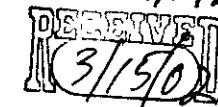


UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

D. BROCK HORNBY
CHIEF JUDGE



156 FEDERAL STREET
PORTLAND, MAINE 04101
(207) 780-3280

02-CR-A

March 11, 2002

Hon. Edward E. Carnes
Chair, Advisory Committee on Criminal Rules
United States Court of Appeals for the Eleventh Circuit
Johnson Federal Building & Courthouse
15 Lee Street
Montgomery, AL 36104

Re: Federal Rule of Criminal Procedure 32

Dear Judge Carnes:

I am writing to suggest a revision to Federal Rule of Criminal Procedure 32. The rule should be amended to clarify the time at which a sentence imposing an order of restitution but reserving determination of the amount to be paid is final for purposes of filing an appeal.

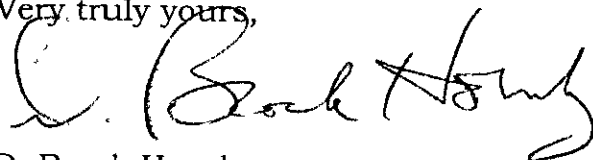
When imposing sentence, the judge must inform the defendant of his or her right to appeal. Fed. R. Crim. P. 32(c)(5). The Federal Rules of Appellate Procedure allow the defendant ten days to appeal the court's judgment. Fed. R. App. P. 4(b)(1)(A)(i). Generally, if the defendant's sentence includes an order of restitution, the judge will order payment and determine the amount to be paid at the sentencing. This restitution order is final and appealable, even though it is subject to later correction. 18 U.S.C. § 3664(o). Sometimes, however, the victim's losses are not ascertainable by the time of sentencing. In that case, the court may order restitution as part of the sentence, but delay determination of the amount as much as ninety days. 18 U.S.C. § 3664(d)(5). Neither Rule 32 nor § 3664(o) answer the question: Is the sentence final when the sentence (with order of restitution) is imposed or when the amount of restitution is later determined?

I suggest that the following sentence be added to the text of Fed. R. Crim. P. 32(d)(1): "A sentence that includes an order of restitution is not a final judgment

Hon. Edward E. Carnes
Chair, Advisory Committee on Criminal Rules
March 11, 2002
Page 2

until the amount of restitution has been determined." (The only alternative seems to be to make both events final orders.) Substantively, the revision would provide procedural certainty both to judges and, more importantly, to defendants affected by § 3664(d)(5) delays. Textually, specific mention of restitution in Rule 32(d)(1) is appropriate because restitution is already specifically mentioned in other provisions of the rule. Fed. R. Crim. P. 32(b)(1), 32(b)(4)(F). And, the Rules pronounce grounds for the finality of orders in other contexts. Fed. R. Crim. P. 32.2(b)(3).

Very truly yours,

A handwritten signature in black ink, appearing to read "D. Brock Hornby". The signature is written in a cursive style with a large, looped initial "D".

D. Brock Hornby

dlh
cc Peter G. McCabe, Secretary,
Committee on Rules of
Practice and Procedure

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RECEIVED
2/4/02

D. BROCK HORNBY
CHIEF JUDGE

156 FEDERAL STREET
PORTLAND, MAINE 04101
(207) 780-3280

02-CR-A

November 28, 2001

Hon. Edward E. Carnes
United States Circuit Judge
Frank M. Johnson, Jr. Federal Building
and United States Courthouse
15 Lee Street
Montgomery, AL 36104

Re: Judicial Conference Advisory Committee on Criminal Rules;
Fed. R. Crim. P. 41

Dear Judge Carnes:

When one of our Magistrate Judges was out sick recently, I had occasion to issue some warrants and take returns of warrants. The process reminded me of a question I had when I was a Magistrate Judge.

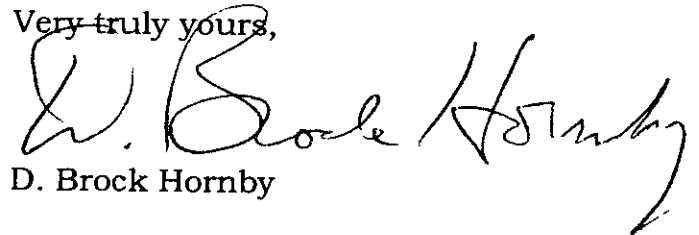
What is gained by requiring the officer to make his/her return and inventory before the judge/magistrate judge? Of course, a judge/magistrate judge must issue the warrant, but why not permit the return and inventory to be made before any deputy clerk who is authorized to administer oaths (as deputy clerks do in the courtroom for witnesses)? Taking the return and inventory is solely a ministerial task, an unnecessary interruption for the judicial officer, and an unnecessary delay for the law enforcement officer who has to arrange an appointment with the judge/judicial officer in advance. The problem is Rule 41(c)(1), which requires that the warrant "designate a federal magistrate judge to whom it shall be returned." Why not just provide that the warrant "designate the court to which it shall be returned"? (That is what our equivalent state rule does here in Maine.) Moreover, subsection (g) requires the magistrate judge to attach a copy of the

Hon. Edward E. Carnes
United States Circuit Judge
November 28, 2001
Page 2

return, the inventory, and any other papers to the warrant and to file them with the clerk of the district court. This latter requirement seems archaic. I believe that in many districts the administrative part of the warranting process and return activity occurs in the clerk's office (where the deputy assigned to the magistrate judge is often located). It seems strange in 2001 to impose filing requirements directly upon the magistrate judge.

I suggest that it is time to re-examine these requirements.

Very truly yours,

A handwritten signature in cursive script, appearing to read "D. Brock Hornby". The signature is written in black ink and is positioned to the right of the typed name.

D. Brock Hornby

dlh

cc: John K. Rabiej, Chief—Rules Committee Support Office
Peter G. McCabe, Secretary to the Rules Committee
Professor David A. Schlueter, Reporter to Criminal Rules Committee
Thomas C. Hnatowski, Chief—Magistrate Judges Division

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

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
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BANKRUPTCY RULES

DAVID F. LEVI
CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

February 5, 2002

Honorable D. Brock Hornby
Chief Judge
United States District Court
for the District of Maine
156 Federal Street
Portland, Maine 04101

Dear Judge Hornby:

Thank you for your suggestion to Criminal Rule 41. Your letter arrived at our office on February 4, 2002, and I am sorry for the late response. A copy of your letter was sent to the chair and reporter of the Advisory Committee on Criminal Rules for their consideration.

We welcome your suggestion and appreciate your interest in the rulemaking process.

Sincerely,



Peter G. McCabe
Secretary

cc: Honorable Edward E. Carnes
Professor David A. Schlueter
Members of the Criminal Rule 41
Subcommittee

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
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CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

May 24, 2002

Honorable D. Brock Hornby
Chief Judge
United States District Court
District of Maine
156 Federal Street
Portland, Maine 04101

RE. Action Taken by the Advisory Committee on Criminal Rules

Dear Judge Hornby

Thank you again for your proposed amendments to Rules 32 and 41 of the Federal Rules of Criminal Procedure. The Advisory Committee on Criminal Rules considered your proposed amendments at its April 25-26, 2002, meeting. With respect to Criminal Rule 32, you had proposed an amendment that would address the question of when a sentence is final where the trial court imposes forfeiture as part of the sentence but defers fixing the amount of the forfeiture until later. The Committee declined to adopt your proposed amendment. Several committee members noted that the issue was probably addressed in 18 U.S.C. § 3664(d)(5). Another member noted the interlocking issues of utilizing the statute, Rule 32 as written, and notices of appeal. Other members observed that they did not believe that there was uncertainty in the existing procedural rules.

With respect to Criminal Rule 41, you had recommended that the rule be amended to permit law enforcement officers to return executed search warrants to the clerk of court, and not necessarily to the issuing judge or magistrate judge. The Committee declined to adopt your proposed amendment. Your proposal was considered by the Committee's Subcommittee on Rule 41. The Subcommittee concluded that it was preferable to have the returns made to the magistrate judge designated in the warrant. It was the Subcommittee's sense that it would be better to maintain judicial monitoring of the warrants and that requiring the warrant to be returned to a judicial officer would further that interest.

Page Two
May 24, 2002

Thank you again for your suggestions. We appreciate your interest in the federal rulemaking process and welcome any proposed amendments that you may have in the future.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter G. McCabe". The signature is written in a cursive style with a large initial "P" and "M".

Peter G. McCabe
Secretary