Agenda H-12
Rules of Practice and
Procedure
March 1980

REPORT OF THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

This report contains the following recommendations for the consideration of the Conference:

1. That the Conference approve the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates, set out in Appendix A, and authorize their transmission to the Supreme Court for consideration and adoption.

2. That the Committee be authorized to make available to the public on request any document submitted to the Standing Committee by an Advisory Committee and to make available any recommendations submitted by the Committee to the Judicial Conference.

Agenda H-12
Rules of Practice and Procedure
March 1980

REPORT OF THE
STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES, CHAIRMAN, AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Standing Committee on Rules of Practice and Procedure met in Washington on February 4, 1980. All members of the Committee were present except Griffin B. Bell, who was unavoidably absent. Professor Wayne LaFave, Reporter to the Advisory Committee on Criminal Rules, was also present, as was Joseph F. Spaniol, Jr., our Secretary.

Proposed Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates

The Advisory Committee on Federal Rules of Criminal Procedure submitted to the Standing Committee a new set of Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates, together with Advisory Committee notes. These new rules would replace the current Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates, which were approved by the Supreme Court on January 27, 1971, pursuant to 18 U.S.C. 3402. The proposed new rules had been circulated to bench and bar for

comment, and at its meeting on January 10, 1980, the Advisory Committee had considered all comments received.

Professor LaFave stated that new rules are required as a result of the Federal Magistrates Act of 1979, Public Law 96-82, approved October 10, 1979, which amended 18 U.S.C. 3401 to abolish the concept of "minor offenses" and to authorize United States Magistrates to try all misdemeanor cases with written consent of the defendant. The new rules, which are based in large part on the existing Rules for the Trial of Minor Offenses Before United States Magistrates, are set out in Appendix A.

The Standing Committee carefully reviewed each of the new rules and made clarifying and technical changes in some of them. Under 18 U.S.C. 3402 the Supreme Court has the authority to adopt these rules without submitting them to the Congress. We recommend that they be transmitted to the Supreme Court for consideration and adoption.

Bankruptcy Rules

The Advisory Committee on Bankruptcy Rules is now considering amendments to the Rules of Bankruptcy Procedure required by the new Bankruptcy Act. The committee met on November 28 and 29, 1979 and again on February 6 and 7, 1980 to consider drafts of the proposed amendments prepared by the Reporters to the Committee, Professor Lawrence King of

of New York University Law School and Professor Walter Taggart of the Villanova Law School. The Committee is planning additional meetings, so that its initial work can be completed as soon as practicable and proposed rules circulated to bench and bar for comment.

Appellate Rules

The Advisory Committee on Appellate Rules met on December 14, 1979. That Committee is in the early stages of developing appropriate amendments.

Civil Rules

The Advisory Committee on Civil Rules met on December 10, 1979 and will meet again on April 24, 1980, to consider drafts of amendments to the Civil Rules, particularly those pertaining to pretrial procedures. Further work is planned by the Reporter, Professor Arthur Miller of Harvard University, before drafts of any proposed amendments are circulated for comment.

Activities of the Committee

The Committee discussed the desirability of appointing a reporter to the Standing Committee, who would have inter alia the responsibility for developing a statement of the internal procedures of the Committee, but decided to consider the matter further at its next meeting. Meanwhile, Professor

Bernard Ward, a member of the Committee, has agreed to prepare a statement describing the procedures followed in drafting and presenting the most recent proposed changes in the Federal Rules of Civil Procedure.

The Committee has been advised of a study of the rules program currently under way in the Federal Judicial Center. The Committee understands that the Center intends to produce a discussion paper summarizing current comment on the rules program and suggestions which have been made for modification of the program, but that the paper will not contain recommendations by the Center. The report will be reviewed by the Committee as soon as it is received.

Public Access to Committee Files and Records

From time to time the Committee has received requests for access to Committee files and records, including the text of proposed amendments to rules submitted by the advisory committees to the Standing Committee and by the Standing Committee to the Judicial Conference. It has heretofore been standard practice to make available to the public only the written comments on proposed changes submitted to the advisory committees in response to requests for comment. Modifications of the proposed rules so submitted for comment, made by the advisory committees or the Standing Committee, have not been made available to the public. As a practical

matter, such changes have been technical or clarifying, because the Standing Committee requires recirculation to the bench and bar of any substantial change made after the original publication of proposed rules. This procedure has not been understood by the public and has led to misunderstanding and criticism. The Committee therefore recommends that on request it be authorized to make available any document submitted to the Standing Committee by an advisory committee and to make available any recommendations submitted by the Committee to the Judicial Conference.

Respectfully submitted,

Judge Roszel C. Thomsen,
Chairman
Judge Carl McGowan
Judge James S. Holden
Professor Frank J. Remington
Professor Bernard J. Ward
Griffin B. Bell, Esquire
Edward H. Hickey, Esquire
Francis N. Marshall, Esquire

February 12, 1980

RULES OF PROCEDURE
FOR THE
TRIAL OF MISDEMEANORS
BEFORE
UNITED STATES MAGISTRATES

COMMITTEE ON RULES OF PRACTICE
AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE
UNITED STATES

MARCH 1980

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RULES OF PROCEDURE
FOR THE
TRIAL OF MISDEMEANORS
BEFORE
UNITED STATES MAGISTRATES

Rule 1. Scope

(a) **In General.** These rules govern the procedure and practice for the conduct of proceedings in misdemeanor cases, including petty offenses, before United States magistrates under 18 U.S.C. § 3401, and for appeals in such cases to judges of the district courts.

(b) **Applicability of Federal Rules of Criminal Procedure.** Except as specificially provided by these rules, the Federal Rules of Criminal Procedure govern all proceedings except those concerning petty offenses for which no sentence of imprisonment will be imposed. Proceedings concerning petty offenses for which no sentence of imprisonment will be imposed are not governed by the Federal Rules of Criminal Procedure, except as specifically provided therein or by these rules. However, to the extent they are not inconsistent with these rules, a magistrate may follow such provisions of the Federal Rules of Criminal Procedure as he deems appropriate.

(c) **Definition.** The term "petty offenses for which no sentence of imprisonment will be imposed," as used in these rules, means any petty offenses, regardless of the penalty authorized by law, as to which the magistrate determines that, in the event of conviction, no sentence of imprisonment will actually be imposed in the particular case.

ADVISORY COMMITTEE NOTE

Subdivision (a) differs from its predecessor, the first sentence of rule 1 of the 1971 Magistrates Rules, in that it makes these rules applicable to the trial of all misdemeanors before United States magistrates. For the applicable definition of "misdemeanor," see 18 U.S.C. § 1. It reflects the expansion of criminal trial jurisdiction of such magistrates by that part of the Federal Magistrate Act of 1979 which amended 18 U.S.C. § 3401.

Subdivision (b) draws a critical distinction between petty offenses for wnich no sentence of imprisonment will be imposed and other misdemeanors. As to the latter, the Federal Rules of Criminal Procedure govern except as to procedures specifically covered by these rules. By contrast, procedures in other cases are not governed by the Federal Rules of Criminal Procedure except as specifically provided therein or in these rules, though it is expressly recognized that a magistrate may follow those provisions of the Federal Rules of Criminal Procedure as he deems appropriate.

Subdivision (b) reflects the policy that misdemeanor cases above the petty offense level or which result in imprisonment should be dealt with in essentially the same way whether or not the defendant has consented to disposition before a magistrate. This is a sound policy, as defendants would be discouraged from giving such consent if many procedural protections were thereby forfeited. To so discourage consent would work against the underlying objectives of the Federal Magistrate Act of 1979.

By stating that the Federal Rules of Criminal Procedure do not apply in other cases but that magistrates trying such cases may follow such provisions of those rules as are deemed appropriate, subdivision (b) deals unambiguously with an issue not clearly resolved in the 1971 Magistrates Rules. Though rule 1 of those rules strongly implies that the criminal procedure rules are not applicable to petty offenses, rule 3(c)(1) requires a magistrate to try a petty offense case in the same manner as a district judge. Moreover, rule 11(b) of the 1971 rules declares that the magistrate "may proceed in any lawful manner not inconsistent with these rules or with any applicable statute," which can be read as either requiring the application of the criminal procedure rules to all petty offense procedures or as authorizing selective application of the criminal procedure rules to petty offense cases. Subdivision (b) of the present rule reflects the fact that the full panoply of rights and procedures to be found in the Federal Rules of Criminal Procedure are neither feasible nor essential when magistrates are dealing with very minor offenses. At the same time, subdivision (b) recognizes that the magistrate may properly look selectively to the Federal Rules of Criminal Procedure in such cases.

Because the distinction between petty offenses for which no sentence of imprisonment will be imposed and other misdemeanors is critical here and in following rules, it must be emphasized that the definition of a "petty offense" in 18 U.S.C. § 1(3), "any misdemeanor, the

penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500 or both," will usually but not inevitably apply here. The Supreme Court has recognized the historical difference in treatment accorded petty offenses and has excluded them from the requirement that the trial of "crimes" be by jury. District of Columbia v. Clawens, 300 U.S. 617 (1937); Shick v. United States, 195 U.S. 63 (1904). Nevertheless, certain offenses have traditionally been considered "crimes" at common law, and are still such even though the maximum penalty currently prescribed by law is not more than six months imprisonment or a fine of $500. That is, the penalty prescribed is of major relevance in determining whether an offense is petty in the constitutional sense, but is not the sole criterion; the historical antecedents of the offense and the ethical condemnation with which the community views the offense are also important. See Baldwin v. New York, 399 U.S. 66 (1970); Duncan v. Louisiana, 391 U.S. 145 (1968). By such reasoning, a defendant has been held to have a constitutional right to jury trial, without regard to the potential penalties, for such offenses as driving while intoxicated, District of Columbia v. Colts, 282 U.S. 63 (1930), and conspiracy, United States v. Sanchez-Meza, 547 F.2d 461 (9th Cir. 1976). See also discussion and cases cited in Brady v. Blair, 427 F.Supp. 5, 9-10 (S.D. Ohio 1976); and Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv.L.Rev. 917 (1926).

But, it must be emphasized that the Federal Rules of Criminal Procedure do apply to those petty offenses for which it is possible that a penalty of imprisonment will be imposed. Thus, these rules employ the standard adopted by the Supreme Court for determining when appointment of counsel is constitutionally required. Scott v. Illinois, 99 S.Ct. 1158 (1979). Precisely the reasons given by the Court for concluding that such cases are important and significant enough to require assistance of counsel have led the Advisory Committee to conclude that these cases are deserving of all the procedural protections provided by the Federal Rules of Criminal Procedure. As with Scott, the "imprisonment will be imposed" test in these rules, as defined in subdivision (c), presents the difficulty that the distinction being made refers to an event which has not yet occurred—sentencing. However, in most cases it will be apparent from the nature of the charge or other circumstances, readily ascertainable by inquiry of the U. S. Attorney or law enforcement officer or otherwise, whether imprisonment (if authorized by statute for the offense charged) is a realistic possibility. If it is, the safer course of action is full compliance with the Federal Rules of Criminal Procedure, as only then will it be possible to sentence to imprisonment if it later appears that such a sentence would be appropriate in the particular case.

Rule 2.
Pretrial Procedures

(a) **Trial Document.** The trial of a misdemeanor may proceed on an indictment, information, or complaint or, if it be a petty offense, on a citation or violation notice. The district court, by order or local rule, may make provision for the reference of such cases to a magistrate.

(b) **Initial Appearance.** At the defendant's initial appearance on a misdemeanor charge, the magistrate shall inform the defendant of the following:

(1) the charge against him, and the maximum possible penalty provided by law;

(2) his right to retain counsel;

(3) unless he is charged with a petty offense for which appointment of counsel is not required, his right to request the assignment of counsel if he is is unable to obtain counsel;

(4) that he is not required to make a statement and that any statement made by him may be used against him;

(5) that he has a right to trial, judgment and sentencing before a judge of the district court;

(6) unless the offense charged is a petty offense, that he has a right to trial by jury before either a magistrate or a judge of the district court;

(7) if the prosecution is not on an indictment or information and is for a misdemeanor other than a petty offense, that he has a right to have a preliminary examination unless he consents to be tried before the magistrate; and

(8) if he is in custody, of the general circumstances under which he may secure pretrial release.

(c) **Consent and Arraignment.** If the defendant signs a written consent to be tried before the magistrate which specifically waives trial before a judge of the district court, the magistrate shall take the defendant's plea to the misdemeanor charge. The defendant may plead not guilty, guilty or, with the consent of the magistrate, nolo contendere. If the defendant pleads not guilty, the magistrate shall either conduct the trial within 30 days upon written consent of the defendant or fix a later time for the trial, giving due regard to the needs of the parties to consult with counsel and prepare for trial.

ADVISORY COMMITTEE NOTE

Subdivision (a) deals with those matters covered in rules 2(a) and 3(a) in the 1971 Magistrates Rules. Apart from the broadening of the provision to cover all misdemeanors, only one substantive change has been made. An indictment has been included as a trial document, as on occasion a grand jury will indict a defendant for a petty offense or other misdemeanor. A misdemeanor case above the petty offense level (see note to rule 1 on the definition of "petty offense") may be initiated by citation or violation notice, and such a document will suffice if a plea of guilty or nolo contendere is entered; but if such a case is to go to trial, then a complaint, information or indictment is necessary.

Subdivision (b) sets out the matters about which the defendant is to be informed by the magistrate at the initial appearance. Items (1) through (4), (7) and (8) essentially correspond to the responsibilities of a magistrate

when the offense is not triable by him, as set out in Fed.R.Crim.P. 5(c). Unique here is the requirement in item (1) that the defendant be informed of the maximum possible penalty, which has been added because it is a most relevant consideration in the defendant's decision whether to consent to trial before the magistrate. Items (5) and (6) supply information necessary to the defendant's decision whether to waive trial before a judge of the district court. Item (7) is limited in the way that it is because under 18 U.S.C. § 3060(e) there is no right to a preliminary hearing if an indictment is returned or an information filed. See also Fed.R.Crim.P. 5(c).

Much of what now appears in subdivision (b) was contained in rule 2(b) of the 1971 Magistrates Rules, a provision expressly covering only minor offenses other than petty offenses. The change reflects the judgment that the enumerated advice is important to all defendants, even those charged with petty offenses. (This has been the practice of most magistrates, who have not found the task burdensome; often much of the subdivision (b) advice can be given to a group of defendants collectively, and when each case is called the magistrate inquires if that defendant heard the advice.) The qualification in item (3) reflects the fact that except for misdemeanors other than petty offenses, for which representation by counsel is provided in 18 U.S.C. § 3006A, appointment of counsel for an indigent defendant is required only if a sentence of imprisonment is actually imposed. Scott v. Illinois, 99 S.Ct. 1158 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972). The requirement in item (4) that the defendant be advised of his right to remain silent is new, and reflects the conclusion of many magistrates that all defendants, even in petty offense cases, are in need of such a warning. Items (5) and (6) in new subdivision (b) are in some respects different from what was required by the 1971 Magistrates Rules; these changes reflect the amendment of 18 U.S.C. § 3401 by the Federal Magistrate Act of 1979.

Subdivision (c) deals with consent and arraignment, which were covered in rules 2(c) and 3(b) of the 1971 Magistrates Rules. No substantive change has been made other than to eliminate the requirement of jury trial waiver as part of the consent to be tried by a magistrate when the charge is not a petty offense. By virtue of the Federal Magistrate Act of 1979, authorizing magistrates to conduct jury trials, such a waiver is not required. It should be noted that the defendant's consent in writing to be tried before a magistrate has been characterized as "a critical stage requiring the opportunity to consult counsel." S.Rep. 96-74, 96th Cong., 1st. Sess. 7 (1979).

Under subdivision (c), trial within 30 days may occur only "upon consent of the defendant." Such consent is necessary because of 18 U.S.C. § 3161(c)(2), which provides: "Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se."

Rule 3.
Additional Procedures Applicable Only To Petty Offenses For Which No Sentence of Imprisonment will be Imposed

(a) **Failure to Consent.** If the defendant charged with a petty offense for which no sentence of imprisonment will be imposed does not consent to trial before the magistrate, he shall be ordered to appear before a judge of the district court for further proceedings on notice. The file shall be transmitted forthwith to the clerk of the district court

(b) **Plea of Guilty or Nolo Contendere.** No plea of guilty or nolo contendere to a petty offense for which no sentence of imprisonment will be imposed shall be accepted unless the magistrate is satisfied that the defendant understands the nature of the charge and the maximum possible penalty provided by law.

(c) **Waiver of Venue for Plea and Sentence.** A defendant charged with a petty offense for which no sentence of imprisonment will be imposed who is arrested, held, or present in a district other than that in which an indictment, information, complaint, citation or violation notice is pending against him may state in writing that he wishes to plead guilty or nolo contendere, to waive venue and trial in the district in which the proceeding against him is pending, and to consent to disposition of the case in the district in which he was arrested, is held, or is present. Unless the defendant thereafter pleads not guilty, the prosecution shall be had as if venue were in such district, and notice of same shall be given to the magistrate in

the district where the proceeding was originally commenced. The defendant's statement that he wishes to plead guilty or nolo contendere shall not be used against him.

(d) **Sentence.** If the defendant charged with a petty offense for which no sentence of imprisonment will be imposed pleads guilty or nolo contendere or is found guilty after trial, the magistrate shall afford him an opportunity to be heard in mitigation. The magistrate shall then immediately proceed to sentence the defendant, except that in the discretion of the magistrate sentencing may be continued to allow an investigation by the probation service or the submission of additional information by either party.

(e) **Notification of Right to Appeal.** After imposing sentence in a case which has gone to trial on a plea of not guilty, the magistrate shall advise the defendant of his right to appeal.

ADVISORY COMMITTEE NOTE

Subdivision (a), which has no counterpart in the 1971 Magistrates Rules, addresses the situation in which a defendant charged with a petty offense for which no sentence of imprisonment will be imposed does not consent to trial before the magistrate. In the great majority of these cases, the offense will have been charged by a complaint, citation or violation notice, but pursuant to Fed.R.Crim.P. 7(a) may be prosecuted before a district judge only by indictment or information. Thus, while this new provision provides that the file shall be transmitted to the clerk of the district court, it is assumed that the clerk will then notify the attorney for the government, who will then decide whether the case merits prosecution before a district judge. In these circumstances, it should suffice that in the interim the defendant is ordered to appear before a judge of the distict court for further proceedings on notice. (Removal by the government to a district judge for good cause is not dealt with in subdivision (a), as this procedure is set out in the Federal Magistrate Act of 1979).

Subdivision (b) sets out those matters which are deemed essential in receiving a plea of guilty or plea of nolo contendere to a petty offense for

which no sentence of imprisonment will be imposed. Quite clearly the magistrate should be satisfied that the defendant understands the nature of the charge and the maximum penalty which could be imposed. Because this abbreviated procedure may be used only upon a prior determination that no imprisonment will be imposed, the defendant need not be advised of any sentence of imprisonment provided for in the applicable statute.

Underlying subdivision (b) is the conclusion that the much more elaborate procedures provided for in Fed.R.Crim.P. 11 need not be routinely applied in petty offense cases for which no sentence of imprisonment will be imposed. Pursuant to rule 1(b) of these rules, however, a magistrate is free, as he deems appropriate, to selectively follow certain of the Fed.R.Crim.P. 11 procedures beyond those incorporated in this subdivision (b). By virtue of rule 1(b) of these rules, all of the Fed.R.Crim.P. 11 procedures are to be followed by magistrates as to offenses above the petty offense category, or for which a sentence of imprisonment will be imposed.

Subdivision (c), although based upon rule 6(b) and (c) of the 1971 Magistrates Rules, is different in certain significant respects. Under the 1971 rules, if the defendant waived trial in the district where the charge was pending, his statement to that effect was to be transmitted to the magistrate before whom the proceeding was pending, and that magistrate was then to transmit the papers or certified copies thereof to the clerk of the district court in which the defendant was arrested, held or present. That elaborate procedure, though generally following the provisions of Fed.R.Crim.P. 20, has proved troublesome in practice. The transmission of defendant's statement from one district to another, followed by transmission of the papers the other direction, has often resulted in serious delay, sometimes lasting several weeks. This delay may severely inconvenience the defendant who, especially in a petty offense case, may wish to plead guilty and complete the proceeding against him at the earliest possible time. To meet that concern, subdivision (c) provides for a waiver of venue in such cases. This will allow the filing of a new formal charge in the district where the defendant was arrested, is held or is present, to which the defendant may promptly plead without waiting for the transmission of papers from the district where that charge was first brought. Before imposing sentence, the magistrate will often find it useful to communicate with the magistrate in the district where the offense arose concerning the details of the offense. Because of the minor nature of the offense involved, the consent of the United States attorney in the district of the original charge is not required. This means, provided the case involves a petty offense for which no sentence of imprisonment will be imposed, that this waiver of venue for plea and sentence is a right of the defendant.

The last sentence of subdivision (c) applies only to a statement made in connection with waiver of venue. It does not apply to his later plea following the waiver.

Subdivision (d), concerned with sentencing in petty offense cases in which no sentence of imprisonment will be imposed, rests upon the conclusion that the more elaborate procedures of Fed.R.Crim.P. 32 need not be routinely followed in such cases. The first sentence, stating that the magistrate is obliged to permit the defendant to be heard before a sentencing, recognizes "the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation." Green v. United States, 365 U.S. 301 (1961). The last sentence recognizes that while often the circumstances in such a case will be such that the magistrate can properly immediately proceed to the matter of sentencing, this is not inevitably so. There will be occasions when the magistrate will want additional facts from the probation service or the parties. For example, when a case is before the magistrate for sentencing by virtue of subdivision (c) of this rule, it will occasionally be necessary for the magistrate to acquire additional facts from the district where the charge originated.

Subdivision (e) is new. The language follows that in Fed.R.Crim.P. 32(a)(2).

Rule 4.
Securing Defendant's Appearance; Payment in Lieu of Appearance

(a) **Forfeiture of Collateral.** When authorized by local rules of the district court, payment of a fixed sum may be accepted in suitable types of misdemeanor cases in lieu of appearance and as authorizing the termination of the proceedings. Such local rules may make provision for increases in such fixed sums not to exceed the maximum fine which could be imposed upon conviction.

(b) **Notice to Appear.** If a defendant fails to pay a fixed sum, request a hearing, or appear in response to a citation or violation notice, the clerk of the district court or a magistrate may issue a notice for the defendant to appear before a magistrate on a date certain. The notice may also afford the defendant an additional opportunity to pay a fixed sum in lieu of appearance, and shall be served upon the defendant by mailing a copy to his last known address.

(c) **Summons or Warrant.** Upon an indictment or a showing by one of the other documents specified in Rule 2(a) of probable cause to believe that a misdemeanor has been committed and that the defendant has committed it, a magistrate may issue an arrest warrant or, if no warrant is requested by the attorney for the government, a summons. The showing shall be made in writing upon oath or under penalty of perjury, but the affiant need not appear before the magistrate. If the defendant fails to appear before the magistrate in response to a summons, the magistrate may summarily

issue a warrant for his immediate arrest and appearance before the magistrate.

ADVISORY COMMITTEE NOTE

The first sentence of subdivision (a) is derived from rule 9 of the 1971 Magistrates Rules. It recognizes that forfeiture of collateral without appearance is an accepted way of terminating proceedings as to minor traffic offenses and similar infractions. See ABA Standards for Traffic Justice § 3.4 (1975). While the earlier provision permitted such disposition only "in cases of petty offenses," it is now provided that this procedure may be authorized by local rules "in suitable types of misdemeanor cases." This change is necessitated by the peculiarities to be found in some state codes, whereby violations which should logically be classified as petty offenses are in fact above the petty offense category because of the high penalties which are authorized by law (but seldom if ever imposed). Local rules can identify those situations with greater specificity than is feasible in this rule, such as that certain specified misdemeanors may be dealt with in this way only for first offenders. It must be emphasized, however, that the aforementioned change in the rule is limited in nature; it is intended to apply only to misdemeanors of the malum prohibitum variety. The last sentence of subdivision (a) expressly recognizes, as some local rules now provide, that the amount of collateral to be forfeited may increase as the case reaches later stages (e.g., after the defendant fails to respond to a violation notice or a notice to appear).

Rule 4 of the 1971 Magistrates Rules provides that if a defendant fails to appear in response to a citation or violation notice, a summons or arrest warrant may issue. That rule expressly states that a warrant may issue only upon probable cause, but no comparable declaration is made with respect to issuance of a summons. However, subdivision (b) of that rule declares that a warrant "may summarily issue" if a defendant fails to comply with a summons. In practice, these provisions have received a variety of interpretations. Some magistrates have construed these provisions literally and thus have reached the conclusion that without any probable cause showing to the magistrate at any time (that is, either before the summons issues or before the warrant issues after noncompliance with the summons), a warrant of arrest may be issued and executed. Others, perhaps drawing upon the interpretation which has been placed upon the summons provisions in Fed.R.Crim.P. 4 and 9, see United States v. Millican, 600 F.2d 273 (5th Cir. 1979); United States v. Greenberg, 320 F.2d 467 (9th Cir. 1963), have read the provision that a warrant may summarily issue upon noncompliance with a summons as meaning that the summons must have itself been issued upon a showing of probable cause. There has also been some variation in practice as to the service of summonses under the 1971 rules; in some localities, a summons for a petty offense is served in a less formal manner than a Fed.R.Crim.P. 4 summons.

Present rule 4 differs from its predecessor in that it gives express recognition to two different follow-up procedures short of arrest: a notice to appear, and a summons. These two procedures, because they are different in several significant respects, avoid constitutional issues which might otherwise arise and provide greater flexibility in the follow-up process. (This flexibility should aid in addressing a problem of considerable dimensions. During the statistical year 1978 there were 437,000 violation notices filed by law enforcement agencies with the district courts; some 50,000 of those were referred directly to magistrates for a mandatory hearing, while another 80,000 were referred to magistrates for "follow-up" because of the failure of the defendant to respond to the instructions on the violation notice or subsequent warnings sent by the Central Violations Bureau.)

A notice to appear, on the one hand, is in the nature of a reminder or warning letter. Either the clerk of the court or a magistrate may issue a notice to appear. It may be issued without the kind of probable cause showing needed for a warrant or a summons; it will suffice that the defendant has failed to pay a fixed sum under subdivision (a), to request a hearing, or to appear in response to a citation or violation notice. The notice to appear calls upon the defendant to appear before a magistrate on a certain date, but may also afford the defendant a further opportunity to utilize the convenient alternative of forfeiting collateral in lieu of making an appearance. Moreover, the notice may be served simply by sending a copy to defendant's last known address. The defendant's non-compliance with the notice to appear carries no immediate adverse consequences; an arrest warrant may not issue merely because of nonappearance following this notice, as the notice itself issued without a probable cause determination.

A summons, on the other hand, may be issued only by a magistrate, and only upon a showing of probable cause supported by oath. It is to be served in the same manner as a Fed.R.Crim.P. 4 summons. Because probable cause must be established before the summons issues, the magistrate may summarily issue a warrant for the defendant's arrest if the defendant fails to appear when summoned.

New rule 4, by expressly recognizing both a notice to appear and a summons as permissible follow-up procedures, provides needed flexibility. In some localities or on some occasions, the notice-to-appear device may prove to be the best alternative, as such a notice may issue without a case-by-case probable cause determination and may be served without difficulty. Elsewhere or on other occasions, the circumstances may make the summons alternative more appropriate. It is permissible to use them in tandem; that is, a defendant who failed to respond to a notice to appear might then be served with a summons rather than an arrest warrant, as he might take more seriously the latter, more formal directive to appear. It must be emphasized, however, that rule 4 does not grant any right to a defendant to be dealt with in this sequence. Provided the requirements of subdivision (c) are met, a summons may issue without prior resort to the

notice-to-appear alternative, and a warrant may issue without first trying the summons alternative. Pursuant to the first sentence of subdivision (c), the magistrate may ordinarily decide on his own whether a warrant or summons is most appropriate; it is only in the exceptional case in which the U. S. Attorney requests a warrant that the magistrate may not resort to the summons alternative. This departure from the policy of Fed.R.Crim.P. 4(a), whereunder a warrant is to issue unless a summons is requested, is justified by the fact that the U.S. Attorney will often not be involved in these minor cases.

By expressly recognizing both a notice to appear and a summons as follow-up alternatives and further providing that only the latter (i) requires a probable cause showing and (ii) permits summary issuance of a warrant upon defendant's nonappearance, new Rule 4 ensures that the follow-up procedures are not vulnerable to attack on Fourth Amendment grounds.

> If a summons could be issued on an information not supported by oath, and a warrant then issued for failure to appear in response to the summons, the end result would be that defendant could be arrested on warrant though there had never been a showing under oath of probable cause. This is not permissible.

1 C. Wright, Federal Practice and Procedure § 151 at 342 (1969). See also United States v. Millican, supra (probable cause required for summons under Fed.R.Crim.P. 9); United States v. Greenberg, supra (probable cause required for summons under Fed.R.Crim.P. 4). While it is said in United States v. Evans, 574 F.2d 352 (6th Cir. 1978), that a bench warrant issued solely on the basis of the defendant's failure to appear on a traffic citation "is clearly valid and based on probable cause," it is significant that this comment was made with respect to practice in a state where such nonappearance is itself a criminal offense. That is not true in the federal system. 18 U.S.C. § 3150.

As previously noted, issuance of either a summons or an arrest warrant requires a showing of probable cause under oath. If that showing could be made only by the police officer who earlier issued the citation or violation notice now appearing in person before the magistrate, the result would be a most inefficient use of scarce law enforcement resources. However, the Fourth Amendment does not require such an appearance, nor does new rule 4(c), which expressly recognizes that "the affiant need not appear before the magistrate." This means that a magistrate may issue an arrest warrant or a summons under subdivision (c) merely by reviewing a document which the officer completed on an earlier occasion (most likely at the time the officer gave the citation to the defendant). Such a procedure is constitutionally permissible provided that this document is prepared in such a way that it conforms to two important Fourth Amendment requirements: (i) that the warrant be upon probable cause "supported by Oath or affirmation"; and (ii) that the magistrate himself decide the probable cause issue based upon facts, and not merely conclusions, supplied to him.

It is clear that the Fourth Amendment oath requirement does not require a personal appearance of the affiant before the magistrate issuing the warrant; "it is the oath itself and not the face-to-face confrontation which is mandated by and which is at the core of the Fourth Amendment requirement." State v. Cymerman, 135 N.J.Super. 591, 343 A.2d 825 (1975). This means, for example, that a warrant may constitutionally issue upon sworn oral testimony communicated by telephone or similar means, as is authorized by Fed.R.Crim.P. 41(c)(2). See United States v. Turner, 558 F.2d 46 (2d Cir. 1977); People v. Peck, 38 Cal.App.3d 993, 113 Cal.Rptr. 806 (1974); State v. Cymerman, supra; Advisory Committee Note to 1977 amendment to Fed.R.Crim.P. 41.

Indeed, the Fourth Amendment does not require that an oath be administered by the magistrate issuing the warrant or, for that matter, by some other person such as a notary public. Rather, the "true test" as to whether the Fourth Amendment oath requirement has been met is whether the procedures followed were such "that perjury could be charged therein if any material allegation contained therein is false." Simon v. State, 515 P.2d 1161 (Okla. Crim. 1973). See also United States v. Turner, supra (variation from usual oath-taking procedures constitutionally permissible provided "the legal significance of the undertaking remains the same"); United States ex rel. Pugh v. Pate, 401 F.2d 6 (7th Cir. 1968) (false-name affidavit unconstitutional because "someone must take the responsibility for the facts alleged"; court appears to assume false name would bar perjury prosecution); State ex rel. Purcell v. Superior Court, 109 Ariz. 460, 511 P.2d 642 (1973) (unsworn uniform traffic ticket and complaint sufficient as charge under state law, but if it is to be used to obtain an arrest warrant then it is necessary that "the officer's certification of the complaint is done under the penalty of perjury"); State v. Cymerman, supra (what constitution requires is procedure whereby officer could not "avoid the sanction for perjury or false swearing by supplying false information"); State v. Douglas, 71 Wash.2d 303, 428 P.2d 535 (1967) (all the formalities of swearing not necessary if enough was done so that the officer "could be held responsible if the statements in the affidavit he signed had been false").

This means, therefore, that if a magistrate receives a document which by its form and manner of preparation could be the basis of a criminal prosecution of the maker if the material facts alleged therein were known by him to be false, the magistrate may constitutionally issue a warrant based upon that document without having the maker appear before him or otherwise communicate with him further. Illustrative is In re Walters, 15 Cal.3d 738,126 Cal.Rptr. 239, 543 P.2d 607 (1975), holding that a magistrate's finding of probable cause required by the Fourth Amendment was properly based upon "arrest and follow-up reports [which] were written and signed by the arresting officer under penalty of perjury." In the federal system, this "penalty of perjury" requirement can be met by complying with 28 U.S.C. § 1746, which reads:

> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
>
> * * *
>
> (2) If executed within the United States, its territories, possessions or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date)."

Assuming now that the document submitted to the magistrate meets the oath requirement of the Fourth Amendment in the manner just described, it will still not meet constitutional requirements unless the form of the document is such that it communicates facts and not just conclusions. The Fourth Amendment requirement of probable cause for issuance of an arrest warrant means that before such a warrant may constitutionally issue it is necessary "that the judicial officer issuing such a warrant be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant." Whiteley v. Warden, 401 U.S. 560 (1971). This is not the case when the document supplied to the magistrate merely sets out the officer's conclusion that a specified person has committed a specified offense. Whiteley v. Warden, supra; Giordenello v. United States, 357 U.S. 480 (1958).

The Uniform Traffic Ticket and Complaint is commonly utilized in state traffic law enforcement. Some have urged that it be adopted for use in federal traffic enforcement as well, while others have noted that certain citation and violation notice forms currently utilized in the federal system for charging minor offenses are in many respects similar to it. This being the case, it must be emphasized that issuance of either an arrest warrant or a summons under rule 4(c) in the manner heretofore described requires a somewhat different type of document. For one thing, the Uniform Traffic Ticket and Complaint or any comparable document which merely identifies the offense charged cannot be used alone to establish probable cause, as it "amounts to nothing more than a mere conclusionary assertion by the complaining officer that defendant committed the offense charged." State v. Miernik, 284 Minn. 316, 170 N.W. 2d 231 (1969). For another, in order to comply with the Fourth Amendment oath requirement without the necessity of the officer appearing before the magistrate or some other official, the language specified in 28 U.S.C. § 1746 should be utilized.

Thus, in order to take advantage of the simplified procedure in rule 4(c), any complaint, citation or violation notice forms which are to be used as a basis for warrant or summons issuance should be revised (or "amended" by a hand stamp, as is now being done in some localities) to include essentially the following:

On _____, 19__, while exercising my duties as a law enforcement officer at or near _____ in the _____ District of _____, I observed _____
_____
_____
_____
_____
_____

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed this _____ day of _____, 19__.

_____
(signature)

_____
(print name and title)

Probable cause has been stated for the issuance of a warrant for the arrest of the offender named or identified herein.

_____ _____
(date) United States Magistrate

Rule 5. Record

Proceedings under these rules shall be taken down by a reporter or recorded by suitable sound recording equipment. In the discretion of the magistrate or, in the case of a misdemeanor other than a petty offense, on timely request of either party as provided by local rule, the proceedings shall be taken down by a reporter. With the written consent of the defendant, the keeping of a verbatim record may be waived in petty offense cases.

ADVISORY COMMITTEE NOTE

The first sentence of rule 5 is broader than rules 2(d)(3) and 3(c)(2) of the 1971 Magistrates Rules, both of which apply to trial proceedings only. The change reflects the fact that it is often desirable to make a record of other proceedings, such as an evidentiary hearing on a motion. Making a record encourages greater formality and dignity in the conduct of the proceedings, and provides the basis for meaningful appeal.

The second sentence recognizes that the magistrate in his discretion may require that the proceedings be taken down by a reporter. A magistrate might well conclude that use of sound recording equipment would be insufficient when, for example, the case is to be tried before a jury or is likely to be appealed in the event of a conviction. The second sentence also recognizes that, in cases involving more than a petty offense, the parties should be entitled upon timely request to a record made by a reporter.

In recognizing that a defendant in a petty offense case may waive the keeping of a verbatim record, the third sentence of rule 5 conforms to rule 3(c)(2) of the 1971 Magistrates Rules. However, the rule does not contemplate the routine obtaining of waivers in petty offense cases. While it is desirable to permit the defendant in a petty offense case to avoid delay by waiving the making of a verbatim record when, e.g., recording equipment is temporarily not functioning, absent such exigent circumstances there should be no need to seek a waiver of the recording requirement.

Rule 6. New Trial

The magistrate, on motion of a defendant, may grant a new trial if required in the interest of justice. The magistrate may vacate the judgment if entered, take additional testimony, and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the magistrate may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after a finding of guilty or within such further time as the magistrate may fix during the 7-day period.

ADVISORY COMMITTEE NOTE

Rule 6 is identical to rule 7 in the 1971 Magistrates Rules, except that the time within which a motion for a new trial based on newly discovered evidence may be made has been changed to two years so as to conform to Fed.R.Crim.P. 33. This subject matter has been retained in the magistrates rules to emphasize this change. By comparison, a motion to withdraw a plea is not dealt with in these rules. By virtue of rule 1(b), Fed.R.Crim.P. 32(d) will apply except for petty offenses for which no sentence of imprisonment will be imposed, and as to those offenses rule 1(b) permits resort to Fed.R.Crim.P. 32(d).

Rule 7. Appeal

(a) **Interlocutory Appeal.** A decision or order by a magistrate which, if made by a judge of the district court, could be appealed by the government or defendant under any provision of law, shall be subject to an appeal to a judge of the district court provided such appeal is taken within 10 days of the entry of the decision or order. An appeal shall be taken by filing with the clerk of the district court a statement specifying the decision or order from which an appeal is taken, and by serving a copy of the statement upon the adverse party, personally or by mail, and by filing a copy with the magistrate.

(b) **Appeal from Conviction.** An appeal from a judgment of conviction by a magistrate to a judge of the district court shall be taken within 10 days after entry of the judgment. An appeal shall be taken by filing with the clerk of the district court a statement specifying the judgment from which an appeal is taken, and by serving a copy of the statement upon the United States Attorney, personally or by mail, and by filing a copy with the magistrate.

(c) **Record.** The record shall consist of the original papers and exhibits in the case together with any transcript, tape, or other recording of the proceedings and a certified copy of the docket entries which shall be transmitted promptly by the magistrate to the clerk of the district court. For purposes of the appeal, a copy of the record of such proceedings shall be made available at the expense of the United States to a person who establishes by affidavit that he is unable to pay or give security therefor, and the expense of such copy

shall be paid by the Director of the Administrative Office of the United States Courts.

(d) **Stay of Execution; Release Pending Appeal.** The provisions of Rule 38(a) of the Federal Rules of Criminal Procedure relating to stay of execution shall be applicable to a judgment of conviction entered by a magistrate. The defendant may be released pending appeal by the magistrate or a district judge in accordance with the provisions of law relating to release pending appeal from a judgment of conviction of a district court.

(e) **Scope of Appeal.** The defendant shall not be entitled to a trial de novo by a judge of the district court. The scope of appeal shall be the same as on an appeal from a judgment of a district court to a court of appeals.

ADVISORY COMMITTEE NOTE

Subdivision (a) of new rule 7 deals with those decisions or orders of a magistrate (e.g., the granting of a pretrial motion to suppress evidence) which, if made by a judge of the district court, could be appealed by the government (e.g., the granting of a pretrial motion to suppress evidence) or the defendant (e.g., denial of a motion to dismiss the charge on double jeopardy grounds, Abney v. United States, 431 U.S. 651 (1977)). Rule 5 of the 1971 Magistrates Rules, dealing only with appeal by the government, provided that such a decision or order "shall be subject to rehearing de novo by a judge of the district court upon motion for such rehearing filed with the magistrate by the attorney for the government within 10 days after entry of the order." That provision, because it provided for a de novo rehearing by a district judge rather than appeal to a judge, was inconsistent with the adjudicatory authority of magistrates in cases lying within their own trial jurisdiction. Consequently, it has been modified so as to provide for interlocutory appeal and has been relocated with the other appeal provisions.

Subdivisions (b) through (e) are virtually unchanged from their counterparts in the 1971 rules, subdivisions (a) through (d) of rule 8.

Subdivision (b), as does subdivision (a), now provides that appeal is to be taken by filing the notice of appeal with the clerk of court rather than the magistrate, as this will facilitate prompt action by the clerk to get the case into the assignment system.

Although the first sentence of subdivision (c) continues the requirement that the magistrate transmit the record to the clerk, it must be noted that the magistrate is a part of the district court and that the clerk may be keeping the record for the magistrate, in which case there may be no reason to "transmit" anything. If there are several trials on a single tape, it is permissible to transmit a certified copy of the portion of the tape relating to the case appealed. The last sentence of new subdivision (c) replaces a sentence which merely stated: "Any expense in connection therewith shall be borne by the government." This change makes the rules consistent with 18 U.S.C. § 3401(e), which requires a showing of indigency in order for the Director to pay transcript costs. The language should not be read as depriving the magistrate of the authority to determine if the affidavit is bona fide and sufficient.

Rule 8. Local Rules

Rules adopted by a district court for the conduct of trials before magistrates shall not be inconsistent with these rules. Copies of all rules made by a district court shall, upon their promulgation, be filed with the clerk of the district court and furnished to the Administrative Office of the United States Courts.

ADVISORY COMMITTEE NOTE

Rule 8 is identical to subdivision (a) of rule 11 in the 1971 Magistrates Rules.

Subdivision (b) of the 1971 Rules (reading: "If no procedure is especially prescribed by rule, the magistrate may proceed in any lawful manner not inconsistent with these rules or with an applicable statute") has not been retained. That language has been the cause of some confusion among magistrates, especially as to the applicability of the Federal Rules of Criminal Procedure to proceedings before magistrates. That issue is now dealt with more directly in new rule 1.