Amendments to the Federal Rules of Criminal Procedure

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By Paul F. Rothstein

Numerous changes in the rules governing criminal trials in federal court have been in effect for four months. Some are major and some are minor, but they should be studied carefully by lawyers handling criminal cases.

Amendments have been made to:

- Rule 6, on disclosure of grand jury information.
- Rule 11, on nolo contendere and guilty pleas, plus a new harmless error rule.
- Rule 12, on Jencks-type disclosures.
- Rule 12.2, on testimony on mental condition of the defendant and mental examinations.
- Rule 23, permitting 11-member juries and
- Rule 32, on correcting pre-sentence reports and withdrawal of pleas.

The grand jury

Rule 6(e)(2) contains a general prohibition against disclosure of "matters occurring before the grand jury." Subparagraph 6(e)(3) contains exceptions to this prohibition. The exceptions generally have to do with the circumstances in which disclosure can be made to other government attorneys or personnel as well as when a court can order special disclosure—for example, to the defendant. The amendments add another exception, permitting disclosure when it is made by the attorney for the government to another federal grand jury.

The amendments also add Rule 6(e)(3)(D) containing procedures for applying to the court for disclosure preliminarily to or in connection with a judicial proceeding. The court always had

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power to order disclosure in this situation. It is the procedures that are new, clarifying matters such as: to which court application must be made; whether the application may be ex parte; who must be given notice of the hearing; and closure of the hearing.

The amendment as originally proposed provided that the government has a right to an ex parte hearing when it was seeking the grand jury information "for its own use." The ABA Criminal Justice Section objected, noting examples in which the government sought to use grand jury information for civil purposes. While not meeting the point fully, a change was made to give the court discretion in the matter.

The amendments probably do not substantially affect several cases decided by the U.S. Supreme Court in the grand jury area last term.

In United States v. Sells Engineering Inc., 103 S.Ct. 3133 (1983), it was held that provisions of the rule authorizing more-or-less automatic disclosure to attorneys for the government did not allow disclosure to Justice Department attorneys working on a civil fraud case. The attorneys would have to apply under the rules requiring a court order and a showing of particularized need.

The Court in another case declined to recognize a particularized need when an application was made by the Internal Revenue Service for a civil tax audit. See 103 S.Ct. 3164 (1983). A third case refused to abrogate the particularized need requirement when a state attorney general requested grand jury materials to facilitate a civil antitrust action, despite provisions of the antitrust laws arguably suggesting the contrary. See 103 S.Ct. 1356 (1983). Another new provision, Rule 6(e)(6), requires that records, orders and subpoenas relating to grand jury proceedings must be kept under seal "to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury." This conceivably could be an obstacle to defense attorneys wishing to ascertain whether there was a proper order authorizing a special grand jury or a proper order extending the life of a grand jury, or wishing to learn the identity of people to whom the government attorney disclosed grand jury information. But most of these problems can be taken care of by a proper motion under Rule 6(e)(3)(C)(ii), which provides that the court may at the request of the defendant disclose grand jury matters when certain showings are made.

Pleas

It often happens that criminal defendants will plead guilty or nolo contendere primarily because they lost an important pre-trial motion—for example, a motion to suppress evidence. In most instances, appeal of adverse rulings on pre-trial motions must await the end of the case. Interlocutory appeals are rarely allowed. A plea of guilty has been held to foreclose nearly all rights of defendants to appeal. The consequence of this is that defendants who lose a pre-trial motion but feel they may succeed on appeal may well be tempted to plead nolo guilty and put the system to the expense of a trial in order to preserve their right to appeal.

To avoid this, Rule 11(a)(2) has been added to permit defendants to condition their plea of guilty or nolo contendere on the outcome of an appeal on any specified pre-trial motion. If the defendant prevails on the appeal he is allowed to withdraw his plea. The amendment, however, requires the approval of the court and the consent of the government before this conditional plea can be entered.

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Rule 11 as a whole sets forth detailed procedures concerning how a guilty or nolo contendere plea must be taken. Included are provisions instructing the judge how to ensure that the defendant has full information about the consequences of a guilty or nolo contendere plea and to ensure that any plea is voluntary. The rule also includes steps the judge and attorneys must take to have a valid plea agreement and provisions regulating the acceptance and rejection by the court of a plea agreement.

The new amendments add a final subdivision to the rule providing that "any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." This is a "harmless error" provision. It stems from the fact that at least one line of authority was developing that any variance from the detailed prescriptions of Rule 11 would vitiate a guilty plea and the conviction on which it is based.

In some instances, however, variances from Rule 11 procedures plainly could not have affected the defendant's decision to plead guilty. In one case a trial judge failed to advise the guilty pleader of the maximum years of special supervised parole following imprisonment, as required by the rule, and instead said that added parole is "generally in the neighborhood of three years." United States v. Peters, No. 77-1700 (4th Cir. Dec. 22, 1978). Suppose the judge failed to explain what a conspiracy charge meant with precision. United States v. Coronado, 554 F.2d 166 (5th Cir. 1977). Suppose some essential element of the crime was not mentioned but the defendant's responses clearly indicated his awareness of that element. McCarthy v. United States, 394 U.S. 459 (1969). Suppose the judge understated the maximum penalty, but the penalty actually imposed did not exceed that indicated, as happened in Coronado, above. Or suppose the judge failed to tell the defendant that statements he made in connection with his plea may be used against him in a prosecution for perjury or false statement.

In all of these situations, although a required piece of information had been omitted by the judge, the variance would probably be considered harmless under the new amendment.

Jencks Act disclosures

Rule 12(i) is new. It extends Rule 26.2—which contains both the principles of the Jencks Act, 18 U.S.C. § 3500 and so-called reverse-Jencks principles—to hearings on motions to suppress evi-
dence in advance of the trial.

Rule 26.2, which speaks in terms of trial witnesses rather than witnesses at pre-trial suppression hearings, requires essentially that certain prior statements made by a prosecution or defense witness must be disclosed by the proponent of the witness to the other side but only after the witness testifies, and only if the statement deals with the same subject matter as the testimony. The theory is that the statement may be useful as impeachment. An entire body of case law has developed concerning what kinds of statements qualify for disclosure. The drafters of the amendments felt that the credibility of witnesses testifying at hearings on pre-trial suppression motions was as important as the credibility of witnesses at trial, and so the same methods of evaluation should apply.

Rule 12(i) further provides that, for purposes of the disclosure of prior statements, a law enforcement officer shall be deemed a witness called by the government, regardless of which side calls him. For example, the defense may wish to call the law officer who conducted the search and who has information the defense believes indicates the illegality of the seizure. The officer can be expected to be sympathetic to the government. The government may have prior statements of his relating to the search and seizure that should be disclosed. The amendment applies to all law enforcement officers, state or federal.

The provision concerning law enforcement officers also provides that, before the statements are disclosed, the court shall excise portions of the prior statement containing privileged matter. The primary concern was protection of the identity of informants. The Criminal Justice Section of the American Bar Association criticized this provision because it may suggest that privileged material is not subject to excision under other applications of Rule 12(i), for example, when the witness is not a law enforcement officer, or under Rule 26.2 or the Jencks Act.

Testimony on mental condition

Rule 12.2(a) provides for pre-trial notice that the defendant intends to rely on the insanity defense. This provision remains unchanged, but Rule 12.2(b), relating to advance notice of defendant's expert witnesses, has been amended and broadened.

Prior to the amendments, the rule required the defense to notify the government of its intent to introduce expert testimony relating to "mental disease, defect or other condition bearing upon the issue of whether he [the defendant] had the mental state required for the offense." The amended rule would require this notice to be given by the defense when expert testimony is intended to be introduced on "any mental condition of the defendant bearing on his guilt." This is an expansion. The mental condition need no longer relate to the mental state required for the offense. It may relate to anything having to do with guilt—for example, the commission of the act itself, the actus reus as opposed to the mens rea.

Currently emerging in the law are a number of mental conditions used as defenses when the mental condition is addressed to the act itself or to some other non-mens rea element of the offense. Defense experts have testified on the defendant's susceptibility to influence to make out the defense of entrapment, United States v. Perl, 584 F.2d 1316 (4th Cir. 1978); his incapability of violent or aggressive acts against others, in order to indicate the unlikelihood that he committed the charged violent criminal act, United States v. Webb, 625 F.2d 709 (5th Cir. 1980); and to other mental traits making the act less likely or making certain defenses more likely. There was ambiguity, before the amendments, as to whether the pre-trial notice required by the rule extended to these kinds of experts.

The expansion of the notice rule to embrace these new experts creates
some problems. For example, the rule
does not specify that any details must be
included in the notice. It has been con-
sidered adequate under the rule simply
to state that “the defense intends to
introduce an expert under Rule 12.2(b).”
This perfunctory notice was adequate to
alert the prosecution to the nature of the
defense and the type of expert that
would be testifying. This usually meant
insanity, intoxication, narcotics impair-
ment or mental deficiency, interfering
with knowledge or intention. In the con-
text of an actual case it was not too dif-
cult to guess the nature.

With the expansion of the rule, the
possibilities become more numerous and
the difficulty correspondingly greater.
Added to the possibilities now are men-
tal qualities that might bear on the actus
reus (the doing of the act), entrapment
and other elements and defenses. It
might be desirable to require some addi-
tional details in the notice. But this
makes the defendant disgorge much of
his potential defense, which may be
undesirable. There may be a question of
the constitutionality of requiring any
notice that goes beyond notice of
insanity or mens rea defenses.

Rule 12.2(c) authorizing the court to
order the defendant to submit to a men-
tal examination is correspondingly
expanded so that the type of examina-
tion is no longer confined to a “psychi-
atric” examination. It now covers a
“mental” examination by a psychiatrist
or “other expert.”

The rule now provides that state-
ments made by the defendant in a court-
ordered mental examination cannot be
used on any issue except “an issue
respecting a mental condition on which
the defendant has introduced testi-
mony.” The prohibition also embraces
testimony by an expert based on such
statements and any other “fruits of the
statement.”

New Rule 12.2(e) provides that if
notice of intention (to plead insanity or
to introduce an expert on any mental
condition) is later withdrawn, the fact
that notice was given or that it was
withdrawn is not admissible against the
person giving the notice in any subse-
quent civil or criminal proceeding.

**Eleven-member juries**

It occasionally happens in federal
criminal trials that, after the jury has
retired to consider its verdict and the
alternate jurors perhaps have been dis-
charged, one of the regular jurors
becomes seriously incapacitated and is
unable to continue. Declaring a mistrial
and ordering a new trial could involve
considerable expense and delay. In
442 (S.D. Fla. 1980), 12 defendants were
named in a 36-count, 100-page indict-
ment for complicated racketeering and
white-collar offenses. The trial took four
months. Before the jury retired, multiple
defense counsel declined the trial
judge’s request to agree to a jury of
fewer than 12 should a juror become
unable to continue during the deliber-
ations. A day later, after the jury retired
for deliberations, one juror had a heart
attack and was excused. Defense coun-
sel again rejected the notion that the
deliberations should continue with the
remaining 11 jurors. Other cases were on
the docket awaiting trial, so that retrial
not only would have been costly but
also would have delayed other cases
that were entitled to speedy trial.

Defense counsel remained adamant in
not agreeing to trial by less than 12
jurors.

In situations like this, if a new trial is
to be avoided, the choice is between
allowing deliberation to continue with 11
jurors or calling on one of the alternate
jurors to serve, assuming that there is
no reasonable prospect of recovery of
the disabled juror. But alternate jurors
are selected to fill in before deliberations
have begun. If an alternate is called into
service after deliberations have begun,
the alternate juror ordinarily will not
have had the benefit of, nor exerted
effect on, the earlier discussions. Or-
dering the jurors to begin deliber-
ations anew is an incomplete answer.
because the alternate will still have missed the earlier discussions. Normally he will not be as able to influence the other jurors. The alternate may have been exposed to outside influences and, as a new juror, may feel intimidated by the other jurors.

The law prior to the amendment was unclear as to what should be done. Rule 23 seemed to prohibit trial by fewer than 12 without the consent of the parties. Amended Rule 23(b) now provides that even absent a stipulation of the parties that if a juror must be excused after deliberations have begun, the court in its discretion may accept as valid a verdict by 11 jurors.

In Williams v. Florida, 399 U.S. 78 (1970), the U.S. Supreme Court upheld the constitutionality of a six-person jury in Florida, so an 11-person jury also would be acceptable. It should be noted that the amendments do not authorize less-than-unanimous verdicts. The 11-person verdict still would have to be unanimous.

The new amendment gives the judge discretion whether to order a new trial or to allow an 11-person deliberation. No standards are provided for the exercise of that discretion, but the advisory committee suggests that the length of the trial and expense are to be weighed in the balance. What is to be weighed on the other side of the balance is less clear, as is how much weight it should be given.

Pre-sentence investigation report

Rule 32 provides for a pre-sentence investigation report to be supplied to the judge and (with exceptions) to the defendant and his counsel for comments prior to sentencing. The new Rule 32(c)(3)(D) provides for the first time what is to be done if an inaccuracy is alleged or shown. As to each matter controverted, the judge must make a finding or determine that no such finding is necessary because the matter will not be taken into account in sentencing. A written record must accompany any copy of the report furnished to the Bureau of Prisons or Parole Commission, which might later rely on the report.

Plea withdrawal

Rule 32(d) deals with withdrawal of a plea of guilty or nolo contendere. Prior to the amendment the rule provided that a motion to withdraw a plea could be made before a sentence was imposed or the imposition of it was suspended. It left ambiguous what standard the judge was to apply and whether these provisions applied after a tentative sentence had been imposed while the defendant was held in custody. The rule (in another part) provided that, to correct "manifest injustice," the court could set aside a judgement of conviction even after sentence and permit the defendant to withdraw his plea. Thus the rule did provide a standard ("manifest injustice") but only for the post-sentence motion.

The difficulty was that after conviction and sentence, precisely the same result could be accomplished if the defendant proceeded under 28 U.S.C. § 2255, which provides for a collateral attack on a conviction. The standard under Section 2255 seems to be very similar to the "manifest injustice" standard. Under Section 2255 the standard is that stated in Hill v. United States, 368 U.S. 424 (1962); "A fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure."

Some of the things that defendants have felt invalidate a plea under one procedure or the other are: that there exists a complete constitutional bar to conviction of the offense charged, see Brooks v. United States, 424 F.2d 425 (5th Cir. 1970); that the defendant was incompetent at the time of his plea, see United States v. Musters, 539 F.2d 721 (D.C. Cir. 1976); that the bargain the prosecution made with defendant was not kept, see Walters v. Harris, 460 F.2d 988 (4th Cir. 1972); that he was not advised of the parole term or sentence he might receive; that the defendant expected a lower sentence, see United States v. White, 572 F.2d 1007 (4th Cir. 1978); and that the defendant's family coerced him to make the plea, see Wojtowicz v. United States, 550 F.2d 786 (2d Cir. 1977).

The amendment clarifies some ambiguities of this rule and in some measure cases the standard applied. First, it provides that the rule may not be used after sentencing. At that point the only route is a direct appeal or a Section 2255 attack; the rule itself is confined to the period prior to sentencing. During this period the amendment provides a standard: the generous one of "any fair and just reason." The amendment also makes clear that the rule applies to motions made after provisional sentencing but before the sentence is finalized pending study of the defendant.

The practical effect of this amendment probably will not be great because most cases seem to have applied a "fair and just" standard to the pre-sentence situation anyway and, in the post-sentence situation, seemed to equate the "manifest injustice" standard of the rule with the standard under Section 2255.

Other amendments

Rule 35, on correction or reduction of sentence, is amended so that a sentence can be reduced within 120 days after the sentence is imposed or probation is revoked; in addition to the other situations permitted by that rule. The rule previously implied that, in the probation revocation situation, the sentence, if it were going to be reduced, had to be reduced at the time of the revocation.

Some minor changes were made to Rule 55 (recordkeeping by the trial court in criminal cases). Rule 58 (forms) and the appendix (setting forth some example forms for lawyers) were abrogated.

What happens when a juror is unable to continue in deliberations? New Rule 23(b) allows the court to accept as valid a verdict by 11 jurors.

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