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AMENDMENTS TO THE FEDERAL RULES  
OF CRIMINAL PROCEDURE

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COMMUNICATION

FROM

THE CHIEF JUSTICE OF THE  
UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE AS ADOPTED BY THE COURT, PURSUANT TO 28 U.S.C. 2072



MAY 1, 1991.—Referred to the Committee on the Judiciary and ordered to be printed

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

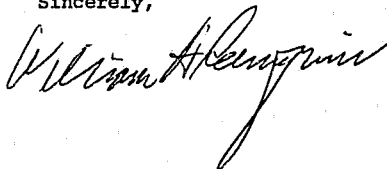
April 30, 1991

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Criminal Procedure which have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,



Honorable Thomas S. Foley  
Speaker of the House of Representatives  
Washington, DC 20015

(III)

SUPREME COURT OF THE UNITED STATES

April 30, 1991

ORDERED

1. That the Federal Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Criminal Rules 16(a), 32(c), 32.1(a), 35(b) and (c), 46(h), 54(a), and 58(b) and (d).

[See infra., pp. \_\_\_\_\_ .]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 1991, and shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

**AMENDMENTS TO THE  
FEDERAL RULES OF  
CRIMINAL PROCEDURE**

**Rule 16. Discovery and Inspection**

(a) **DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.**

(1) **Information Subject to Disclosure.**

(A) **STATEMENT OF DEFENDANT.** Upon request of a defendant the government shall disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the

**RULES OF CRIMINAL PROCEDURE**

offense charged. The government shall also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of that testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in

## RULES OF CRIMINAL PROCEDURE

3

respect to that alleged conduct in which the witness was involved.

\* \* \* \* \*

## Rule 32. Sentence and Judgment

\* \* \* \* \*

## (c) PRESENTENCE INVESTIGATION.

\* \* \* \* \*

(2) Report. The report of the presentence investigation shall contain--

(A) information about the history and characteristics of the defendant, including prior criminal record, if any, financial condition, and any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant;

\* \* \* \* \*

## (3) Disclosure.

(A) At least 10 days before imposing sentence, unless this minimum period is waived by the defendant, the court shall

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provide the defendant and the defendant's counsel with a copy of the report of the presentence investigation, including the information required by subdivision (c)(2) but not including any final recommendation as to sentence, and not to the extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. The court shall afford the defendant and the defendant's counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

\* \* \* \* \*



## RULES OF CRIMINAL PROCEDURE

**Rule 32.1. Revocation or Modification of Probation or Supervised Release****(a) REVOCATION OF PROBATION OR SUPERVISED RELEASE.**

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

\* \* \* \* \*

**Rule 35. Correction or Reduction of Sentence**

\* \* \* \* \*

(b) REDUCTION OF SENTENCE FOR CHANGED CIRCUMSTANCES. The court, on motion of the Government made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent, substantial

## RULES OF CRIMINAL PROCEDURE

assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. The court may consider a government motion to reduce a sentence made one year or more after imposition of the sentence where the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after imposition of sentence. The court's authority to reduce a sentence under this subsection includes the authority to reduce such sentence to a level below that established by statute as a minimum sentence.

(c) CORRECTION OF SENTENCE BY SENTENCING COURT.

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.

## RULES OF CRIMINAL PROCEDURE

**Rule 46. Release From Custody**

\* \* \* \* \*

(h) FORFEITURE OF PROPERTY. Nothing in this rule or in chapter 207 of title 18, United States Code, shall prevent the court from disposing of any charge by entering an order directing forfeiture of property pursuant to 18 U.S.C. 3142 (c)(1)(B)(xi) if the value of the property is an amount that would be an appropriate sentence after conviction of the offense charged and if such forfeiture is authorized by statute or regulation.

**Rule 54. Application and Exception**

(a) COURTS. These rules apply to all criminal proceedings in the United States District Courts; in the District of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263); in the District Court of the Virgin Islands; and (except as otherwise provided in the Canal Zone) in the United States District Court for the District of the Canal Zone; in the United States

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Courts of Appeals; and in the Supreme Court of the United States; except that the prosecution of offenses in the District Court of the Virgin Islands shall be by indictment or information as otherwise provided by law.

\* \* \* \* \*

**Rule 58. Procedure for Misdemeanors and Other Petty Offenses**

\* \* \* \* \*

**(b) PRETRIAL PROCEDURES.**

\* \* \* \* \*

(2) Initial Appearance. At the defendant's initial appearance on a misdemeanor or other petty offense charge, the court shall inform the defendant of:

(A) the charge, and the maximum possible penalties provided by law, including payment of a special assessment under 18 U.S.C. § 3013, and restitution under 18 U.S.C. § 3663;

\* \* \* \* \*

**(d) SECURING THE DEFENDANT'S APPEARANCE; PAYMENT IN LIEU OF APPEARANCE.**

\* \* \* \* \*

## RULES OF CRIMINAL PROCEDURE

(3) Summons or Warrant. Upon an indictment or a showing by one of the other documents specified in subdivision (b)(1) of probable cause to believe that an offense has been committed and that the defendant has committed it, the court may issue an arrest warrant or, if no warrant is requested by the attorney for the prosecution, a summons. The showing of probable cause shall be made in writing upon oath or under penalty for perjury, but the affiant need not appear before the court. If the defendant fails to appear before the court in response to a summons, the court may summarily issue a warrant for the defendant's immediate arrest and appearance before the court.

\* \* \* \* \*

EXCERPT FROM THE  
REPORT OF THE JUDICIAL CONFERENCE  
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
MARCH 1991

1. Amendments to the Rules of Practice and Procedure

A. Federal Rules of Criminal Procedure

The Advisory Committee on the Federal Rules of Criminal Procedure has submitted to your Committee amendments to Criminal Rules 16(a)(1)(A), 35(b), and 35(c), as well as technical amendments to Criminal Rules 32, 32.1, 46, 54(a), and 58. The proposed amendment to Rule 16(a)(1)(A) would slightly expand the duty of the Government to disclose a defendant's oral statements.

The proposed amendment to Rule 35(b) would permit the government to move the sentencing court to reduce the defendant's sentence for substantial assistance more than one year after the imposition of sentence under certain circumstances. The proposed amendment to Rule 35(c) is based upon, but differs from, a recommendation of the Federal Courts Study Committee. It would permit the court to correct a technical error in a sentence within seven days of its imposition. If the Conference approves the proposed amendment to Rule 35(c), your Committee, at the request of the Advisory Committee, will refer to the Appellate Rules Advisory Committee a suggestion to consider an amendment to Appellate Rule 4, which would stipulate that the filing of a notice of appeal would not divest the district court of jurisdiction to act within the seven-day period provided in amended Rule 35(c).

The above-referenced amendments to the Federal Rules of Criminal Procedure have been circulated for public comment and minor changes made in the Advisory Committee Notes in response thereto.

The Advisory Committee had also submitted to your Committee, on a closely divided vote, a proposed amendment to Rule 24(b) that would equalize the number of peremptory challenges in a criminal trial: 20 for each side in a capital case, six for each side in a felony case, and 3 for each side in a misdemeanor case. A similar amendment, which had provided for eight challenges in a felony case, had been proposed in Congress in the last session, but was not passed. Your Committee, after discussion, voted unanimously against recommending the amendment to the Judicial Conference.

The proposed amendments to Rules 32(c)(2)(A), 32(c)(3)(A), 32.1(a)(1), 46(h), 54(a), 58(b)(2)(A) and 58(d)(3) would correct technical errors. Because these proposed amendments are purely technical, your Committee recommends their approval without public comment.

These proposed amendments are set out in Appendix A, and are accompanied by Advisory Committee Notes and a report explaining their purpose and intent.

**Recommendation 1:** That the Judicial Conference approve amendments to Rules 16(a), 32(c), 32.1(a), 35(b), 35(c), 46(h), 54(a), 58(b) and 58(d) of the Federal Rules of Criminal Procedure and transmit them to the Supreme Court for its consideration with the recommendation that they be approved and transmitted to Congress pursuant to law.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

ROBERT E. KEETON  
CHAIRMAN

JAMES E. MACKLIN, JR.  
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES  
KENNETH F. RIPPLE  
APPELLATE RULES  
SAM C. POINTER, JR.  
CIVIL RULES  
WILLIAM TERRELL HODGES  
CRIMINAL RULES  
EDWARD LEAVY  
BANKRUPTCY RULES

TO: Honorable Robert E. Keeton, Chairman  
Standing Committee on Rules of Practice  
and Procedure

FROM: Honorable Wm. Terrell Hodges, Chairman  
Advisory Committee on Rules of Criminal Procedure

SUBJECT: Report on Proposed and Pending Rules of Criminal  
Procedure and Rules of Evidence

DATE: December 18, 1990

#### I. INTRODUCTION

At its November 1990 meeting the Advisory Committee on the Rules of Criminal Procedure acted upon proposed or pending amendments to a number of Rules of Criminal procedure and one Rule of Evidence. This report addresses those proposals and the recommendations to the Standing Committee. The minutes of that meeting, \*\*\* and copies of the rules and the accompanying Committee Notes are attached. In summary, the rules and the recommended actions are as follows:

##### A. Rules of Criminal Procedure Circulated for Public Comment.

Four rules previously considered and approved by the Standing Committee for circulation to the bench and the bar have been reviewed by the Advisory Committee. The Committee recommends that the Rules be approved by the Standing Committee and forwarded to the Judicial Conference.

1. Rule 16(a)(1)(A). Statement of Defendant.
2. Rule 24(b). Peremptory Challenges.
3. Rule 35(b). Reduction of Sentence.
4. Rule 35(c). Correction of Sentence.



**B. Rules of Evidence Circulated for Public Comment.**

One Rule of Evidence has been circulated to the bench and the bar for comment. After considering the public comments, the Committee recommends that it be approved by the Standing Committee and forwarded to the Judicial Conference.

1. Fed. R. Evid. 404(b). Notice Provision.

**C. Proposed Technical Amendments to Rules of Criminal Procedure and Rules of Evidence.**

The Advisory Committee recommends that technical amendments be made in the following Rules, as discussed infra,

1. Rule 32. Technical Amendments.
2. Rule 32.1. Technical Amendment.
3. Rule 46. Technical Amendment.
4. Rule 54(a). Technical Amendment.
5. Rule 58. Technical Amendment.

\* \* \* \* \*

6. Fed. R. Evid. 1102. Technical Amendment.

**II. RULES OF CRIMINAL PROCEDURE CIRCULATED FOR PUBLIC COMMENT.**

In January 1990, the Standing Committee approved amendments in Rule 16(a)(1)(A), Rule 24(b), and Rule 35(a) for circulation to the public. In July 1990, the Standing Committee approved the circulation of a new provision, Rule 35(c), on an expedited basis. Comments were received on all of these rules and considered by the Advisory Committee at its November 1990 meeting.\*\*\*

The Advisory Committee recommends that the Standing Committee approve these three amendments and forward them to the Judicial Conference.

**III. RULE OF EVIDENCE CIRCULATED FOR PUBLIC COMMENT.**

In January 1990, the Standing Committee approved the publication of a proposed amendment to Federal Rule of Evidence 404(b) which would add a notice provision in criminal cases. At its November 1990 meeting, the Advisory Committee considered the written comments it had received.

The Advisory Committee recommends that the Standing Committee approve the amendment to Rule 404(b) and forward it to the Judicial Conference.

**IV. PROPOSED TECHNICAL AMENDMENTS TO RULES OF CRIMINAL PROCEDURE AND RULES OF EVIDENCE.**

Although the Advisory Committee has no proposed amendments to be published for circulation to the bench and the bar at this time, a number of technical amendments are in order. The Advisory Committee therefore recommends that the Standing Committee approve the following technical amendments to the Rules of Criminal Procedure and Rules of Evidence.

A. Rule 32(c)(2)(A). Mr. Edward F. Willett, Law Revision Counsel, U.S. House of Representatives, has suggested several technical changes to Rule 32(c)(2)(A). The Advisory Committee recommends that the Standing Committee approve the following technical changes in that Rule and present them to the Judicial Conference. The page and footnote references are in the December 1, 1990 copy of the Federal Rules of Criminal Procedure published by the United States Printing Office, for the House Committee on the Judiciary.

1. Page 32: A semicolon should be added after "defendant" -- the last word in the sentence under (A). See Footnote.
2. Page 33: Strike comma after "opinions" -- eighth line, comma should follow the word "which", ninth line. See Footnote.

B. Rule 32.1. Mr. Willett, *supra*, suggests that a technical change be made in subdivision Rule 32.1(a)(1), on page 34 by deleting the "s" from "grounds" in the third line. See Footnote.

C. Rule 46(h). The reference in Rule 46(h), on page 45, to 18 U.S.C. 3142(c)(2)(K) is incorrect. Public Law 99-646 changed the references in 3142(c); the new provision is 18 U.S.C. 3142(c)(1)(B)(xi).

D. Rule 54(a). Because of changes in legislation, the Advisory Committee recommends that appropriate technical changes be made in Rule 54(a). That rule addresses the applicability of the Rules of Criminal Procedure. As noted in the Advisory Committee Note accompanying the amendment, changes proposed by the Committee would clarify the ability of the District Courts in the Virgin Islands to begin criminal prosecutions through the indictment process. The Advisory Committee recommends that the Standing Committee approve this

technical change. The Rule and accompanying Note are attached to this Report.

E. Rule 58. Mr. Willett, supra, also suggests that two minor changes should be made to Rule 58. The page and Footnote references are, as above, to the version of the Rules published for use by the Committee on the Judiciary, House of Representatives:

1. Page 50: The first word in subsection 58(b)(2)(A), "The," should not be capitalized. See Footnote.
2. Page 52: The word "subdivision" should be inserted before "(b)(1)" in the first sentence of Rule 58(d)(3). See Footnote.

F. Rule 58, et al, regarding term "Magistrate." The 1990 Crime Control Act changed the term "magistrate" to "magistrate judge". An attached letter from Magistrate Harvey Schlesinger, a member of the Advisory Committee explains the need for the technical change in terminology throughout all of the Rules of Criminal Procedure.

The Advisory Committee will consider appropriate conforming amendments to the Rules of Criminal Procedure.

G. Federal Rule of Evidence 1102. The language in Federal Rule of Evidence 1102, "in section 2076 of title 28 of the United States Code" should be changed to, "in section 2072 of title 28 of the United States Code." The change was effected by Title IV -- "Rules Enabling Act", Public Law 100-702, effective December 1, 1988.

PROPOSED AMENDMENTS  
TO THE  
FEDERAL RULES OF CRIMINAL PROCEDURE\*

Rule 16. Discovery and Inspection

- 1           (a) DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.
- 2                 (1) Information Subject to Disclosure.
- 3                         (A) STATEMENT OF DEFENDANT. Upon
- 4                         request of a defendant the government
- 5                         shall ~~permit the defendant to inspect and~~
- 6                         ~~copy or photograph~~ disclose to the
- 7                         defendant and make available for
- 8                         inspection, copying, or photographing: any
- 9                         relevant written or recorded statements
- 10                        made by the defendant, or copies thereof,
- 11                        within the possession, custody or control
- 12                        of the government, the existence of which
- 13                        is known, or by the exercise of due
- 14                        diligence may become known, to the
- 15                        attorney for the government; that portion
- 16                        of any written record containing the
- 17                        substance of any relevant oral statement

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\*New matter is underlined; matter to be omitted is lined through.

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18           ~~which the government intends to offer in~~  
19           ~~evidence at the trial~~ made by the  
20           defendant whether before or after arrest  
21           in response to interrogation by any person  
22           then known to the defendant to be a  
23           government agent; and recorded testimony  
24           of the defendant before a grand jury which  
25           relates to the offense charged. The  
26           government shall also disclose to the  
27           defendant the substance of any other  
28           relevant oral statement made by the  
29           defendant whether before or after arrest  
30           in response to interrogation by any person  
31           then known by the defendant to be a  
32           government agent if the government intends  
33           to use that statement at trial.

\* \* \* \* \*

## COMMITTEE NOTE

The amendment to Rule 16(a)(1)(A) expands slightly government disclosure to the defense of statements made by the defendant. The rule now requires the prosecution, upon request, to disclose any written record which contains reference to a relevant oral statement by the defendant which was in response to interrogation, without regard to whether the prosecution intends to use the statement at trial. The change recognizes that the defendant has some proprietary interest in statements

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The written record need not be a transcription or summary of the defendant's statement but must only be some written reference which would provide some means for the prosecution and defense to identify the statement. Otherwise, the prosecution would have the difficult task of locating and disclosing the myriad oral statements made by a defendant, even if it had no intention of using the statements at trial. In a lengthy and complicated investigation with multiple interrogations by different government agents, that task could become unduly burdensome.

The existing requirement to disclose oral statements which the prosecution intends to introduce at trial has also been changed slightly. Under the amendment, the prosecution must also disclose any relevant oral statement which it intends to use at trial, without regard to whether it intends to introduce the statement. Thus, an oral statement by the defendant which would only be used for impeachment purposes would be covered by the rule.

The introductory language to the rule has been modified to clarify that without regard to whether the defendant's statement is oral or written, it must at a minimum be disclosed. Although the rule does not specify the means for disclosing the defendant's statements, if they are in written or recorded form, the defendant is entitled to inspect, copy, or photograph them.

### Rule 32. Sentence and Judgment

\* \* \* \* \*

1 (c) PRESENTENCE INVESTIGATION.

\* \* \* \* \*

2 (2) Report. The report of the presentence  
3 investigation shall contain--

## RULES OF CRIMINAL PROCEDURE

4 (A) information about the history and  
5 characteristics of the defendant,  
6 including prior criminal record, if any,  
7 financial condition, and any circumstances  
8 affecting the defendant's behavior that  
9 may be helpful in imposing sentence or in  
10 the correctional treatment of the  
11 defendant;

\* \* \* \* \*

12 (3) Disclosure.

13 (A) At least 10 days before imposing  
14 sentence, unless this minimum period is  
15 waived by the defendant, the court shall  
16 provide the defendant and the defendant's  
17 counsel with a copy of the report of the  
18 presentence investigation, including the  
19 information required by subdivision (c)(2)  
20 but not including any final recommendation  
21 as to sentence, and not to the extent that  
22 in the opinion of the court the report  
23 contains diagnostic opinions, which, if  
24 disclosed, might seriously disrupt a  
25 program of rehabilitation; or sources of  
26 information obtained upon a promise of

## RULES OF CRIMINAL PROCEDURE

5

27                    confidentiality; or any other information  
 28                    which, if disclosed, might result in harm,  
 29                    physical or otherwise, to the defendant or  
 30                    other persons. The court shall afford the  
 31                    defendant and the defendant's counsel an  
 32                    opportunity to comment on the report and,  
 33                    in the discretion of the court, to  
 34                    introduce testimony or other information  
 35                    relating to any alleged factual inaccuracy  
 36                    contained in it.

\* \* \* \* \*

## COMMITTEE NOTE

The amendments are technical. No substantive changes are intended.

**Rule 32.1. Revocation or Modification of Probation  
 or Supervised Release.**

1                    (a) REVOCATION OF PROBATION OR SUPERVISED  
 2                    RELEASE.

3                    (1) Preliminary Hearing. Whenever a person  
 4                    is held in custody on the grounds that the  
 5                    person has violated a condition of probation or  
 6                    supervised release, the person shall be  
 7                    afforded a prompt hearing before any judge, or  
 8                    a United States magistrate who has been given  
 9                    the authority pursuant to 28 U.S.C. § 636 to



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## RULES OF CRIMINAL PROCEDURE

10           conduct such hearings, in order to determine  
 11           whether there is probably cause to hold the  
 12           person for a revocation hearing. The person  
 13           shall be given

\* \* \* \* \*

## COMMITTEE NOTE

The amendment is technical. No substantive change is intended.

Rule 35. Correction or Reduction of Sentence

\* \* \* \* \*

1           (b) CORRECTION REDUCTION OF SENTENCE FOR CHANGED  
 2           CIRCUMSTANCES. The court, on motion of the  
 3           Government, made may within one year after the  
 4           imposition of the sentence, may reduce ~~lower~~ a  
 5           sentence to reflect a defendant's subsequent,  
 6           substantial assistance in the investigation or  
 7           prosecution of another person who has committed an  
 8           offense, in accordance with the guidelines and  
 9           policy statements issued by the Sentencing  
 10          Commission pursuant to section 994 of title 28,  
 11          United States Code. The court may consider a  
 12          government motion to reduce a sentence made one  
 13          year or more after imposition of the sentence where  
 14          the defendant's substantial assistance involves

15 information or evidence not known by the defendant  
16 until one year or more after imposition of  
17 sentence. The court's authority to reduce lower a  
18 sentence under this subsection includes the  
19 authority to reduce lower such sentence to a level  
20 below that established by statute as a minimum  
21 sentence.

22 (c) Correction of Sentence By Sentencing Court,  
23 -- The Court, acting within 7 days after the  
24 imposition of sentence, may correct a sentence that  
25 was imposed as a result of arithmetical, technical,  
26 or other clear error.

#### COMMITTEE NOTE

Rule 35(b), as amended in 1987 as part of the Sentencing Reform Act of 1984, reflects a method by which the government may obtain valuable assistance from defendants in return for an agreement to file a motion to reduce the sentence, even if the reduction would reduce the sentence below the mandatory minimum sentence.

The title of subsection (b) has been amended to reflect that there is a difference between correcting an illegal or improper sentence, as in subsection (a), and reducing an otherwise legal sentence for special reasons under subsection (b).

Under the 1987 amendment, the trial court was required to rule on the government's motion to reduce a defendant's sentence within one year after imposition of the sentence. This caused problems, however, in situations where the defendant's assistance could not be fully assessed in time to make a timely motion which could be ruled upon before one year had elapsed. The amendment requires the government to make its motion to

reduce the sentence before one year has elapsed but does not require the court to rule on the motion within the one year limit. This change should benefit both the government and the defendant and will permit completion of the defendant's anticipated cooperation with the government. Although no specific time limit is set on the court's ruling on the motion to reduce the sentence, the burden nonetheless rests on the government to request and justify a delay in the court's ruling.

The amendment also recognizes that there may be those cases where the defendant's assistance or cooperation may not occur until after one year has elapsed. For example, the defendant may not have obtained information useful to the government until after the time limit had passed. In those instances the trial court in its discretion may consider what would otherwise be an untimely motion if the government establishes that the cooperation could not have been furnished within the one-year time limit. In deciding whether to consider an untimely motion, the court may, for example, consider whether the assistance was provided as early as possible.

Subdivision (c) is intended to adopt, in part, a suggestion from the Federal Courts Study Committee 1990 that Rule 35 be amended to recognize explicitly the ability of the sentencing court to correct a sentence imposed as a result of an obvious arithmetical, technical or other clear error, if the error is discovered shortly after the sentence is imposed. At least two courts of appeals have held that the trial court has the inherent authority, notwithstanding the repeal of former Rule 35(a) by the Sentencing Reform Act of 1984, to correct a sentence within the time allowed for sentence appeal by any party under 18 U.S.C. 3742. See United States v. Cook, 890 F.2d 672 (4th Cir. 1989) (error in applying sentencing guidelines); United States v. Rico, 902 F.2d 1065 (2nd Cir. 1990) (failure to impose prison sentence required by terms of plea agreement). The amendment in effect codifies the result in those two cases but provides a more stringent time requirement. The Committee believed that the time for correcting such errors should be narrowed within the time for appealing the sentence to reduce the likelihood of jurisdictional questions in the event of an appeal and to provide the parties with an opportunity to address the court's correction of the sentence, or lack thereof, in any appeal of the sentence. A shorter period of time would

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also reduce the likelihood of abuse of the rule by limiting its application to acknowledged and obvious errors in sentencing.

The authority to correct a sentence under this subdivision is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action under Rule 35(a). The subdivision is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence. Nor should it be used to reopen issues previously resolved at the sentencing hearing through the exercise of the court's discretion with regard to the application of the sentencing guidelines. Furthermore, the Committee did not intend that the rule relax any requirement that the parties state all objections to a sentence at or before the sentencing hearing. See, e.g., United States v. Jones, 899 F.2d 1097 (11th Cir. 1990).

The subdivision does not provide for any formalized method of bringing the error to the attention of the court and recognizes that the court could sua sponte make the correction. Although the amendment does not expressly address the issue of advance notice to the parties or whether the defendant should be present in court for resentencing, the Committee contemplates that the court will act in accordance with Rules 32 and 43 with regard to any corrections in the sentence. Compare United States v. Cook, supra (court erred in correcting sentence sua sponte in absence of defendant) with United States v. Rico, supra (court heard arguments on request by government to correct sentence). The Committee contemplates that the court would enter an order correcting the sentence and that such order must be entered within the seven (7) day period so that the appellate process (if a timely appeal is taken) may proceed without delay and without jurisdictional confusion.

Rule 35(c) provides an efficient and prompt method for correcting obvious technical errors that are called to the court's attention immediately after sentencing. But the addition of this subdivision is not intended to preclude a defendant from obtaining statutory relief from

a plainly illegal sentence. The Committee's assumption is that a defendant detained pursuant to such a sentence could seek relief under 28 U.S.C. § 2255 if the seven day period provided in Rule 35(c) has elapsed. Rule 35(c) and § 2255 should thus provide sufficient authority for a district court to correct obvious sentencing errors.

The Committee considered, but rejected, a proposal from the Federal Courts Study Committee to permit modification of a sentence, within 120 days of sentencing, based upon new factual information not known to the defendant at the time of sentencing. Unlike the proposed subdivision (c) which addresses obvious technical mistakes, the ability of the defendant (and perhaps the government) to come forward with new evidence would be a significant step toward returning Rule 35 to its former state. The Committee believed that such a change would inject into Rule 35 a degree of post-sentencing discretion which would raise doubts about the finality of determinate sentencing that Congress attempted to resolve by eliminating former Rule 35(a). It would also tend to confuse the jurisdiction of the courts of appeals in those cases in which a timely appeal is taken with respect to the sentence. Finally, the Committee was not persuaded by the available evidence that a problem of sufficient magnitude existed at this time which would warrant such an amendment.

#### Rule 46. Release From Custody

\* \* \* \* \*

1           (h) FORFEITURE OF PROPERTY. Nothing in this  
2           rule or in chapter 207 of title 18, United States  
3           Code, shall prevent the court from disposing of any  
4           charge by entering an order directing forfeiture of  
5           property pursuant to 18 U.S.C. ~~3142(e)(2)(K)~~ 3142  
6           (c)(1)(B)(xi) if the value of the property is an  
7           amount that would be an appropriate sentence after

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8 conviction of the offense charged and if such  
9 forfeiture is authorized by statute or regulation.

## COMMITTEE NOTE

The amendment is technical. No substantive change is intended.

## Rule 54. Application and Exception

1 (a) COURTS. These rules apply to all criminal  
2 proceedings in the United States District Courts;  
3 in the District of Guam; in the District Court for  
4 the Northern Mariana Islands, except as otherwise  
5 provided in articles IV and V of the covenant  
6 provided by the Act of March 24, 1976 (90 Stat.  
7 263); in the District Court of the Virgin Islands;  
8 and (except as otherwise provided in the Canal  
9 Zone) in the United States District Court for the  
10 District of the Canal Zone; in the United States  
11 Courts of Appeals; and in the Supreme Court of the  
12 United States; except that ~~all offenses shall~~  
13 ~~continue to be prosecuted in the District Court of~~  
14 ~~Guam and in the District Court of the Virgin~~  
15 ~~Islands by information as heretofore except such as~~  
16 ~~may be required by local law to be prosecuted by~~  
17 ~~indictment by grand jury.~~ the prosecution of  
18 offenses in the District Court of the Virgin

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19           Islands shall be by indictment or information as  
 20           otherwise provided by law.

\* \* \* \* \*

**COMMITTEE NOTE**

The amendment to 54(a) conforms the Rule to legislative changes affecting the prosecution of federal cases in Guam and the Virgin Islands by indictment or information. The "except" clause in Rule 54(a) addressing the availability of indictments by grand jury Guam has been effectively repealed by Public Law 98-454 (1984), 48 U.S.C. § 1424-4 which made the Federal Rules of Criminal Procedure (including Rule 7, relating to use of indictments) applicable in Guam notwithstanding Rule 54(a). That legislation apparently codified what had been the actual practice in Guam for a number of years. See 130 Cong. Rec., H25476 (daily ed. Sept. 14, 1984). With regard to the Virgin Islands, Public Law 98-454(1984) also amended 48 U.S.C. §§ 1561 and 1614(b) to permit (but not require) use of indictments in the Virgin Islands.

**Rule 58. Procedure for Misdemeanors and Other  
 Petty Offenses**

\* \* \* \* \*

1           (b) PRETRIAL PROCEDURES.

\* \* \* \* \*

2                   (A) ~~T~~the charge, and the maximum  
 3                   possible penalties provided by law,  
 4                   including payment of a special assessment  
 5                   under 18 U.S.C. § 3013, and restitution  
 6                   under 18 U.S.C. § 3663;

\* \* \* \* \*

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7 (d) SECURING THE DEFENDANT'S APPEARANCE;  
8 PAYMENT IN LIEU OF APPEARANCE.

\* \* \* \* \*

9 (3) Summons or Warrant. Upon an indictment  
10 or a showing by one of the other documents  
11 specified in subdivision (b)(1) of probable  
12 cause to believe that an offense has been  
13 committed and that the defendant has committed  
14 it, the court may issue an arrest warrant or,  
15 if no warrant is requested by the attorney for  
16 the prosecution, a summons. The showing of  
17 probable cause shall be made in writing upon  
18 oath or under penalty for perjury, but the  
19 affiant need not appear before the court. If  
20 the defendant fails to appear before the court  
21 in response to a summons, the court may  
22 summarily issue a warrant for the defendant's  
23 immediate arrest and appearance before the  
24 court.

\* \* \* \* \*

**COMMITTEE NOTE**

The amendments are technical. No substantive changes are intended.