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# The Federal Rules of Criminal Procedure: Application and Practice

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- I. **SCOPE OF PAPER.** This paper presents an overview of the Federal Rules of Criminal Procedure, and discusses the rules most frequently encountered in the typical case. Practice commentaries and cross-references to authorities outside the rules are generally placed in footnotes. In many instances, the rule or a portion of it will be quoted. In every instance, the reader should consult the full text of the rule, with notes and case-law interpretations, for the fullest understanding. A bibliography of source material for further research on the rules, and federal criminal practice manuals is provided in part III below.
- II. **THE FEDERAL RULES OF CRIMINAL PROCEDURE.**
  - A. **CURRENT RULES.**
    1. **Rule 1. Scope.** The rules govern “procedure in all criminal proceedings in the courts of the United States” as provided more specifically in Rule 54(a); and apply, “whenever specifically provided in one of the rules, to preliminary, supplementary, and special proceedings before United States magistrate judges . . . .” Rule 1.
    2. **Rule 2. Purpose and Construction.** The rules “shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.” Rule 2.
    3. **Rule 3. The Complaint.** “The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate judge.” Rule 3.
    4. **Rule 4. Arrest Warrant or Summons upon Complaint.**
      - a. **Issuance.** If probable cause appears from the complaint or from any affidavits filed with it, a warrant of arrest shall issue. Upon request of the government, a summons rather than a warrant may issue. “More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.” Rule 4(a).

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- b. **Probable Cause.** “The finding of probable cause may be based upon hearsay evidence in whole or in part.” Rule 4(b).
  - c. **Execution.** “The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.” Rule 4(d)(2). The officer need not have the warrant in possession at the time of the arrest, but if not “the officer shall then inform the defendant of the offense charged and of the fact that a warrant has been issued.” Rule 4(d)(3).
5. **Rule 5. Initial Appearance Before the Magistrate.**<sup>1</sup>
- a. **In General.** An officer making an arrest “shall take the arrested person without unnecessary delay before the nearest available federal magistrate judge,” or, if a federal magistrate judge is not “reasonably available,” before a state or local judicial officer authorized by 18 U.S.C. § 3041. Compliance with this rule is not required when an officer makes an arrest under a warrant based on a complaint that charges only a violation of 18 U.S.C. § 1073, Flight to avoid prosecution or giving testimony, provided “the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest and an attorney for the government moves promptly, in the district in which the warrant was issued, to dismiss the complaint.” Rule 5(a).<sup>2</sup>

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1 See Rule 46 (Release from Custody), and Title 18, Ch. 207, Release and Detention Pending Judicial Proceedings, 18 U.S.C. §§ 3141–3156. Section 3154, Functions and powers relating to pretrial services, defines the pretrial services function of collecting, verifying, and reporting to the judicial officer information pertaining to the pretrial release of an individual. Typically, a pretrial services officer (or a probation officer performing pretrial services) will seek to interview an accused person before presentment, to gather information pertinent to the pretrial release or detention decision. While information gained by pretrial services has limited confidentiality, it will be disclosed to the attorney for the accused and the attorney for the Government, and it will be provided to the probation office for preparation of any presentence report. Some of the information sought in the pretrial services interview may affect sentence under the sentencing guidelines.

2 A confession obtained during a period of unnecessary delay in taking an arrested person before a magistrate may be subject to suppression. See 18 U.S.C. § 3501; *United States v. Perez*, 733 F.2d 1026 (2d Cir. 1984); cf. *United States v. Causey*, 835 F.2d 1527, 1529 (5th Cir. 1988). Take note that Rule 54(c) defines the term “federal magistrate judge” to include not only a United States magistrate judge, but a “judge of the United States,” which “includes

- b. **Misdemeanors.** “If the charge against the defendant is a misdemeanor or other petty offense triable by a United States magistrate judge under 18 U.S.C. § 3401, the magistrate judge shall proceed in accordance with Rule 58.” Rule 5(b).<sup>3</sup>
- c. **Offenses Not Triable by the United States Magistrate.** Rule 5(c) prescribes procedures for the initial appearance, including the advice and warnings to be given by the magistrate judge. “A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court.”<sup>4</sup> Rule 5(c). The preliminary examination shall be held not later than 10 days following the initial appearance if the defendant is in custody, and not later than 20 days if defendant is not in custody. These time limits may be extended under conditions specified in the rule. No preliminary examination shall be held if the defendant is indicted or an information filed in district court before the date set for the preliminary examination.
- 5.1. **Rule 5.1. Preliminary Examination.**<sup>5</sup> If the magistrate judge finds from the evidence “probable cause to believe that an offense has been committed and that the defendant committed it,” the magistrate judge shall hold the defendant to answer in the district court. Rule 5.1(a). “The finding of probable cause may be based upon hearsay evidence in whole or in part.” *Id.*

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a judge of a district court, court of appeals, or the Supreme Court.”

A judicial determination of probable cause must be afforded within 48 hours after a warrantless arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

- 3 When so designated, a magistrate judge has jurisdiction to try a petty offense without consent of the accused. 18 U.S.C. § 3401(b) (as amended effective Nov. 13, 2000). A designated magistrate judge may try other misdemeanor charges only with the express consent of the accused. *Id.*
- 4 *But see* Rule 58(b)(2)(G) (emphasis added): “*If the defendant is held in custody* and charged with a misdemeanor other than a petty offense, [the court shall inform the defendant of] the right to a preliminary examination in accordance with 18 U.S.C. § 3060 . . . .”
- 5 See also 18 U.S.C. § 3060, Preliminary examination. This statute provides that a preliminary examination is not required in enumerated circumstances, including that “an indictment is returned or, *in appropriate cases*, an information is filed against such person in a court of the United States.” § 3060(e) (emphasis added).

The defendant has the right to cross examine adverse witnesses and to introduce evidence in his own behalf.<sup>6</sup> “Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.” *Id.* If no probable cause is shown, the magistrate judge shall dismiss the complaint and discharge the defendant. “The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.” Rule 5.1(b).

6. **Rule 6. The Grand Jury.**<sup>7</sup> The grand jury consists of not less than 16 nor more than 23 members. Rule 6(a).
- a. **Objections.** The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors, or an individual juror, on the grounds specified. Rule 6(b)(1). “Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.” *Id.* “A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualifications of an individual juror, if not previously determined upon challenge. *It shall be made in the manner prescribed in 28 U.S.C. § 1867(e) . . .*” Rule 6(b)(2) (emphasis added) (manner set out in § 1867(d)).<sup>8</sup>

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6 “Rule 26.2(a)–(d) and (f) [governing production of witness statements] applies at any hearing under this rule, unless the court, for good cause shown, rules otherwise in a particular case.” Rule 5.1(d).

7 Title 18 U.S.C. § 1504 criminalizes an attempt

to influence the action or decision of any grand or petit jury of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any written communication, in relation to such issue or matter . . . .

This section does not prohibit “the communication of a request to appear before the grand jury.”

8 The Supreme Court held in *United States v. Mechanik*, 475 U.S. 66 (1986), that a guilty verdict rendered harmless a Rule 6(d) violation which was raised only during trial, even though the defense used all diligence to discover the violation before trial. The Court “express[ed] no opinion as to what remedy may be appropriate for a violation of Rule 6(d) that has affected the grand jury’s charging decision and is brought to the attention of the

- b. **Disclosure.** Grand jury proceedings are subject to a general rule of secrecy. Rule 6(e)(2). The rule provides exceptions, permitting disclosure “other than deliberations and vote of any grand juror” in specified circumstances. Rule 6(e)(3). The federal magistrate judge may order that an indictment be sealed and kept secret “until the defendant is in custody or has been released pending trial.” Rule 6(e)(4).
  - c. **Finding and Return.** “An indictment may be found only upon the concurrence of 12 or more jurors.” Rule 6(f).
  - d. **Discharge.** A grand jury shall serve until discharged, but not to exceed 18 months, unless the court extends the service up to 6 months “upon a determination that such extension is in the public interest.” Rule 6(g).<sup>9</sup>
7. **Rule 7. The Indictment and the Information.**
- a. **Use of Indictment or Information.** “An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.” Rule 7(a).
  - b. **Waiver of Indictment.** An offense punishable in excess of one year may be prosecuted by information “if the defendant, after having been advised of the nature of the charge and of the rights of the defendant, waives in open court prosecution by indictment.” Rule 7(b).
  - c. **Nature and Contents.** The rule states in part: “The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations

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trial court before the commencement of trial.” 475 U.S. at 74. (Rule 6(d) governs who may be present while the grand jury is in session.) The opinion distinguished *Vasquez v. Hillery*, 474 U.S. 254 (1986), a decision setting aside a final judgment of conviction because of racial discrimination in the composition of the grand jury, on the ground that result was “compelled by precedent directly applicable to the special problem of racial discrimination.” 475 U.S. at 70 n.1.

<sup>9</sup> But see Chapter 216, Special Grand Jury, 18 U.S.C. §§ 3331–3334.

made in one count may be incorporated by reference in another count.” Rule 7(c)(1).<sup>10</sup> To support a judgment of forfeiture, the indictment or information must “provide[ ] notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.” Rule 7(c)(2).

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<sup>10</sup> The Supreme Court has held that the levels of injury set out in the federal carjacking offense, 18 U.S.C. § 2119, that determine the penalty range are not sentencing factors, but instead are elements of the offense that must be alleged in the indictment and proved to the jury beyond a reasonable doubt. *United States v. Jones*, 119 S. Ct. 1215 (1999). The Court enunciated the constitutional principle underpinning this holding: “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” 117 S. Ct. at 1224 n.6. *See also Castillo v. United States*, 120 S. Ct. 2090 (2000) (as a matter of statutory interpretation, type of firearm is an element of the offense under 18 U.S.C. § 924(c)).

**N.B.:** In a decision that a dissenting justice called a “watershed change in constitutional law,” the Supreme Court elevated the constitutional principle of *Jones* to a constitutional holding: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 120 S. Ct. 2348, 2262–63 (2000). (The opinions in the case also suggest that five members of the Court believe that *Almendarez-Torres v. United States*, 118 S. Ct. 1219 (1998) (prior conviction in 8 U.S.C. § 1326(b)(2) is a sentencing factor, not an element of the offense), was incorrectly decided.)

Following *Apprendi*, the Fifth Circuit has renounced its prior precedent and held that drug quantity is an element of the offense when it increases the statutory maximum penalty under the federal drug statutes. *United States v. Keith*, 230 F.3d 784 (5th Cir. 2000); *United States v. Doggett*, 230 F.3d 160 (5th Cir. 2000). “*Apprendi* overruled our . . . jurisprudence that treated drug quantity as a sentencing factor rather than as an element of the offense under § 841.” *Keith*, 230 F.3d at 786. Accordingly, before a defendant can be subject to enhanced penalties based on drug quantity, “the quantity must be stated in the indictment and submitted to a jury for a finding of proof beyond a reasonable doubt.” *Doggett*, 230 F.3d at 165.

A circuit split exists over whether the rule of *Apprendi* extends to a mandatory *minimum* penalty. *United States v. Ramirez*, No. 98-6130, 2001 WL 137939 (6th Cir. Feb. 16, 2001) (extending *Apprendi* to minimums; acknowledging conflict with Fifth and Eighth Circuits).

- d. **Surplusage.** “The court on motion of the defendant may strike surplusage from the indictment or information.” Rule 7(d).
  - e. **Amendment of Information.** “The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.” Rule 7(e).
  - f. **Bill of Particulars.** “The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.” Rule 7(f).
8. **Rule 8. Joinder of Offenses and Defendants.** Rule 8 provides:
- “(a) **Joinder of Offenses.** Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
  - “(b) **Joinder of Defendants.** Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.”<sup>11</sup>

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<sup>11</sup> The Supreme Court has held that a misjoinder under Rule 8(b) is subject to harmless-error analysis, and does not require reversal unless it actually prejudiced the defendant because it had substantial and injurious effect or influence in determining the jury’s verdict. *United States v. Lane*, 474 U.S. 438 (1986). See also *United States v. Maggitt*, 784 F.2d 590, 594–96 (5th Cir. 1986) (applying *Lane*). While a motion to sever under Rule 14 (relief from prejudicial joinder) requires the trial court to first determine whether joinder was proper under Rule 8, *United States v. Holloway*, 1 F.3d 307, 310 n.2 (5th Cir. 1993), it is better practice to specifically seek relief under all applicable rules. In the Fifth Circuit, “a defendant is not required to renew a severance objection at the close of the evidence to preserve the error.” *Id.* (citing *United States v. Stouffer*, 986 F.2d 916, 924 n.7 (5th Cir.)

Note that there are three bases for joinder under subdivision (a) and two under subdivision (b), with only one common basis—“same act or transaction.” In a case with multiple defendants, subdivision (b) exclusively controls; subdivision (a) has no application.<sup>12</sup> The most significant difference between the subdivisions is that subdivision (a) permits joinder of offenses of “the same or similar character” while subdivision (b) does not.

9. **Rule 9. Warrant or Summons Upon Indictment or Information.** The rule governs the issuance, form, execution or service, and return of warrants and summonses.
10. **Rule 10. Arraignment.** Rule 10 provides: “Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called upon to plead.”
11. **Rule 11. Pleas.** Federal criminal practice requires complete understanding of this rule, which governs all pleas.
  - a. **Alternatives.** A defendant may plead not guilty, guilty, or nolo contendere. Rule 11(a)(1). Federal rules recognize a conditional plea: “With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.” Rule 11(a)(2). Take note that such a plea requires (1) approval of the court and consent of the government, and (2) a *written* reservation of the right to appeal, based on a *specified* pretrial motion ruling.<sup>13</sup>

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(Rule 14 motion).

<sup>12</sup> See *United States v. DeLeon*, 641 F.2d 330, 337 n.4 (5th Cir. Unit A Apr. 1981).

<sup>13</sup> It should be expected that the courts of appeals will require strict compliance with the requisites for a conditional plea. See *United States v. Wise*, 179 F.3d 184 (5th Cir. 1999) (entry of an unconditional guilty plea, without expressly reserve in writing a right to appeal, waived right to appeal a suppression ruling). *But see United States v. Fernandez*, 887 F.2d 564, 566 n.1 (5th Cir. 1989) (excusing, under Rule 11(h), variance from formality that did not affect substantial rights).

- b. **Nolo Contendere.** “A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.” Rule 11(b).
- c. **Advice to Defendant.** Rule 11(c) specifies in detail the matters that the court must explain to the defendant before accepting a plea of guilty or nolo contendere. The matters roughly fall into three categories:
- (1) The nature of the charges against the defendant.
  - (2) The consequences of pleading guilty. This includes the maximum possible penalty,<sup>14</sup> any mandatory minimum penalty, the effect of any special parole or supervised release term,<sup>15</sup> and the possibility that restitution may be ordered.<sup>16</sup> The court must also advise the defendant that it must “consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances.”
  - (3) The rights waived by pleading guilty. The court must advise the defendant that he is giving up his rights to plead not guilty; to be tried by a jury; to have the assistance of counsel at trial;<sup>17</sup> to confront and cross-

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14 “Penalty” includes imprisonment, supervised release, and any fine. The maximum amounts and other incidents of fines are governed by 18 U.S.C. §§ 3571–3572. The court must also advise the defendant of the special assessment mandated by the Victims of Crime Act of 1984, codified as 18 U.S.C. § 3013.

15 Imposition and modification (including revocation) of supervised release are governed by 18 U.S.C. § 3583.

16 This is a reference to the restitution provisions of 18 U.S.C. §§ 3663–3664. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), substantially expanded mandatory restitution provisions. Title II, Subtitle A of the Act, the Mandatory Victims Restitution Act of 1996, created a new section 3663A of title 18 that requires a federal court to enter a restitution order for a defendant convicted of certain specified offenses.

17 The defendant is to be advised that he will have the assistance of counsel at every stage in the proceeding even if he pleads guilty or nolo contendere. Fed. R. Crim. P. 11(c)(2).

examine witnesses; and to be free from forced self-incrimination.<sup>18</sup> The court must also advise the defendant of “the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.” Rule 11(c)(6) (1999).<sup>19</sup>

- d. **Insuring That the Plea Is Voluntary.** Before accepting a plea of guilty or nolo contendere, the court must establish on the record that the plea is voluntary.
- e. **Plea Agreement Procedure.** Rule 11(e)(1) sets out the forms of plea agreement sanctioned by the rule. In exchange for a plea, the attorney for the government may:

“(A) move to dismiss other charges; or

“(B) recommend, or agree not to oppose the defendant’s request for a particular sentence or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Any such recommendation or request is not binding upon the court; or

“(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Such a plea agreement is binding on the court once it is accepted by the court.”

Rule 11(e)(1) (Dec. 1, 1999). This subdivision also provides that “[t]he court shall not participate in any discussions between the parties concerning any such plea agreement.” Further, “[i]f the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may . . . defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision

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18 The rule provides that, if the court intends to question the defendant regarding the offense to which the defendant has pleaded, it must advise the defendant that any answers may later be used in a prosecution for perjury or false statement. Fed. R. Crim. P. 11(c)(5).

19 In adding this requirement to the plea advice, the Advisory Committee on the Criminal Rules “takes no position on the underlying validity of such waivers.” Fed. R. Crim. P. 11 advisory committee’s note, 1999 amendments.

(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.” Rule 11(e)(2). If the court accepts the plea agreement, the disposition provided for is to be embodied in the judgment and sentence.<sup>20</sup> Rule 11(e)(3). If the court rejects an 11(e)(1)(A) or (C) agreement, the court shall afford the defendant the opportunity to withdraw the plea. Rule 11(e)(4). “Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.” Rule 11(e)(5).<sup>21</sup> Pleas, plea discussions, and related statements, *as defined in the rule*, are not admissible against the defendant in any civil or criminal proceeding, except (1) when one such statement is introduced and another “ought in fairness to be considered contemporaneously with it,” and (2) in a prosecution for perjury or false statement, and the statement was made “under oath, on the record, and in the presence of counsel.” Rule 11(e)(6).<sup>22</sup>

- f. **Determining Accuracy of Plea.** The court must make sufficient inquiry to “satisfy it that there is a factual basis for the plea.” Rule 11(f).<sup>23</sup>

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<sup>20</sup> If the government violates the terms of a plea agreement that has been accepted by the court, a defendant may seek either (1) specific performance, which requires that the sentence be vacated and that the defendant be resentenced by a different judge; or (2) withdrawal of the guilty plea, and the opportunity to plead anew, which requires vacation of both the conviction and the sentence. *United States v. Palomo*, 998 F.2d 253, 256 (5th Cir. 1993); *see also Santobello v. New York*, 404 U.S. 257, 263 (1971).

<sup>21</sup> *See also United States v. Ellis*, 547 F.2d 863 (5th Cir. 1977).

<sup>22</sup> *See also* Federal Rule of Evidence 410, Inadmissibility of Pleas, Plea Discussions, and Related Statements. These rules of inadmissibility may be waived by a defendant as part of a plea agreement. *United States v. Mezzanatto*, 513 U.S. 196 (1995).

<sup>23</sup> This is typically done by having the prosecutor recite the factual basis, and calling upon the defendant to confirm or deny those facts. Alternatively, the defendant may be called upon to make a testimonial judicial confession to the offense. **CAVEAT:** *In guideline sentencing cases, counsel must be especially mindful of guideline §1B1.2, which provides in part:*

(a) Determine the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction (*i.e.*, the offense conduct charged in the count of the indictment or information of which the defendant was convicted).

- g. **Harmless Error.** A harmless error rule applies to any variance from plea procedures that “does not affect substantial rights.” Rule 11(h).<sup>24</sup>

**12. Rule 12. Pleadings and Motions Before Trial; Defenses and Objections.**

- a. Rule 12(b) provides: “Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

“(1) Defenses and objections based on defects in the institution of the prosecution,<sup>25</sup> or

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*Provided, however, in the case of a plea agreement (written or made orally on the record) containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two most applicable to the stipulated offense.*

....

- (c) A plea agreement (written or made orally on the record) containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offenses(s).

In this connection, see *Braxton v. United States*, 500 U.S. 344 (1991) (to support use of the higher guideline range, the stipulation must establish every element of the more serious offense, including the culpable mental state); *United States v. Garza*, 884 F.2d 181, 183–84 (5th Cir. 1989) (marihuana conspiracy); *United States v. Strong*, 891 F.2d 82, 85 (5th Cir. 1989) (application of the higher guideline range requires “stipulated facts sworn to by the defendant in open court”); *United States v. Martin*, 893 F.2d 73, 75 (5th Cir. 1990) (sentencing judge must ascertain on the record before sentencing that the stipulation establishes a factual basis for each essential element of the more serious offense).

Rule 11(f) does not require a district court to inquire into the factual basis for a stipulated forfeiture of assets contained in a plea agreement. *Libretti v. United States*, 516 U.S. 29 (1995).

<sup>24</sup> See *United States v. Johnson*, 1 F.3d 296, 300–02 (5th Cir. 1993) (en banc) (all variances from Rule 11 procedure are subject to harmless-error analysis).

<sup>25</sup> The dismissal sanction of the Speedy Trial Act is specifically so restricted: “Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere

“(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings);<sup>26</sup> or

“(3) Motions to suppress evidence; or

“(4) Requests for discovery under Rule 16; or

“(5) Requests for a severance of charges or defendants under Rule 14.”

- b. **Motion Date.** By local rule or otherwise, the court may set a time for the making of pretrial motions.<sup>27</sup>
- c. **Ruling on Motion.** A pretrial motion shall be determined before trial unless the court for good cause defers ruling, but the court shall not defer ruling if a party’s right to appeal is adversely affected. Rule 12(e). “Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.” *Id.*
- d. **Effect of Failure to Raise Defenses or Objections.** The rule provides: “Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.” Rule 12(f).

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shall constitute a waiver of the right to dismissal under this section.” 18 U.S.C. § 3162(a)(2); *United States v. Bell*, 966 F.2d 914, 915 (5th Cir. 1992).

A limitations defense must be affirmatively asserted “at trial” in order to preserve it for appeal. *United States v. Arky*, 938 F.2d 579, 582 (5th Cir. 1991). It may also be raised prior to trial.

In *United States v. Dixon*, 509 U.S. 688 (1993), the Supreme Court stated that a double jeopardy challenge may be raised before trial and must be raised no later than trial.

<sup>26</sup> Raising the issue of failure to charge an offense for the first time on appeal, or after trial, will result in a more onerous standard of review. *United States v. Campos-Asencio*, 822 F.2d 506 (5th Cir. 1987).

<sup>27</sup> Untimely filing of a pretrial motion may result in its denial for that reason alone. *See United States v. Echols*, 577 F.2d 308, 311 (5th Cir. 1978).

- e. **Effect of Determination.** “If the court grants a motion based on a defect in the institution of the prosecution or in the indictment, or information, it may also order that the defendant be continued in custody or that bail be continued for a specified time pending the filing of a new indictment or information.” Rule 12(h).
  - f. **Production of Statements at Suppression Hearing.** Rule 12(i) provides that “rule 26.2 applies at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer is deemed a government witness.” This entitles the defense to obtain access to prior statements, as defined, for cross-examination at a hearing on a motion to suppress to the same extent as upon trial.<sup>28</sup>
- 12.1. **Rule 12.1. Notice of Alibi.** Take note that the requirement of notice of alibi is triggered by the government’s written demand, setting out certain particulars, and not by the rule itself. Rule 12.1(a). Upon compliance with such a demand, the defendant is entitled to certain reciprocal disclosure. Rule 12.1(b). Both parties are under a continuing duty to disclose pertinent alibi witnesses. Rule 12.1(c). For failure to comply with the rule, the court may exclude the testimony of any undisclosed witness of a party, but shall not limit the right of the defendant to testify in defendant’s own behalf. Rule 12.1(d).
- 12.2. **Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant’s Mental Condition.**<sup>29</sup> Unlike Rule 12.1 on notice of alibi, which is triggered by the government’s demand, this rule places the responsibility on the defendant to give timely notice of an insanity defense. Rule 12.2(a) provides in full:

“If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this

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<sup>28</sup> See also 18 U.S.C. § 3500 (Jencks Act), which applies to government witnesses and prospective government witnesses.

<sup>29</sup> See 18 U.S.C. § 17 for substantive limits on the insanity defense. See also Federal Rule of Evidence 704, pertaining to expert’s opinion on ultimate issue. Finally, see 18 U.S.C. §§ 4241–4247 for procedures in cases where sanity or competency is an issue.

subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.”

A similar rule applies to the broader subject of mental disease or defect. Rule 12.2(b). On motion of the government, the court may order a mental examination of the defendant; the rule provides certain protections against use of the defendant’s statement made during examination. Rule 12.2(c). The government’s motion may run to an examination pursuant to 18 U.S.C. § 4241 (competency) as well as § 4242 (sanity). This conforms the rule to the statute, 18 U.S.C. § 4241(a). More important, it brings the government’s § 4241 motion under the limited use and derivative use immunity provisions of the rule. For failure to give notice, or to submit to examination, the court may exclude testimony of an expert. Rule 12.2(d).

- 12.3. **Rule 12.3. Notice of Defense Based Upon Public Authority.** “A defendant intending to claim a defense of actual or believed exercise of public authority on behalf of a law enforcement or Federal intelligence agency at the time of the alleged offense shall within the time provided for the filing of pretrial motions or at such later time as the court may direct serve upon the attorney for the government a written notice of such intention and file a copy of such notice with the clerk.” The rule specifies the procedure for and content of the notice, the government’s response, procedures for disclosure of witnesses, and sanctions.<sup>30</sup>
13. **Rule 13. Trial Together of Indictments or Informations.** Two or more indictments or informations may be tried together if the offenses (and defendants, if multiple) could have been joined in a single accusation. See Rule 8.
14. **Rule 14. Relief from Prejudicial Joinder.** “If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.” This

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<sup>30</sup> See also the Classified Information Procedures Act, title 18, app. III.

discretionary relief must be distinguished from relief from misjoinder under Rule 8.<sup>31</sup>

15. **Rule 15. Depositions.** Depositions are not taken of right in criminal cases, but the court may order them in “exceptional circumstances . . . in the interest of justice.” Rule 15(a). The rule specifies deposition procedures in full.<sup>32</sup>

16. **Rule 16. Discovery and Inspection.**

a. **Discovery by Defendant.** The defendant is entitled to discovery of defendant’s statement as defined and prior record; documents and tangible objects as defined; reports of examinations and tests as defined; and expert testimony.<sup>33</sup> Rule 16(a)(1)(A)–(E). *It is imperative to understand the precise*

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31 For application of Rule 14, and appellate review of refusal to sever, see *Zafiro v. United States*, 506 U.S. 534 (1993); *United States v. Holloway*, 1 F.3d 307 (5th Cir. 1993).

One ground for severance is use of a nontestifying codefendant’s confession that implicates the defendant, see *Bruton v. United States*, 391 U.S. 123 (1968); *Gray v. Maryland*, 118 S. Ct. 1151 (1998); *Lilly v. Virginia*, 119 S. Ct. 1887 (1999).

32 See also 18 U.S.C. § 3503. In the Western District of Texas, the possibility of deposition practice in a criminal case comes up most often in prosecutions for illegal transportation of aliens under 8 U.S.C. § 1324(a)(1)(B), when the material witnesses are detained. See 18 U.S.C. § 3144, Release or detention of a material witness. Counsel should be alert to constitutional issues arising from the right of confrontation. See *United States v. Guadian-Salazar*, 824 F.2d 344 (5th Cir. 1987); *United States v. Allie*, 978 F.2d 1401 (5th Cir. 1992).

In *United States v. Aggarwal*, 17 F.3d 737, 742 (5th Cir. 1994), the court held that a motion for deposition under Rule 15(a), made a month before trial but a month after the deadline for pretrial motions, was properly denied as untimely.

33 Federal Rule of Evidence 404(b), Other crimes, wrongs, or acts, includes a discovery obligation. The rule conditions admissibility of evidence of other crimes, wrongs, or acts upon the government’s compliance with the accused’s request for “reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.” FED. R. EVID. 404(b). A request for notice under Rule 404(b) should be made in every case. It may be made by letter to the prosecutor with a copy to the clerk, or in the form of a legal instrument, addressed to the prosecutor rather than to the court, but filed with the clerk and served on the prosecutor. In any event, the request must be documented to facilitate opposing admission of Rule 404(b) evidence if reasonable notice was not given.

*definition of discoverable and non-discoverable items.* The discoverability of a defendant's statement is governed by Rule 16(a)(1)(A). Under the rule, the government's obligation to disclose oral statements runs to the pertinent portion of any written record containing the substance of any relevant oral statement, regardless of whether the government intends to offer it at trial. Further, the government must also disclose the defendant's oral statement, as defined, even if it is not memorialized in writing, if it intends to use that statement at trial. This portion of the rule reaches use for impeachment only, even if the government does not intend to introduce the statement.

The predicate for discoverability of other items shifts from one subdivision to the next. Documents and tangible objects, as defined, are discoverable to the extent they "are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant." Rule 16(a)(1)(C). Reports of examinations and tests, as defined, are discoverable to the extent they "are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial." Rule 16(a)(1)(D).

Subdivisions (a)(1)(E) and (b)(1)(C) require disclosure of the intent to rely on expert opinion testimony, as well as a description of what the testimony will consist of, and bases of the testimony. Subdivision (a)(1)(E), as further amended effective December 1, 1997, provides:

**(E) EXPERT WITNESSES.** At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions and the witnesses' qualifications.

Except as specifically provided, Rule 16 does not authorize discovery of government reports, memoranda and internal documents, nor does it authorize discovery of government witnesses' statements, except as provided in 18 U.S.C. § 3500 (Jencks Act). Rule 16(a)(2). (See also Rules 12(i) and 26.2.) Except as

provided in Rules 6, 12(i), 16(a)(1)(A), and 26.2, the rules do not relate to discovery of grand jury proceedings. Rule 16(a)(3).

- b. **Reciprocal Discovery.** If the defendant requests discovery under subdivision (a)(1)(C), (D), or (E)—documents and tangible objects, reports of examinations and tests, or expert witnesses—the government is entitled, “upon compliance with such request,” to reciprocal discovery of such items. Rule 16(b)(1). Subdivision 16(b)(1)(C) governing a defendant’s duty to disclose expert witnesses was amended effective December 1, 1997:

**(C) EXPERT WITNESSES.** Under the following circumstances, the defendant shall, at the government’s request, disclose to the government a written summary of testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence at trial; (i) if the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant’s mental condition. This summary shall describe the witnesses’ opinions, the bases and reasons for those opinions, and the witnesses’ qualifications.

Certain items are excluded from reciprocal discovery. Rule 16(b)(2).

- c. **Continuing Duty to Disclose.** There is a continuing duty to disclose, in compliance with rule, before and during trial. Rule 16(c).
- d. **Regulation of Discovery.** The court may enter protective orders modifying or limiting discovery, and the court may impose sanctions, including exclusion of evidence, for failure to comply with the rule. Rule 16(d).<sup>34</sup>
17. **Rule 17. Subpoena.**<sup>35</sup> This rule governs issuance of subpoena, application by indigent, subpoena duces tecum including advance production, service, and contempt. Take note that a defendant unable to pay is entitled to apply to the court

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<sup>34</sup> The Sixth Amendment Compulsory Process Clause does not create an absolute bar to precluding the testimony of a defense witness as a sanction for violating a discovery rule. *Taylor v. Illinois*, 484 U.S. 400 (1988).

<sup>35</sup> Title 28 U.S.C. § 1825 permits counsel appointed under the Criminal Justice Act to make an affidavit of defense witnesses’ appearance, *pursuant to court-approved subpoenas*, which will provide a basis for a clerk’s certificate authorizing payment of witness fees by the United States marshal.

*ex parte* for issuance of witness subpoenas at no cost to him. Rule 17(b).<sup>36</sup> “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.” Rule 17(h).

- 17.1. **Rule 17.1. Pretrial Conference.** The court may order “one or more conferences to consider such matters as will promote a fair and expeditious trial.” Rule 17.1. The rule further provides that “[n]o admissions made by the defendant or the defendant’s attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and the defendant’s attorney.” *Id.*
18. **Rule 18. Place of Prosecution and Trial.** The rule provides: “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 of the defendant and the witnesses and the prompt administration of justice.”
19. **Rule 19** has been rescinded.
20. **Rule 20. Transfer from the District for Plea and Sentence.** This rule provides for a plea of guilty or nolo contendere in the district in which a defendant is arrested, held, or present, rather than the district in which the charge is pending. It requires approval of the United States attorney for each district affected. Take note that this procedure is only for a plea of guilty or nolo contendere; a plea of not guilty will result in return of the case to the originating district.
21. **Rule 21. Transfer from the District for Trial.** This rule, rather than Rule 20, governs interdistrict transfer for trial. The court may transfer to another district upon motion of the defendant and (1) a showing that “there exists in the district where the prosecution is pending so great a prejudice against a defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law or holding court in that district,” or (2) for the “convenience of parties and witnesses, and in the interest of justice . . . .” Rule 21(a), (b).

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<sup>36</sup> See *United States v. Meriwether*, 486 F.2d 498, 506 (5th Cir. 1973).

22. **Rule 22. Time of Motion to Transfer.** The rule provides: “A motion to transfer under these rules may be made at or before arraignment or at such other time as the court or these rules may prescribe.”
23. **Rule 23. Trial by Jury or by the Court.** “Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.” Rule 23(a).<sup>37</sup> Juries shall be of 12, but the parties may stipulate, before verdict, to a jury of fewer than 12, or to verdict by a jury of fewer than 12 if one or more jurors are excused. Rule 23(b). “Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.” *Id.*
24. **Rule 24. Trial Jurors.**
- a. **Examination.** “The court may permit the defendant or the defendant’s attorney and the attorney for the government to conduct the examination of prospective jurors, or may itself conduct the examination.” Rule 24(a). In the latter event, supplemental examination is permitted. *Id.*

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<sup>37</sup> A person charged in a single proceeding with multiple petty offenses is not entitled to a jury trial just because the aggregate imprisonment may exceed six months. *Lewis v. United States*, 116 S. Ct. 2163 (1996).

- b. **Peremptory Challenges.**<sup>38</sup> Peremptory challenges are allocated as follows: in a capital case, 20 per side; in a felony, 6 to the government and 10 to the defendant or defendants jointly; in a misdemeanor, 3 per side. Rule 24(b). If there are multiple defendants, the court may allow additional peremptory challenges. *Id.*

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<sup>38</sup> In a line of cases starting with *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court has held that the purposeful use of peremptory challenges to strike potential jurors of a cognizable racial group may be challenged under the Equal Protection Clause. A defendant who raises a *Batson* challenge need not be of the same racial group as the excluded juror. *Powers v. Ohio*, 499 U.S. 400, 408–09 (1991). The use of peremptory challenges to strike potential jurors on the basis of sex also violates the Equal Protection Clause. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

Either the defense or the prosecution has standing to raise a *Batson* challenge. *Georgia v. McCollum*, 505 U.S. 42, 56 (1992). “[T]o be timely, a *Batson* objection must be made before the venire is dismissed and before the trial commences.” *United States v. Maseratti*, 1 F.3d 330, 335 (5th Cir. 1993) (quoting *United States v. Romero-Reyna*, 867 F.2d 834, 837 (5th Cir. 1989)). A party can make a prima facie case of purposeful discrimination in the use of peremptory challenges by showing that the opposing party has struck a protected group, coupled with facts and circumstances raising an inference that the other party struck venire members on account of their race or sex. Once the objecting party makes that showing, the burden shifts to the opposing party to come forward with a neutral explanation for those challenges. Failure to dispute all of the opposing party’s explanations for a strike waives the *Batson* challenge. *United States v. Arce*, 997 F.2d 1123, 1127 (5th Cir. 1993). A defendant may complain under *Batson* of a codefendant’s discriminatory strikes. *United States v. Huey*, 76 F.3d 638 (5th Cir. 1996) (reversing convictions of both defendants for one defendant’s violation of the jurors’ equal-protection rights); *contra*, *United States v. Boyd*, 86 F.3d 719, 724 (7th Cir. 1996).

*Batson* does not apply retroactively to collateral review of convictions that became final before the opinion was announced. *Allen v. Hardy*, 478 U.S. 255 (1986) (per curiam). The method of *Batson* analysis was explained in *Purkett v. Elem*, 115 S. Ct. 1769 (1995).

In *United States v. Martinez-Salazar*, 120 S. Ct. 774 (2000), it was held on that record that the defendant’s exercise of peremptory challenges was not denied or impaired when the defendant chooses to use a peremptory challenge to remove a juror who should have been excused upon a challenge for cause.

- c. **Alternate Jurors.** The court may direct that not more than 6 alternate jurors be empanelled. Rule 24(c)(1). The rule was recently amended with respect to retention of alternate jurors:

*“Retention of Alternate Jurors.* When the jury retires to consider the verdict, the court in its discretion may retain the alternate jurors during deliberations. If the court decides to retain the alternate jurors, it shall ensure that they do not discuss the case with any other person unless and until they replace a regular juror during deliberations. If an alternate replaces a juror after deliberations have begun, the court shall instruct the jury to begin its deliberations anew.”

Rule 24(c)(3) (1999).

25. **Rule 25. Judge; Disability.** This rule prescribes procedures during trial and post-verdict, upon death, sickness, or other disability of the judge.
26. **Rule 26. Taking of Testimony.**
- 26.1. **Rule 26.1. Determination of Foreign Law.**
- 26.2. **Rule 26.2. Production of Statements of Witnesses.** This rule governs production of the statement of a witness other than the defendant following testimony on direct examination. The predicate also requires that there be a motion by a party who did not call the witness, and that the statement of the witness “is in their possession and . . . relates to the subject matter concerning which the witness has testified.” Rule 26.2(a). There is a provision for excising non-pertinent matter, and for appellate review of any excision. Rule 26.2(c). The court may grant a recess to a party for examination of a produced statement. Rule 26.2(d). The rule provides sanctions for noncompliance, including the striking of testimony, or if it is the government that elects not to comply, declaring a mistrial “if required by the interest of justice.” Rule 26.2(e). The rule defines “statement” the same as the Jencks Act, 18 U.S.C. § 3500(e), that is:

“(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 the witness;

“(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.”

Rule 26.2(f).

Subdivision (g), Scope of rule, recognizes that the disclosure requirements have been extended by rule to other proceedings: in Rule 32(e) at sentencing; in Rule 32.1(c) at a hearing to revoke or modify probation or supervised release; in Rule 46(i) at a detention hearing; and in Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255, and (effective Dec. 1, 1998) in Rule 5.1 at a preliminary examination.

- 26.3. **Rule 26.3. Mistrial.** This rule provides: “Before ordering a mistrial, the court shall provide an opportunity for the government and for each defendant to comment on the propriety of the order, including whether each party consents or objects to a mistrial, and to suggest any alternatives.” The advisory committee explains that the rule is intended not to change the substantive law, but “to reduce the possibility of an erroneously ordered mistrial which could produce adverse and irretrievable consequences.”<sup>39</sup>
27. **Rule 27. Proof of Official Record.** The rule provides: “An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions.”<sup>40</sup>
28. **Rule 28. Interpreters.**
29. **Rule 29. Motion for Judgment of Acquittal.** The court on motion of a defendant or on its own motion shall enter judgment of acquittal after evidence on either side is closed, on any offense as to which the evidence is insufficient to sustain a conviction. Rule 29(a). If the defendant’s motion at the close of the

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39 In the Fifth Circuit, a defendant who does not make timely explicit objection to a sua sponte declaration of mistrial will be deemed to have consented to it. *United States v. Palmer*, 122 F.3d 215, 218 (1997) (no discussion of Rule 26.3).

40 See also FED. R. CIV. P. 44; FED. R. EVID. 803, 902.

government's case is not granted, the defendant may offer evidence without having reserved the right. *Id.*<sup>41</sup>

(b) Reservation of Decision on Motion. The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

Rule 29(b). “[A] motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period.” Rule 29(c).<sup>42</sup>

(d) Same: Conditional Ruling on Grant of Motion. If a motion for judgment of acquittal after verdict of guilty under this Rule is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed, specifying the grounds for such determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial

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41 A motion for judgment of acquittal must be made in order to preserve for appeal the issue of sufficiency of the evidence. In the absence of a motion, sufficiency will be reviewable only to the standard of “plain error.” *United States v. Pierre*, 958 F.2d 1304, 1310 (5th Cir. 1992) (en banc). If a defendant presents evidence after his motion at the conclusion of the government's case is denied, that motion is deemed waived. To preserve the issue of sufficiency of the evidence for appellate review, the motion must be renewed at the conclusion of all the evidence. The issue will then be reviewed on the basis of the entire record, not just the government's case. See, e.g., *United States v. White*, 611 F.2d 531, 536 (5th Cir. 1980). While testimony by a codefendant does not in itself result in a waiver, *United States v. Arias-Diaz*, 497 F.2d 165 (5th Cir. 1974), there can be exceptions. In one instance, a defendant who presented no evidence of his own, but requested a jury charge on the strength of a codefendant's defensive evidence, and relied upon that evidence in jury argument, was deemed to have waived his Rule 29 motion made at the conclusion of the government's evidence. *United States v. Cardenas Alvarado*, 806 F.2d 566, 570 & n.2 (5th Cir. 1986).

42 The district court has no authority to grant a motion for judgment of acquittal filed outside the Rule 29(c) time limit. *Carlisle v. United States*, 116 S. Ct. 1460 (1996).

has been granted conditionally and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. If such motion has been denied conditionally, the appellee may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

Rule 29(d).

29.1. **Rule 29.1. Closing Argument.** This rule provides that the prosecution shall open the argument, the defense shall be permitted to reply, and the prosecution shall then be permitted to reply in rebuttal.

30. **Rule 30. Instructions.** This rule provides: “At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.”<sup>43</sup> Service of copies of requested instructions must be made upon all parties, not just adverse parties.

31. **Rule 31. Verdict.** The verdict must be unanimous, returned by the jury to the judge in open court. Rule 31(a). If there are multiple defendants, the jury may return partial verdicts; the defendant or defendants as to whom the jury does not agree may be tried again. Rule 31(b). “The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.” Rule 31(c). “After a verdict is returned but before the jury is discharged, the court shall, on a party’s request, or may on its own motion, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the

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<sup>43</sup> Objections to the charge made at an informal, off-the-record charge conference do not satisfy the rule. *United States v. Marbury*, 732 F.2d 390, 403 n.20 (5th Cir. 1984).

jury to deliberate further or may declare a mistrial and discharge the jury.” Rule 31(d).

### 32. Rule 32. Sentence and Judgment.

a. **Time for Sentencing.** “Sentence should be imposed without unnecessary delay” following disclosure of and filing of objections to the presentence report. Rule 32(a). Subdivision (b)(6) prescribes time limits for disclosure and objection; this subdivision allows those limits to “be either shortened or lengthened for good cause.”

b. **Presentence Investigation and Report.**

(1) **When Made.** A probation officer must make a presentence investigation and submit a report to the court before the sentence is imposed, unless the court finds that there is in the record information sufficient to exercise its sentencing authority meaningfully under 18 U.S.C. § 3553, and the court explains this finding on the record.<sup>44</sup> Rule 32(b)(1). Notwithstanding that provision, “a presentence investigation and report, or other report containing information sufficient for the court to enter an order of restitution, as the court may direct, shall be required in any case in which restitution is required to be ordered.” *Id.*

(2) **Presence of Counsel.** On request, defense counsel is entitled to notice and a reasonable opportunity to be present at any interview of the defendant conducted by the probation officer. Rule 32(b)(2).<sup>45</sup>

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<sup>44</sup> Under the Federal Death Penalty Act of 1994, “when a defendant is found guilty or pleads guilty to an offense under section 3591, no presentence report shall be prepared. At the sentencing hearing, information may be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor permitted or required to be considered under section 3592.” 18 U.S.C. § 3593(c).

<sup>45</sup> Although the courts have not held that presentence interviews are a critical stage of the trial for purposes of the Sixth Amendment right to counsel, the rule reflects case law which has indicated that requests for counsel to be present should be honored. *See, e.g., United States v. Herrera-Figueroa*, 918 F.2d 1430, 1437 (9th Cir. 1990) (court relied on its supervisory power to hold that probation officers must honor request for counsel's presence); *United States v. Tisdale*, 952 F.2d 934, 940 (6th Cir. 1992) (court agreed with rule requiring probation officers to honor defendant's request for attorney or request from attorney not to interview defendant in absence of counsel).

According to the Advisory Committee, “interview” includes “any communication initiated by the probation officer when he or she is asking the defendant to provide information which will be used in preparation of the presentence investigation [report],” but not “[s]pontaneous or unplanned encounters.”

- (3) **Nondisclosure.** “The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty.” Rule 32(b)(3) (formerly Rule 32(c)(1)).
- (4) **Contents of the Presentence Report.** “The presentence report must contain—

“(A) information about the defendant’s history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant’s behavior, may be helpful in imposing sentence or in correctional treatment;

“(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. § 994(a), as the probation officer believes to be applicable to the defendant’s case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. § 994(a)(1); and the probation officer’s explanation of any factors that may suggest a different sentence—within or without the applicable guideline—that would be more appropriate given all the circumstances;<sup>[46]</sup>

“(C) a reference to any pertinent policy statement issued by the Sentencing Commission under 28 U.S.C. § 994(a)(2);

“(D) verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and

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<sup>46</sup> The Supreme Court has held that a sentencing court cannot depart from the guideline sentencing range without first notifying the parties that it is contemplating departure. *Burns v. United States*, 501 U.S. 129 (1991).

medical impact on any individual against whom the offense has been committed;

“(E) in appropriate cases, information about the nature and extent of nonprison programs and resources available for the defendant;

“(F) in appropriate cases, information sufficient for the court to enter an order of restitution;

“(G) any report and recommendation resulting from a study ordered by the court under 18 U.S.C. § 3552(b); and

“(H) any other information required by the court.”

Rule 32(b)(4).

(5) **Exclusions.** “The presentence report must exclude:

“(A) any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation;

“(B) sources of information obtained upon a promise of confidentiality;  
or

“(C) any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.”

Rule 32(b)(5).

(6) **Disclosure and Objections.** Subdivision (b)(6) reflects the key role the presentence report plays in guideline sentencing, addresses the problem of resolving the parties’ objections to the probation officer’s presentence report. Most important, it sets deadlines for addressing disputes about the contents of the report:

“(A) Not less than 35 days before the sentencing hearing—unless the defendant waives this minimum period—the probation officer must furnish the presentence report to the defendant, the defendant’s counsel, and the attorney for the Government. The court may, by local rule or in individual cases, direct that the probation officer not disclose the probation officer’s recommendation, if any, on the sentence.

“(B) Within 14 days after receiving the presentence report, the parties shall communicate in writing to the probation officer, and to

each other, any objections to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the presentence report. After receiving objections, the probation officer may meet with the defendant, the defendant's counsel, and the attorney for the Government to discuss those objections. The probation officer may also conduct a further investigation and revise the presentence report as appropriate.

“(C) Not later than 7 days before the sentencing hearing, the probation officer must submit the presentence report to the court, together with an addendum setting forth any unresolved objections, the grounds for those objections, and the probation officer's comments on the objections. At the same time, the probation officer must furnish the revisions of the presentence report and the addendum to the defendant, the defendant's counsel, and the attorney for the Government.

“(D) Except for any unresolved objection under subdivision (b)(6)(B), the court may, at the hearing, accept the presentence report as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.”

Rule 32(b)(6).

c. **Sentence.**<sup>47</sup>

- (1) **Sentencing Hearing.** Rule 32(c)(1) provides: “At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule on any unresolved objections to the presentence report. The court may, in its discretion, permit the parties to introduce

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<sup>47</sup> In the federal criminal system, a guilty plea does not waive the privilege against self-incrimination in the sentencing phase of the case. Therefore, in determining facts that bear on the circumstances and details of the crime, the sentencing judge may not draw an adverse inference from the defendant's silence at sentencing. *Mitchell v. United States*, 119 S. Ct. 1307 (1999).

testimony or other evidence on the objections.<sup>[48]</sup> For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing.<sup>[49]</sup> A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons.”

- (2) **Production of Statements at Sentencing Hearing.** Rule 26.2(a)–(d) (requiring production of witness statements) applies to a sentencing hearing, with a sanction of non-consideration of testimony for failure to comply. Rule 32(c)(2). The advisory committee note states that production is triggered by a witness’s oral testimony, and that the sanction rests on an assumption of deliberate refusal to produce.
- (3) **Imposition of Sentence.** Rule 32(c)(3) provides: “Before imposing sentence, the court must:

“(A) verify that the defendant and defendant’s counsel have read and discussed the presentence report made available under subdivision (b)(6)(A). If the court has received information excluded from the presentence report under subdivision (b)(5) the court—in lieu of making that information available—must summarize it in writing, if the information will be relied on in determining sentence. The court must also give the defendant and the defendant’s counsel a reasonable opportunity to comment on that information;

“(B) afford defendant’s counsel an opportunity to speak on behalf of the defendant;

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48 The rule speaks in terms of the court’s discretion, but the U.S. Sentencing Commission’s *Guidelines Manual* specifically provides that the court must provide the parties with a reasonable opportunity to offer information concerning a sentencing factor reasonably in dispute. See U.S.S.G. §6A1.3(a), p.s.; Rule 32(c)(1), advisory committee’s note, 1994 amendment.

49 The Fifth Circuit has held that the district court may satisfy Rule 32 through “implicit findings” by adopting the presentence report, if the report is clear on the disputed issue. *United States v. Carreon*, 11 F.3d 1225, 1231 (5th Cir. 1994). Counsel should therefore stress to the district court any incompleteness of the presentence report on a disputed issue.

“(C) address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence;[<sup>50</sup>]

“(D) afford the attorney for the Government an opportunity equivalent to that of the defendant’s counsel to speak to the court: and

“(E) if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence.”<sup>51</sup>

- d. **Notification of Right to Appeal.** This portion of the rule provides: “After imposing sentence in a case which has gone to trial on a plea of not guilty, the court must advise the defendant of the right to appeal. After imposing sentence in any case, the court must advise the defendant of any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court must immediately prepare and file a notice of appeal on behalf of the defendant.” Rule 32(c)(5) (formerly Rule 32(a)(2)).
- e. **Plea Withdrawal.** Rule 32(c)(5) provides: “If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.”<sup>52</sup>

### 32.1. Rule 32.1. Revocation or Modification of Probation or Supervised Release. This rule prescribes procedures and rights pertaining to

<sup>50</sup> Denial of a defendant’s right to allocute is per se reversible error, not subject to plain-error or harmless-error analysis. *United States v. Myers*, 150 F.3d 459, 463–64 (5th Cir. 1998) (noting circuit split).

<sup>51</sup> The court’s summary of information, and the statements by the defendant, the defendant’s counsel, the victim, or the attorney for the Government under Rule 32(c)(3), may be heard in camera. Rule 32(c)(4).

<sup>52</sup> A defendant has no automatic right to withdraw a guilty plea even when the court has not yet approved the plea agreement, but has deferred the decision until after review of the presentence report. *United States v. Hyde*, 117 S. Ct. 1630 (1997).

revocation or modification of probation. Subdivision (b) of this rule, governing modification of probation, reads as follows:

“(b) **Modification of Probation or Supervised Release.** A hearing and assistance of counsel are required before the terms or conditions of probation or supervised release can be modified, unless the relief to be granted to the person on probation or supervised release upon the person’s request or the court’s own motion is favorable to the person, and the attorney for the government, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of the term of probation or supervised release is not favorable to the person for the purposes of this rule.”

Rule 26.2 (requiring production of witness statements) applies to revocation hearing. Rule 32.1(c).

32.2. **Rule 32.2. Criminal Forfeiture.** New Rule 32.2, added December 1, 2000, consolidates a number of procedural rules governing forfeiture of assets in a criminal case.

33. **Rule 33. New Trial.** “On a defendant’s motion, the court may grant a new trial to that defendant if the interests of justice so require. If trial was by the court without a jury, the court may—on defendant’s motion for a new trial—vacate the judgment, take additional testimony, and direct the entry of a new judgment. A motion for new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty. But if an appeal is pending, the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds may be made only within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period.”

The requirement that a motion for new trial based on newly discovered evidence be made only “within three years after the verdict or finding of guilty” came by amendment effective December 1, 1998. **Before that amendment**, the rule required that a motion for new trial based on newly discovered evidence be made only “before or within two years after final judgment . . . .”

34. **Rule 34. Arrest of Judgment.** “The court on motion of a defendant shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 7 days after verdict or finding of guilty, or after plea

of guilty or nolo contendere, or within such further time as the court may fix during the 7-day period.”

35. **Rule 35. Correction or Reduction of Sentence.** Subdivision (a) governs correction of a sentence after remand following a sentence appeal under 18 U.S.C. § 3742.

Subdivision (b) authorizes the court to reduce a sentence when the Government so moves. The sole ground for the Government’s motion is that the defendant has provided “subsequent substantial assistance in investigating or prosecuting another person who has committed an offense . . . .” The Government must make the motion within one year after imposition of sentence, unless the information or evidence was “not known by the defendant until one year or more after sentence is imposed.” An amendment to this subdivision effective December 1, 1998, provided: “In evaluating whether substantial assistance has been rendered, the court may consider the defendant’s pre-sentence assistance.” Any reduction of sentence must accord with the U.S. Sentencing Commission’s guidelines and policy statements. Under this subdivision, a sentence may be reduced to a level below the statutory mandatory minimum.

Subdivision (c) recognizes a limited authority to correct error in sentencing: “The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error.”

36. **Rule 36. Clerical Mistakes.**

37. **Rule 37** has been abrogated.

38. **Rule 38. Stay of Execution, and Relief Pending Review.**

39. **Rule 39** has been abrogated.

40. **Rule 40. Commitment to Another District.** This rule governs procedures when a person is arrested in a district other than the district in which the charge or probation or supervised release violation is pending, or other than the district where the person failed to appear as a witness or a released person. Subdivision (a) authorizes transmission of the warrant or certified copy of the warrant by facsimile. Subdivision (d), pertaining to arrested probationers and supervised releasees, provides that a federal magistrate judge may release the arrested person under Rule 46(c).

**41. Rule 41. Search and Seizure.**<sup>53</sup> This rule governs search warrant procedures. It includes authority to issue a warrant, property or persons subject to seizure, and provisions for issuance and the requisite contents. Rule 41(a)–(c). Rule 41(a) permits (1) an anticipatory warrant for property expected to come within the district, and (2) a warrant (issued by a federal magistrate judge only) for search of property or person outside the district, if the subject “is within the district when the warrant is sought but might move outside the district before the warrant is executed.” The finding of probable cause may be based upon hearsay in whole or in part. Rule 41(c)(1).<sup>54</sup> The warrant shall command the officer to search within a specified period of time, not to exceed 10 days. *Id.* The warrant shall be served in the “daytime” (defined as the hours from 6:00 A.M. to 10:00 P.M., Rule 41(h)), “unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime.” Rule 41(c)(1). The rule authorizes issuance of a search warrant on sworn oral testimony (e.g., by telephone) under detailed prescribed procedures. Rule 41(c)(2).

**Warrant Upon Oral Testimony.** If the circumstances make it reasonable to do so, the federal magistrate judge may dispense “in whole or in part” with a written affidavit, and “telephone or other reasonable means of communication” including facsimile may be relied upon instead. Rule 41(c)(2). The advisory committee note makes clear that “reasonable means of communication” does not include electronic transmission by computer modem. In the committee’s view, “facsimile transmissions provide some method of assuring the authenticity of the writing transmitted by the affiant.”

**42. Rule 42. Criminal Contempt.**<sup>55</sup>

**43. Rule 43. Presence of the Defendant.** This rule states the general requirement for the presence of the defendant at arraignment, plea, trial, and

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<sup>53</sup> See also 18 U.S.C. ch. 205, Searches and Seizures, §§ 3101–3118.

<sup>54</sup> To determine “probable cause,” see *Illinois v. Gates*, 462 U.S. 213 (1983). If probable cause is lacking, see *United States v. Leon*, 468 U.S. 897 (1984). In *Leon*, the Supreme Court found a “good faith” exception to the exclusionary rule when evidence was seized by officers acting in objectively reasonable reliance on a facially valid search warrant, even though the affidavit was legally insufficient.

<sup>55</sup> See also 18 U.S.C. §§ 401, 402, 3285, 3691–3692; 28 U.S.C. § 1826 (Recalcitrant witnesses).

sentencing. Rule 43(a). It also states the circumstances under which continued presence is not required: voluntary absence after commencement of trial; in a noncapital case, voluntary absence at the imposition of sentence; or disruptive defendant. Rule 43(b). Finally, the rule sets out situations in which the presence of the defendant is not required: (1) a defendant organization appearing by counsel; (2) *in absentia* misdemeanor proceedings permitted by the court with the written consent of the defendant; (3) a conference or argument upon a point of law; and (4) a reduction of sentence under Rule 35(b) or (c) or 18 U.S.C. § 3582(c) (modification of an imposed term of imprisonment. Rule 43(c) (amended eff. Dec. 1, 1998).

44. **Rule 44. Right to and Assignment of Counsel.**<sup>56</sup> The rule enunciates a right to assigned counsel, unless waived. A portion of this rule requires the court to make inquiry and warning in cases of joint representation. Rule 44(c).

45. **Rule 45. Time.**

- a. **Computation.** “In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included.” Rule 45(a). If the last day of a time period is a Saturday, Sunday, or legal holiday, then the time period shall run until the end of the next day that is not one of the aforementioned days. *Id.* “When a period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays

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<sup>56</sup> On the general subject of the rule, see also the Criminal Justice Act, 18 U.S.C. § 3006A, and GUIDELINES FOR ADMINISTRATION OF THE CRIMINAL JUSTICE ACT, reprinted in 7 *Guide to Judiciary Policies and Procedures*, available in the clerk’s office and in the federal public defender’s office.

shall be excluded in the computation.” *Id.*<sup>57</sup> The term “legal holiday” is defined in this subdivision; do not assume that a local holiday will be excluded.

- b. **Enlargement.** Rule 45(b) provides: “When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but the court may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them.”
  - c. **Additional Time After Service by Mail.** “Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon that party and the notice or other paper is served by mail, 3 days shall be added to the prescribed period.” Rule 45(e).
46. **Rule 46. Release from Custody.** Rule 26.2(a)–(d) (requiring production of witness statements) applies to the detention hearing held under 18 U.S.C. § 3142, “unless the court, for good cause shown, rules otherwise in a particular case.” The advisory committee explains that this exception recognizes “that pretrial detention hearings are often held very early in a prosecution, and that a particular witness’s statement may not yet be on file, or even known about.”

The subject matter of this rule was extensively revamped by the Bail Reform Act of 1984, codified in 18 U.S.C. §§ 3141–3150.

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<sup>57</sup> This provision governs 10-day limits under the criminal rules. **CAVEAT:** Federal Rule of Appellate Procedure 26 differs; intermediate Saturdays, Sundays, and legal holidays are excluded when the time prescribed or allowed under the appellate rules is less than 7 days. Therefore, in computing the 10-day limit for filing the defendant’s notice of appeal in a criminal case under FED. R. APP. P. 4(b), intermediate Saturdays, Sundays and legal holidays are *not excluded*. An attorney’s confusion over these rules may constitute excusable neglect for late filing of notice of appeal, but the court is not required to so find. *United States v. Clark*, 51 F.3d 42 (5th Cir. 1995) (applying *Pioneer Inv. Services Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993)). **FURTHER CAVEAT:** Under Supreme Court Rule 30.1, the exclusion for “federal legal holiday” is narrower than the Federal Rule of Criminal Procedure 45(a) exclusion for “legal holiday,” which includes “any other day appointed as a holiday by . . . the state in which the district court is held.”

47. **Rule 47. Motions.**

48. **Rule 48. Dismissal.** The government may by leave of court file a dismissal of a charging instrument, but it may not do so during the trial without the consent of the defendant. Rule 48(a). “If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.” Rule 48(b).<sup>58</sup>

49. **Rule 49. Service and Filing of Papers.**

50. **Rule 50. Calendars; Plan for Prompt Disposition.** The rule includes a directive that “[p]reference shall be given to criminal proceedings as far as practicable.” Rule 50(a).

51. **Rule 51. Exceptions Unnecessary.** “Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party’s objection to the action of the court and the

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<sup>58</sup> See also the Sixth Amendment; *Barker v. Wingo*, 407 U.S. 514 (1972); *United States v. Loud Hawk*, 474 U.S. 302 (1986); and the Speedy Trial Act, 18 U.S.C. §§ 3161–3174.

grounds therefor,<sup>[59]</sup> but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party.”

52. **Rule 52. Harmless Error and Plain Error.** This rule provides:

“(a) **Harmless Error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.<sup>[60]</sup>”

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59 *Cf. United States v. Waldrip*, 981 F.2d 799, 804 (5th Cir. 1993) (“A loosely formulated and imprecise objection will not preserve error.”); FED. R. EVID. 103(a)(1) (requiring a “timely objection or motion to strike . . . stating the specific ground of objection, if the specific ground was not apparent from the context”). **N.B.:** The evidence rule was recently amended to add this language: “Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.” FED. R. EVID. 103(a) (Dec. 1, 2000.) Counsel must be mindful of several caveats accompanying this amendment. First, the ruling must be on the record, and it must be “definitive.” If there is doubt as to whether a ruling is definitive, counsel bears the obligation of obtaining a clarification. Second, the court may change a ruling, or a party may violate a ruling. In these circumstances, a fresh objection would be required. Third, a ruling admitting or excluding evidence is reviewed on the basis of the facts and circumstances before the court at the time of the ruling. (*See United States v. Fortenberry*, 919 F.2d 923, 924 (5th Cir. 1990) (cautioning district courts against granting and counsel against accepting pretrial continuing objections).) If those facts or circumstances change, counsel must make a new, timely objection, offer of proof, or motion to strike, in order to predicate an appeal on those changes. Fourth, if evidence is admitted subject to a later foundation, it is opposing counsel’s responsibility to move to strike if that foundation is not established. Fifth, the amendment is not intended to affect the rule of *Luce v. United States*, 469 U.S. 38 (1984) (to preserve a claim of error predicated upon the court’s admission of a criminal defendant’s prior conviction, the defendant must testify at trial). For a fuller discussion of these and other considerations arising from the amendment, see Federal Rule of Evidence 103, advisory committee’s note (2000 amendment).

Be aware also of *Ohler v. United States*, 120 S. Ct. 1851 (2000) (defendant who preemptively introduces evidence of a prior conviction on direct examination may not challenge on appeal the court’s ruling that the conviction was admissible).

60 See also 28 U.S.C. § 2111, Harmless error. Harmless error is reviewed to different standards depending on the mode of review. On direct review of claimed constitutional error, the *Chapman* standard (harmless beyond a reasonable doubt) applies. On collateral review, the *Kotteakos* standard (substantial and injurious effect or influence in determining the jury’s verdict) applies. *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *Lowery v. Collins*, 996

“(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.”<sup>61</sup>

53. **Rule 53. Regulation of Conduct in the Court Room.** The rule prohibits photograph taking or radio broadcasting in the court room during the progress of judicial proceedings.
54. **Rule 54. Application and Exception.** This rule contains the detailed statement of the applicability of the criminal rules and definitions.
55. **Rule 55. Records.**
56. **Rule 56. Courts and Clerks.** This rule includes the list of legal holidays under the criminal rules.
57. **Rule 57. Rules of Court.** This rule governs the promulgation of local rules of the district courts. It requires appropriate public notice of proposed rules and an opportunity to comment on them. Subdivision (a)(2) provides: “A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.” Subdivision (b) provides:

PROCEDURE WHEN THERE IS NO CONTROLLING LAW. A judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

The latter provision is intended to protect a party or attorney from disadvantage based on noncompliance with internal operating procedures, standing orders, and other internal directives, unless actual notice of the requirement was given. The advisory committee opines that notice might be given by providing litigants a copy of the requirement, or by “specifically adopting by reference a judge’s standing order and indicating how copies can be obtained.”

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F.2d 770 (5th Cir. 1993).

<sup>61</sup> “Plain error” is (1) deviation from a legal rule that has not been waived, (2) producing an error that is “plain,” “clear,” or “obvious,” and (3) that affected the outcome of the proceedings. *United States v. Olano*, 507 U.S. 725 (1993); *United States v. Calverley*, 37 F.3d 160 (5th Cir. 1994) (en banc).

**58. Rule 58. Procedure for Misdemeanors and Other Petty Offenses.** This rule governs the trial of a misdemeanor or petty offense before a district judge or a magistrate judge. Subdivision (b)(2) affords a right to a preliminary hearing only to a defendant charged with a misdemeanor other than a petty offense, and who is in custody. Under subdivision (c)(2), in the case of a petty offense for which no sentence of imprisonment will be imposed, venue may be waived without the formal consent of the U.S. attorney. (This addresses the situation where a defendant is arrested, held, or present in a district other than the district in which the charge is pending.) While the advisory committee notes do not mention it, subdivision (b)(1), coupled with the availability of Rule 58 to district judges trying misdemeanor cases, appears to authorize the trial of a misdemeanor by a district judge upon a complaint, which was not authorized by Rule 7(a).

Rule 58 was amended effective December 1, 1997, to conform to recent enlargements of the jurisdiction of a magistrate judge, to try certain misdemeanors without the consent of the accused.

**59. Rule 59. Effective Date.** The effective date of the original set of rules was 1946.

**60. Rule 60. Title.** “These rules may be known and cited as the Federal Rules of Criminal Procedure.”

**B. AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE.** The criminal rules are presently undergoing a comprehensive restyling. In addition, substantive amendments are under consideration for the following rules: Rule 5, Initial Appearance; Rule 5.1, Preliminary Hearing in a Felony Case; Rule 10, Arraignment; Rule 12.2, Notice of Insanity Defense; Mental Examination; Rule 12.4, Disclosure Statement; Rule 26, Taking Testimony; Rule 30, Jury Instructions; Rule 32, Sentencing and Judgment; Rule 35, Correcting or Reducing a Sentence; Rule 41, Search and Seizure; Rule 43, Defendant’s Presence. The proposed amendments are available on the U.S. Courts Website at <http://www.uscourts.gov/rules/comment2001/amendments/toc.htm>.

**III. BIBLIOGRAPHY.** The following publications are useful in dealing with the Federal Rules of Criminal Procedure, and issues arising under the rules.

**A. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Fifth Circuit Slip Opinion Service.** Subscriptions may be entered through the Office of the Clerk, United States Court of Appeals for the Fifth Circuit, 600 Camp Street, Room 100, New Orleans, LA 70130.

- B. PHYLIS S. BAMBERGER, ED., *Practice Under the New Federal Sentencing Guidelines* (New York: Aspen Law & Business, 3d ed. 1993 & Supp. 1999).
- C. BAR ASS'N OF THE FIFTH FEDERAL CIRCUIT, *Fifth Circuit Reporter* (West, monthly). This publication provides a capsule summary of cases recently decided, cases pending en banc consideration, cases argued and pending, and cases pending on petition for rehearing. It is the only published source for much of this information. A subscription to the *Fifth Circuit Reporter* is included in the annual dues of \$60. Membership information is available from the administrator, Mary Douglass, telephone (504) 586-8185, or from District Governor Seagal V. Wheatley, Jenkins Gilchrist Groce Locke & Hebdon, 1800 Frost Bank Tower, 100 W. Houston, San Antonio, Texas 78205; (210) 246-5635.
- D. BNA, *The Criminal Law Reporter* (weekly).
- E. CLARK BOARDMAN CO., *1999–2000 Criminal Procedure Handbook*.
- F. JAMES C. CISELL, *Federal Criminal Trials* (Matthew-Bender & Company, Inc., 5th ed. 1999). This is a commercially published update of *Proving Federal Crimes*, *infra* paragraph III.T.
- G. FEDERAL DEFENDERS OF SAN DIEGO, INC., *Defending a Federal Criminal Case* (1998 ed.). This is an excellent federal criminal practice manual offered for sale by the Federal Defenders of San Diego, Inc., 225 Broadway, Suite 500, San Diego, CA 92101-5097; (619) 234-8467.
- H. EDWARD J. DEVITT ET AL., *Federal Jury Practice and Instructions* (West 4th ed. 1990 & Supp. 1999) and KEVIN F. O'MALLEY ET AL., *Federal Jury Practice and Instructions* (West Group 5th ed. 2000).
- I. FEDERAL JUDICIAL CENTER, *Guideline Sentencing Update* (periodical). Controlled distribution within the judicial branch; available in most federal court law libraries. Also available on the Center's Website at <http://www.fjc.gov>.
- J. ———, *Sentencing Federal Offenders for Crimes Committed Before November 1, 1987* (1991). This is an excellent short treatment of all aspects of federal sentencing before guideline sentencing. Federal Judicial Center publications are available from the Federal Judicial Center, Information Services, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, D.C. 20002; (202) 502-4153.
- K. GEORGETOWN LAW JOURNAL, "Annual Review of Criminal Procedure." This is a comprehensive review of the criminal procedure decisions of the United States Supreme Court during the term just closed, and contemporaneous decisions of the

United States courts of appeals. The text sets out older leading decisions in each area of criminal procedure. The current edition of the Criminal Procedure Project issue (Vol. 88, No. 5, May 2000) sells for \$30 from the Georgetown Law Journal, 600 New Jersey Ave. NW, Washington, D.C. 20001; (202) 662-9468.

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- N. WAYNE R. LAFAYE, *Search and Seizure* (West 3d ed. 1996 & Supp. 2000).
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- X. WEST GROUP, *Federal Criminal Code and Rules* (pamphlet issued periodically). As to the criminal rules, this publication traces amendments and provides some advisory committee notes and excerpted legislative history. It also includes the Federal Rules of Evidence, Federal Rules of Appellate Procedure, Supreme Court Rules, Titles 18 and 21, U.S.C., and other criminal statutes.
- Y. ———, *United States Code Annotated*, Title 18, Federal Rules of Criminal Procedure, with annotations.
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