departure from prior case law.[135] Formerly, a judge was prohibited from granting such a reduction to a defendant who had already begun serving his sentence.[136] With the amendment, the grant of probation to one already incarcerated is considered a "permissible reduction of sentence."[137] The amendment reflects a policy which encourages a court to "consider all alternatives that were available at the time of imposition of the original sentence."[138] Thus, a court may consider a defendant's motion to reduce an imposed sentence in light of those sentencing options which were originally open to it.

K. *Amendment to Rule 40: Commitment to Another District*

The amendment to rule 40[139] involves a complete restyling of the

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133. FED. R. CRIM. P. 35 (1979) reads as follows:

(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. The court may reduce a sentence within 120 days after the sentence is imposed, 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. The court may also reduce a sentence upon revocation of probation as provided by law. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

134. FED. R. CRIM. P. 35 (1979), Notes of the Advisory Committee.

135. In both Affronti v. United States, 350 U.S. 79 (1955), and United States v. Murray, 275 U.S. 347 (1928), the Supreme Court, in construing the Probation Act, 18 U.S.C. § 3651, found that a judge could not grant probation to a convict who had already begun serving time in the penitentiary.

136. *Id.*

137. FED. R. CRIM. P. 35(b) (1979).

138. United States v. Golphin, 362 F. Supp. 698, 699 (W.D. Pa. 1973). *See also* FED. R. CRIM. P. 35(b) (1979), Notes of the Advisory Committee.

139. FED. R. CRIM. P. 40 (1979) reads as follows:

(a) Appearance Before Federal Magistrate.—If a person is arrested in a district other than that in which the offense is alleged to have been committed, he shall be taken without unnecessary delay before the nearest available federal magistrate. Preliminary proceedings concerning the defendant shall be conducted in accordance with Rules 5 and 5.1, except that if no preliminary examination is held because an indictment has been returned or an information filed or because the defendant elects to have the preliminary examination conducted in the district in which the prosecution is pending, the person shall be held to answer upon a finding that he is the person named in the indictment, information or warrant. If the defendant is held to answer, he shall be held to answer in the district court in

prior rule. There is a substantial change in the procedure accorded those arrested in districts different from that of the crime. The distinction between arrest in a nearby district and one in a distant district is abolished. The new rule adds provisions not found in the former rule, dealing with the arrest of probationers in districts other than the district of supervision. It also clarifies the bailsetting procedure and provides a postarrest procedure for persons who failed to appear in other districts.[140]

In eliminating the distinction between arrests in nearby and distant districts, amended rule 40 provides for a uniform preliminary hearing procedure whenever an accused is arrested outside the district where

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which the prosecution is pending, provided that a warrant is issued in that district if the arrest was made without a warrant, upon production of the warrant or a certified copy thereof.

(b) Statement by Federal Magistrate.—In addition to the statements required by Rule 5, the federal magistrate shall inform the defendant of the provisions of Rule 20.

(c) Papers.—If a defendant is held or discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

(d) Arrest of Probationer.—If a person is arrested for a violation of his probation in a district other than the district of supervision, he shall be taken without unnecessary delay before the nearest available federal magistrate. The federal magistrate shall:

(1) Proceed if jurisdiction over the probationer is transferred to that district pursuant to 18 U.S.C. § 3653;

(2) Hold a prompt preliminary hearing if the alleged violation occurred in that district, and either (i) hold the probationer to answer in the district court of the district having probation supervision or (ii) dismiss the proceedings and so notify that court; or

(3) Otherwise order the probationer held to answer in the district court of the district having probation jurisdiction upon production of certified copies of the probation order, the warrant, and the application for the warrant, and upon a finding that the person before him is the person named in the warrant.

(e) Arrest for Failure to Appear.—If a person is arrested on a warrant in a district other than that in which the warrant was issued, and the warrant was issued because of the failure of the person named therein to appear as required pursuant to a subpoena or the terms of his release, the person arrested shall be taken without unnecessary delay before the nearest available federal magistrate. Upon production of the warrant or a certified copy thereof and upon a finding that the person before him is the person named in the warrant, the federal magistrate shall hold the person to answer in the district in which the warrant was issued.

(f) Bail.—If bail was previously fixed in another district where a warrant, information or indictment issued, the federal magistrate shall take into account the amount of bail previously fixed and the reasons set forth therefor, if any, but will not be bound by the amount of bail previously fixed. If the federal magistrate fixes bail different from that previously fixed, he shall set forth the reasons for his action in writing.

140. FED. R. CRIM. P. 40(a), (d), (e), and (f) (1979).

the warrant was issued or the alleged offense committed. Under the old rule, one arrested in a nearby district[141] on the basis of a warrant issued or offense committed in another district was entitled to proceedings under rules 5 and 5.1.[142] Rules 5 and 5.1 provide for a preliminary determination of probable cause that an offense was committed and that it was committed by the arrestee. One arrested in a distant district,[143] however, was only entitled to a hearing before a magistrate to determine if there was sufficient evidence to order the defendant's removal to the district in which the arrest warrant was issued or the offense committed. The enactment of a uniform procedure will adequately "protect the [due process] rights of an arrestee wherever he might be arrested,"[144] because the probable cause determination must now be made no matter where the defendant or probationer is apprehended. The rule retains the requirement that a warrant must be issued by the district in which the alleged offense took place if the accused was arrested without a warrant. This guarantees that the district of anticipated prosecution will have made a determination of probable cause.[145]

A new provision of rule 40 is subsection (d) which deals with the arrest of probationers in districts other than the district of supervision. Under this subsection, the probationer, when arrested in a district other than the one having supervision of his probation, can be returned to the supervisory district or retained in the arresting district upon a proper transfer of jurisdiction.[146] Practically, such a transfer of jurisdiction to the arresting district would be especially appropriate if the accused/probationer was residing in the transferee district. Con-

141. Nearby district is defined as a different district in the same state, or a district in a different state, but less than one hundred miles from the place of arrest. FED. R. CRIM. P. 40, *abrogated,* August 1, 1979.

142. FED. R. CRIM. P. 40 (1979), Notes of the Advisory Committee.

143. Distant district is defined as a place in a different state which is over one hundred miles from the place of arrest. FED. R. CRIM. P. 40, *amended by* Pub. L. No. 42-46, July 31, 1979, 93 Stat. 326.

144. FED. R. CRIM. P. 40 (1979), Notes of the Advisory Committee.

145. *Id.*

146. 18 U.S.C. § 3653 (1976) provides in pertinent part that:

> 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.

siderable expense and loss of time can be saved by transferring jurisdiction over the probationer rather than transferring him back to the supervisory district.[147] However, when the probationer is arrested in the same district in which the alleged probation violation occurred, he is entitled to a prompt preliminary hearing.[148] Should proposed rule 32.1 be adopted, then presumably, the hearing would be conducted in accordance with the procedure set forth therein. If, however, the alleged probation violation took place in a district other than the one in which the probationer is arrested, there is no requirement for a preliminary hearing.[149] The arresting district is required to hold the probationer to answer in the district having supervisory jurisdiction. The court will hold the probationer for production of the probation order, the warrant, the application for the warrant, and for a finding that the person before the court is the person named in the warrant.[150] The probationer will not be held to answer in the supervisory district until a warrant is issued for him and produced to the arresting district—procedural rights are thereby safeguarded.[151]

Subdivision (e) of rule 40, which has no counterpart in the former rule, deals with the arrest of persons who have escaped or otherwise failed to appear pursuant to subpoena in a district other than the one which issued the warrant. A defendant who is a fugitive from justice is not entitled to a preliminary hearing as provided for in subsection (a) of the rule.[152] Upon production of the warrant and a determination as to proper identity, the accused will be held to answer in the district in which the warrant was issued. For the purpose of returning a prisoner who has escaped from custody, the court may summarily direct his return under its general power to issue writs.[153]

A further modification of rule 40, set forth in subsection (f), allows a federal magistrate to fix the bail of an arrestee at an amount dif-

147. FED. R. CRIM. P. 40 (1979), Notes of the Advisory Committee.

148. *See* notes 100-132 and accompanying text *supra* for a discussion of Rule 32.1.

149. *See* FED. R. CRIM. P. 40(d) (1979). *See also* FED. R. CRIM. P. 40(d)(3) (1979), Notes of the Advisory Committee.

150. *Id.*

151. *See* notes 86-100 and accompnaying text *supra.*

152. Note the Eighth Circuit's treatment of this issue in Bandy v. United States, 408 F.2d 518 (8th Cir. 1969). This case involved a defendant released on his own recognizance, but who failed to appear at a court ordered hearing. He objected to his arrest in New York and subsequent removal to Kansas which was not in compliance with Rule 40 procedures. The court held that "the provisions of Rules 5 and 40 . . . may not be availed of by a prisoner in escape status." *Id.* at 521 (quoting Rush v. United States, 290 F.2d 709, 710 (5th Cir. 1961)).

153. Notzoff, *Removal of Defendants in Federal Criminal Proceedings,* 4 F.R.D. 455 (1945).

ferent from that previously set in another district.[154] The magistrate is to take into account the previous bail amount, but is not bound by it.[155] Any changes in bail made by the magistrate must be accompanied by a written explanation.[156] By allowing the magistrate greater discretion, the individual circumstances of a particular defendant can now be given greater consideration.

The various changes in rule 40 have affected a complete restyling of that rule.

L. Rule 41: Search and Seizure

The 1979 amendment to subsection (b) of rule 41 authorizes the issuance of a warrant to search for persons who may be unlawfully restrained or who may be suspects in the commission of a crime.[157] There is no counterpart in old rule 41, which was directed only to the search and seizure of certain kinds of property and contraband. This amendment prescribes a procedure for procuring a search warrant to search for a person on private premises. It is a well settled principle of law that law enforcement officers "may not constitutionally enter the home of a private individual to search for another person, though he be named in a valid arrest warrant . . . absent probable cause that the named suspect is present within at the time."[158] However, there is a split among the circuits as to whether a search warrant is necessary to enter private premises to effectuate an arrest.[159] Some courts have

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154. FED. R. CRIM. P. 40(f) (1979).

155. *Id.*

156. *Id.*

157. FED. R. CRIM. P. 41 (1979) reads in part:

(b) Property or Persons Which May Be Seized with a Warrant.—A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

158. Fisher v. Volz, 496 F.2d 333, 338 (3d Cir. 1974). *Accord,* Chambers v. Maroney, 399 U.S. 42 (1970).

159. *Compare* United States v. Fernandez, 480 F.2d 726 (2d Cir. 1973), *with* Virgin Islands v. Gereau, 502 F.2d 914 (3d. Cir. 1974), *cert. denied,* 420 U.S. 909 (1975). In the former case, the Second Circuit Court of Appeals found that no search warrant was necessary where the police had probable cause to believe that a suspect was hiding in the home of a third person; they found that a valid arrest was made in that case. In the latter case, the Third Circuit Court of Appeals found that absent exigent circumstances an arrest warrant could not be substituted for a search warrant. *But see* Payton v. New York, 48 U.S.L.W. 4375 (1980) where the Court held that the Fourth Amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest.

maintained that probable cause that a suspect is within the home of a third person is itself sufficient to validate an arrest entry.[160] Conversely, other courts have asserted that in the absence of exigent circumstances, a search warrant is a necessary prerequisite to the effectuation of such a valid arrest.[161] There is a body of authority which now holds that an arrest warrant is insufficient to justify police entry into the home of a third person to search for suspects named in an arrest warrant.[162] The logic of this position is that an arrest warrant indicates only that the police officer has probable cause to believe that the suspect has committed the crime; it affords no probable cause for believing that the suspect is located in a third person's home.[163] Recognizing that some courts are moving towards a requirement that police obtain a search warrant for such arrests, rule 41 provides police with the opportunity to obtain the necessary warrants.

In adddition to making a search warrant available to seize those persons in third party premises for whom there is probable cause to arrest, the amendment provides for search warrants to be issued to search for a person who is being held against their will.[164] Persons unlawfully restrained are "evidence" of a crime, and therefore properly the subject of a search warrant.[165] The availability of a search warrant provides for an initial neutral probable cause determination.

M. Proposed Amendment to Rule 44: Joint Representation

The final amendment to the Federal Rules of Criminal Procedure proposed by the Supreme Court on April 30, 1979, is the addition of subsection (c) to rule 44.[166] Rule 44(c), as proposed, provides that

160. United States v. Fernandez, 480 F.2d 726 (2d Cir. 1973); United States *ex rel.* Wright v. Woods, 432 F.2d 1143 (7th Cir. 1970), *cert. denied,* 401 U.S. 966 (1971).

161. United States v. Calhoun, 542 F.2d 1094 (9th Cir. 1976), *cert. denied,* 429 U.S. 1064 (1977).

162. *See, e.g.,* Virgin Islands v. Gereau, 502 F.2d 914 (3d Cir. 1974), *cert. denied,* 420 U.S. 909 (1975). *But see* note 159 *supra.*

163. Fisher v. Volz, 496 F.2d 333, 341 (3d Cir. 1974).

164. FED. R. CRIM. P. 41(b)(4) (1979).

165. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 210.3(1)(d) (Proposed Official Draft Complete Text and Commentary, 1975).

166. FED. R. CRIM. P. 44(c), *effectiveness postponed,* Pub. L. No. 42-46, July 31, 1979, 93 Stat. 326 until December 1, 1980 or at such time when Congress approves the addition, which ever comes first. Rule 44(c) reads:

> Joint Representation. Whenever two or more defendants have been jointly charged pursant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate

whenever two or more defendants are jointly charged under rule 8[167] or joined for trial under rule 13,[168] and are represented by the same counsel or by counsel who are associated in the practice of law, the court is to personally advise each defendant of his right to effective assistance of counsel including separate representation. The rule thus "establishes a procedure for avoiding the occurence of events which might otherwise give rise to a plausible postconviction claim that because of joint representation the defendants . . . were deprived of their Sixth Amendment right to the effective assistance of counsel."[169]

The potential problems arising from dual representation are legion; preventing and minimizing these problems are the laudable goals to which rule 44(c) is directed. One difficulty which may arise in the course of trial is a conflict of interest between codefendants if either of them plans to take the stand.[170] Thus, an attorney representing both codefendants may be precluded from giving full and effective assistance of counsel to both of his clients.[171] Problems may also be encountered in pretrial situations. Codefendants may be hampered in plea bargaining attempts, as one defendant might be tempted to plead guilty to a lesser charge in exchange for testimony against the other, resulting in pressure on the second defendant to plead guilty rather than facing his codefendant's testimony at trial.[172]

Under a rule 44(c) inquiry, the court must address each defendant personally, and advise him of the potential dangers and conflicts of interest which may arise from dual representation.[173] It is the court's duty to ensure that both defendants understand the risks of dual representation and that they realize that they have a right to separate counsel.[174] The court's inquiry is beneficial for both the defendant and the pro-

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representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

167. FED. R. CRIM. P. 8(b) provides that two or more defendants may be jointly charged if they have participated in the same act or transaction constituting the offense with which they are charged.

168. FED. R. CRIM. P. 13 provides that the court may order two or more indictments or informations to be tried together if the offenses and defendants could have been joined in a single indictment or information.

169. FED. R. CRIM. P. 44(c), Notes of the Advisory Committee, *effectiveness postponed*, Pub. L. No. 42-46, July 31, 1979, 93 Stat. 326.

170. Morgan v. United States, 396 F.2d 110 (2d Cir. 1968).

171. United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976).

172. United States v. Mari, 526 F.2d 117 (2d Cir. 1975), *cert. denied*, 429 U.S. 941 (1976).

173. *See* United States v. Garcia, 517 F.2d 272, 278 (5th Cir. 1975).

174. *See* United States v. Foster, 469 F.2d 1 (1st Cir. 1972).

secution, as it provides for early identification of potential conflicts before prejudicial error occurs.[175]

III. CONCLUSION

The recent amendments to the Federal Rules of Criminal Procedure make a number of significant changes.[176] The amendments are generally corrective and conform the criminal rules to recent court decisions and other changes in the law. The modifications and additions to the rules seek to establish a balance in their application so that both the prosecution and the defense share in their benefits and burdens. The requirement that all grand jury proceedings be recorded, the provisions dealing with disclosure of prior statements made by either party's witness, and the detailing of a procedure for probation revocation hearings demonstrate a concern that the Rules genuinely provide for the prompt, efficient, and fair administration of justice. The amendments will undoubtedly bring that goal closer to reality.

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175. United States v. Garcia, 517 F.2d 272 (5th Cir. 1975). *See also* United States v. Mari, 526 F.2d 117 (2d Cir. 1975), *cert. denied,* 429 U.S. 941 (1976); United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973). In *Mari* the defendant was informed by the court of the possible conflicts involved in joint representation, but the defendant nonetheless plead guilty to the charges against him. On appeal, the court would not hear the defendant complain of the representation he received. *See also* United States *ex rel* Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973); United States v. Foster, 469 F.2d 1 (1st Cir. 1972).

176. 125 CONG. REC. H 6735-36 (daily ed. July 23, 1979) (remarks of Rep. Drinan).