



# FEDERAL MAGISTRATE JUDGES ASSOCIATION

49TH ANNUAL CONVENTION - ATLANTA, GEORGIA

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February 8, 2011

10-CR-002

Peter G. McCabe, Secretary  
Committee on Rules of Practice & Procedure  
of the Judicial Conference of the United States  
Administrative Office of the United States Courts  
Thurgood Marshall Federal Judiciary Building  
Washington, DC 20544

Re: Comments on Proposed Amendments to Federal Rules  
of Criminal Procedure and Evidence

Dear Mr. McCabe:

The Federal Magistrate Judges Association submits the attached comments to the Rules Advisory Committee. The comments were first considered by the Standing Rules Committee of the FMJA. The committee members are:

Honorable S. Allan Alexander, Northern District of Mississippi, Chair  
Honorable Clint Averitte, Northern District of Texas  
Honorable William Baughman, Northern District of Ohio  
Honorable Alan J. Baverman, Northern District of Georgia  
Honorable Hugh Warren Brenneman, Jr., Western District of Michigan  
Honorable Joe B. Brown, Middle District of Tennessee  
Honorable Geraldine Soat Brown, Northern District of Illinois  
Honorable Waugh B. Crigler, Western District of Virginia  
Honorable Judith Dein, District of Massachusetts  
Honorable Steven Gold, Eastern District of New York  
Honorable Margaret Kravchuck, Eastern District of Maine  
Honorable Kristin L. Mix, District of Colorado  
Honorable David Peebles, Northern District of New York  
Honorable Mary Pat Thyng, District of Delaware  
Honorable David A. Sanders, Northern District of Mississippi  
Honorable Nita L. Stormes, Eastern District of Pennsylvania  
Honorable Diane K. Vescovo, Western District of Tennessee  
Honorable Linda T. Walker, Northern District of Georgia  
Honorable Andrew J. Wistrich, Central District of California

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The committee members come from several kinds of districts and have varying types of duties. Many of them consulted with their colleagues in the course of preparing these comments. The comments were then reviewed and unanimously approved by the Officers and Directors of the FMJA.

The comments reflect the considered position of magistrate judges as a whole. The FMJA has also encouraged individual magistrate judges to forward comments to you.

We are pleased to have this opportunity to present written comments representing the view of the FMJA, and we welcome the opportunity to testify.

Sincerely,

Barry M. Kurren

Enclosure

**COMMENTS OF FEDERAL MAGISTRATE JUDGES ASSOCIATION  
RULES COMMITTEE ON PROPOSED CHANGES TO  
THE FEDERAL RULES OF CRIMINAL PROCEDURE  
(Class of 2012)**

**I PROPOSED RULES 5(c)(4) [Initial Appearance; Procedure for Persons Extradited to the United States ]:**

**COMMENT:** The Federal Magistrate Judges Association does not disagree with the concept of specifying the charging district as the location of the initial appearance for a person extradited to the United States, but recommends that the proposed rule be amended to add language similar to that in Rule 5(a)(1)(A) and-(B) to minimize unreasonable delay in such cases.

**DISCUSSION:** The Committee Note to the proposed rule states that its purpose for requiring an initial appearance in the charging district(s) is to reduce the risk that delay resulting from an initial appearance in any district other than the district[s] charging the defendant will impair an extradited person’s ability to obtain and consult with counsel and prepare a defense. The proposed rule does not contain language identical or similar to that contained in Fed. R. Crim. P. 5(a)(1)(A) and -(B), which each require that the person making an arrest take the defendant before a magistrate judge or state or local judge “without unnecessary delay” for an initial appearance.

Despite subsection 5(a)(1)(B)’s requirement that “*a person making an arrest* outside the United States” take the defendant before a magistrate judge without unnecessary delay, past experiences of FMJA members lead to some concern that the amendment and the committee comments may be interpreted by those

transporting the defendant as excusing delays in the arrival district or in transit without the defendant being advised of rights or having contact with counsel. The FMJA therefore believes the insertion of the following language will make clear that an extradited defendant is entitled to the same prompt appearance before the court in the charging district that is required under subsection 5(a)(1)(A) for a domestic defendant in the district of arrest and under subsection 5(a)(1)(B) for a defendant who was arrested outside the United States but did not have to be extradited:

(4) Procedure for Persons Extradited to the United States. If the defendant is surrendered to the United States in accordance with a request for the defendant's extradition, the initial appearance must be in the district (or one of the districts) where the offense is charged, and the defendant must be presented there without unnecessary delay.

**II. PROPOSED RULES 5(d)(1)(F) [Initial Appearance – Procedure in a Felony Case] and 58(b)(2)(H) [Petty Offenses and Other Misdemeanors – Initial Appearance]:**

**COMMENT:** The FMJA has some reservations about the necessity for these two rules, but believes that if any procedure on consular notification is to be adopted, the proposed rule provides adequate notice.

**DISCUSSION:** It appears that the duties under Article 36 of the Vienna Convention on consular relations and other bilateral treaties are executive-branch functions and are not necessarily the function of the judiciary. The FMJA also

has concern that despite the Committee notes about unresolved issues, including establishing individual rights, the adoption of this formal requirement in the rules could lend substantial credence to the creation of such rights.

In addition, many of the defendants who would be given this advice are charged with some form of illegal entry, or could be so charged if their non-citizen status were established. Great care would have to be taken to insure that defendants in custody, having been advised of their rights against self-incrimination, would not then be asked to incriminate themselves by supplying information about their non-citizen status.

Because the courts currently follow no uniform practice to advise defendants of their rights concerning consular notification or inquire whether the United States Attorney or arresting agents have provided such advice, the FMJA believes that the proposed rules do provide adequate advice if the judiciary is to become involved in this executive function.

**III. PROPOSED RULE 37** [Indicative Ruling on a Motion for Relief That is Barred By a Pending Appeal:

**COMMENT:** The FMJA endorses the proposed changes.