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Improving Procedure on Judgment and Appeal in Federal Criminal Cases

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IMPROVING PROCEDURE ON JUDGMENT AND APPEAL IN FEDERAL CRIMINAL CASES*

By LESTER B. ORFIELD**

THE task of the Advisory Committee on Rules of Criminal Procedure is one of great magnitude. But with respect to problems and principles of judgment and appeal, it has been lightened in no small degree by the fact that more than eight years ago, on May 7, 1934, to be exact, the Supreme Court promulgated the Criminal Appeals Rules.[1] The Court in doing so proceeded under the authority of Acts of Congress, passed in 1933 and 1934.[2] No

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[1]The title employed by the Court was: "Rules of Practice and Procedure, after plea of guilty, verdict or finding of guilt, in Criminal Cases brought in the District Courts of the United States and in the Supreme Court of the District of Columbia." See (1933) 292 U. S. 659, 54 Sup. Ct. XXXVII, 78 L. Ed. 1512. The term "Criminal Appeals Rules" is used in White v. United States, (C.C.A. 4th Cir. 1935) 80 F. (2d) 515, 576; Ray v. United States, (1937) 301 U. S. 158, 57 Sup. Ct. 700, 701, 81 L. Ed. 976, and in several other decisions.

[2]Act of Feb. 24, 1933, ch. 119, 47 Stat. at L. 904, as amended by Act of Mar. 8, 1934, ch. 49. 48 Stat. at L. 399, 18 U. S. C. sec. 688, 18 U. S. C. A. sec. 688, 28 U. S. C. sec. 723a, 28 U. S. C. A. sec. 723a, which reads as follows: "That the Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases in district courts of the United States, including the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands, in the Supreme Courts of the District of Columbia, Hawaii, and Puerto Rico, in the United States Courts for China, in the United States Circuit Courts of Appeals, in the Court of Appeals of the District of Columbia, and in the Supreme Court of the United States: *Provided*, That nothing herein contained shall be construed to give the Supreme Court the power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.

"Sec. 2. The right of appeal shall continue in those cases in which appeals are now authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

"Sec. 3. The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force."

advisory committee was then appointed to assist the Court. The Department of Justice under the direction of Solicitor General Thacher did the preliminary work for the Court at the request of the Court.[3] We have been operating under the Criminal Appeals Rules four years longer than under the Federal Rules of Civil Procedure.[4]

When our committee was appointed on February 3, 1941, it was authorized by the appointing order to prepare and submit a draft of rules dealing with the procedure prior to judgment and appeal. This order was based on the Act of Congress of June 29, 1940.[5] But, while the scope of activity of the Advisory Committee was limited, this was not true of the Court itself since the Acts of 1933 and 1934 were still in effect. It soon became apparent to the Committee that a well integrated and symmetrical system of procedure required a reworking of all of its parts. It also appeared that certain improvements might be made in the Criminal Appeals Rules themselves.[6] The Court readily came to the aid of the Committee by an order of November 17, 1941, authorizing and directing the Committee to make such recommendations as may be deemed advisable with respect to amendments to the Criminal Appeals Rules.[7]

Two subsequent statutes have made even more imperative a revision of the Criminal Appeals Rules. The Contempt Rules

[3]Nineteen proposed rules, a proposed promulgating order, and notes thereon were submitted on May 26, 1933.

[4]The rules became effective on September 1, 1934. See the last paragraph of the promulgating order. Unlike the Civil Rules no submission to Congress was necessary.

[5]Act of June 29, 1940, ch. 445, 54 Stat. at L. 688, 18 U. S. C. sec. 687, 18 U. S. C. A. sec. 687; 28 U. S. C. sec. 723 a-1, 28 U. S. C. A. sec. 723 a-1.

[6]That the rules have substantially accelerated the process of review is pointed out in Note, (1939) 52 Harv. L. Rev. 938, 988-992, Tables I-V. As to certain cases sampled, between verdict and the judgment of the Circuit Court, six days were gained in the Second Circuit, 125 in the Third, 70 in the Fourth, 94 in the Fifth, 69 in the Sixth, 128 in the Seventh, 38 in the Eighth, 123 in the Ninth, and 84 in the Tenth, though 70 were lost in two cases examined in the First Circuit. The average days gained was 77.

[7](1941) 314 U. S. ....., 62 Sup. Ct. XI. "The Advisory Committee appointed February 3, 1941, to assist the Court in the preparation of rules of pleading, practice and procedure with respect to proceedings prior to and including verdict, or finding of guilty or not guilty, in criminal cases in district courts of the United States, is authorized and directed to make such recommendations as may be deemed advisable respecting amendments to the rules promulgated by this Court pursuant to the provisions of the Act of Congress, approved March 8, 1934, amending an Act entitled 'An Act to give the Supreme Court of the United States authority to prescribe Rules of Practice and Procedure with respect to proceedings in criminal cases after verdict' (Act of February 24, 1933, ch. 119, 28 U. S. C. A. sec. 723(a)."

Act of November 21, 1941, extended the rule-making power of the Supreme Court to "proceedings to punish for criminal contempt of court."[8] This act covered all stages of criminal contempt procedure including judgment and appeal. The Government Appeals Act of May 9, 1942, authorized the Supreme Court to lay down rules of procedure as to appeals taken by the government.[9] The same act permitted the government to take appeals to the Circuit Courts of Appeals in cases where previously no right of appeal to any court had lain.[10] Prior to the Act no appeal by the government in criminal cases lay to the Circuit Courts of Appeals.

The promulgating order of the Criminal Appeals Rules gave them but a limited territorial coverage, continental United States and the District of Columbia. On March 17, 1941, the Supreme Court issued an order effective July 1, 1941, extending the operation of the rules to Alaska, Hawaii, Puerto Rico, the Canal Zone, and the Virgin Islands.[11] It may reasonably be anticipated that this increased coverage will not be altered.

JUDGMENT

Rule I. The first problem I should like to raise is with respect to Criminal Appeals Rule I, entitled "Sentence."[12] That rule does very little to encourage the use of pre-sentence investigations. The

[8]Act of Nov. 21, 1941, ch. 492, 55 Stat. at L. 779, 18 U. S. C. A. sec. 689. If the present Criminal Appeals Rules apply at all to criminal contempt proceedings, they do so only in an extremely narrow range of cases. See Nye v. United States, (1941) 313 U. S. 33, 43-44, 61 Sup. Ct. 810, 85 L. Ed. 1172. It would seem that such range might include 1) the criminal contempt cases where the right to jury trial is given as under the Norris-La Guardia Act and 2) any criminal contempt case in which the defendant pleads guilty.

[9]Act of May 9, 1942, ch. 295, 56 Stat. at L. 271, 18 U. S. C. A. sec. 682. By an order of Oct. 26, 1942, the Supreme Court authorized the Advisory Committee to make recommendations with respect to government appeals. (U.S. 1942) 63 Sup. Ct. XII.

[10]That is to say, in cases not involving the validity or construction of a statute upon which the indictment or information is founded.

[11](1941) 312 U. S. 721, 61 Sup. Ct. CLIII, 85 L. Ed. 731.

[12]For Rule I as amended on May 24, 1937, see (1937) 301 U. S. 717, 57 Sup. Ct. LXII, 81 L. Ed. 1373: "I. *Sentence.* After a plea of guilty, or a verdict of guilty by a jury or finding of guilty by the trial court where a jury is waived, and except as provided in the Act of March 4, 1925, c. 521, 43 Stat. 1259, sentence shall be imposed without delay unless (1) a motion for the withdrawal of a plea of guilty, or in arrest of judgment or for a new trial, is pending, or the trial court is of opinion that there is reasonable ground for such a motion; or (2) the condition or character of the defendant, or other pertinent matters, should be investigated in the interest of justice before sentence is imposed. The judgment setting forth the sentence shall be signed by the judge who imposes the sentence and shall be entered by the clerk.

"Pending sentence, the court may commit the defendant or continue or increase the amount of bail."

trial judge is left entirely free to determine the sentence within, of course, the statutory limits on the basis of his own hunches or observation. It seems to me that it would be a salutary thing to lay down a rule making pre-sentence investigation the regular procedure. This may be done by a provision that investigation must be made unless the court affirmatively orders that no investigation be made. Such a rule is flexible enough to permit the court to deal with the situation where such investigation would interfere with the work of the probation services in supervising persons on probation or parole. Some courts are not sufficiently staffed to permit of pre-sentence investigation in all cases. The rule ought to provide for pre-sentence investigation even where there is to be no probation since such investigation will aid in the imposition of sentence and in correctional treatment.

It might be well to have the rule prescribe in detail concerning the report of the pre-sentence investigation. This report should contain any prior criminal record of the defendant and such facts as to the defendant's traits and the circumstances affecting his behavior as might assist in the imposition of sentence or the granting of probation or in the correctional treatment of the defendant. Thus the report would constitute a thorough social case history of the defendant. The report should by all means be kept confidential, and should be available only to such persons as prison officials or parole authorities. It might be well to provide expressly that the report shall be available only to such persons or agencies as the court in its discretion may direct, and upon such conditions as the court may impose.

The rule might also prescribe the time for the making of the pre-sentence investigation. Because of Anglo-American doctrines, such as the presumption of innocence, the defendant should have the right to object to such an investigation being made before the finding of guilt. An earlier investigation would, however, permit a more thorough and less hurried study and, therefore, if he expressly consents, such investigation should be permitted.

Perhaps it would be desirable that the court be required to state the sociological, psychological, psychiatric, and any other bases of the sentence which it imposes. It is to be doubted, however, that so novel a proposal would be acceptable to the courts and to the bar. Some will object that this is an attempt to reduce the inherently irrational to the rational!

A problem of the non-sociological side of sentencing is this:

How deal with the situation where a comprehensive sentence on a number of counts is imposed beyond that which could have been imposed on one count and it subsequently develops that the conviction on one or more counts is invalid? The solution undoubtedly is a rule that if the total of the sentences imposed exceeds the sentence which may be imposed under any count, then the court shall state separately the sentence which it is imposing for each count.

Neither Rule I nor any of the other Criminal Appeals Rules deals with the problem of reduction or correction of sentence. Perhaps a rule is desirable to the effect that a motion for the correction of an illegal sentence may be made at any time. But a motion to reduce a legally proper but criminologically excessive sentence should be limited to some such period as sixty days after sentence. The abuse under existing law has been that trial judges by entry of orders from time to time have extended for the purposes of a particular case the term of court at which a sentence was imposed for periods of years, and have granted motions for reduction a long time after the sentence was imposed. This has been done on the theory that reduction of sentence is always permissible during the same term of court.[13] In one notorious case a district judge, after imposing a ten year sentence, which the defendant began to serve, extended the court term for three successive years and then, on motion of the defendant, modified the judgment by reducing the sentence to the time already served. Such action by the court may fairly be said to have amounted to an encroachment upon the executive power to pardon.

Rule II. A number of problems arise in connection with Criminal Appeals Rule II, which deals with motions by the defendant after verdict or finding or plea of guilty. The rule does not specify the grounds for motion for new trial. Under existing law the grounds are undoubtedly very broad and comprehensive but to make doubly sure that relief will be available in every meritorious case should not the rule expressly provide that a new trial be grantable whenever required in the interests of justice? The present rule does not specify the grounds for motion in arrest of judgment. Should not this motion which has been unduly broad in the past be confined to cases where the indictment or information fails to state an offense or where the court was without jurisdiction of the offense charged? It would seem that other defects

[13]United States v. Benz, (1931) 282 U. S. 304, 51 Sup. Ct. 113, 75 L. Ed. 354.

and objections formerly raised by way of motion in arrest of judgment should be raised by motion before trial. Defendants should not be permitted to raise the same point over and over again except as to the most vital matters.[14]

The present Rule II (2) lays down a rigid time limit of three days after verdict in which to move in arrest of judgment or for a new trial. This may on occasion be unfair to the defendant. Would it not be well to introduce a reasonable amount of flexibility by a provision that such motions may also be made within such further time as may be fixed by the court during the three day period? The present Rule II (3) lays down a sixty day limit as to motion for new trial on the ground of newly-discovered evidence except in capital cases. The exception as to capital cases was itself incorporated into the rules only by way of amendment on May 31, 1938.[15] In actual life newly-discovered evidence may turn up much later. In order that the defendant may have judicial relief should we not remove all time limitations upon the making of motions on the ground of newly-discovered evidence? The present Rule II (4) provides that a motion to withdraw a plea of guilty must be made within ten days after entry of such plea. Is not this an undue hardship on the defendant, and should we not adopt the rule now prevalent in many states which permits withdrawal of the plea at any time before sentence?[16]

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[14]H. L. McClintock, Indictment by Grand Jury, (1941) 26 MINNESOTA LAW REVIEW 141, 171-176. For the Rule as amended May 31, 1938, see (1938) 304 U. S. 592, 58 Sup. Ct. CXXVIII, 82 L. Ed. 1561: "II. *Motions.* (1) Motions after verdict or finding of guilt, or to withdraw a plea of guilty, shall be determined promptly.

"(2) Save as provided in subdivision (3) of this Rule, motions in arrest of judgment, or for a new trial, shall be made within three (3) days after verdict or finding of guilt.

"(3) Except in capital cases, a motion for a new trial solely upon the ground of newly-discovered evidence may be made within sixty (60) days after final judgment, without regard to the expiration of the term at which judgment was rendered, unless an appeal has been taken and in that event the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time before final judgment. In capital cases the motion may be made at any time before execution of the judgment.

"(4) A motion to withdraw a plea of guilty shall be made within ten (10) days after entry of such plea and before sentence is imposed."

[15](1938) 304 U. S. 592, 58 Sup. Ct. CXXVIII, 82 L. Ed. 1561. Under sec. 362 of the American Law Institute Code of Criminal Procedure (1930) a motion on the ground of newly-discovered evidence "may be made within one year after the rendition of the verdict or the finding of the court or at a later time if the court for good cause so permits."

[16]Sec. 230 of the American Law Institute Code of Criminal Procedure (1930) goes even further and permits setting aside of a judgment so that the plea may be withdrawn.

The present Criminal Appeals Rule II is entitled "Motions" but deals only with motion for new trial, motion in arrest of judgment, and motion to withdraw a plea of guilty. Should there not be a rule covering the modern practice on motion which has been substituted for the writ of error *coram nobis*.[17] In my opinion, though not many cases come within that remedy, it is not the function of our committee to abolish or whittle down small rights of defendants any more than large rights. Hence, the remedy should be preserved and it should be made clear that the time limits governing other motions do not govern it.

APPEAL

When our Committee took up the subject of appeal, we found available for aid and assistance not only the Criminal Appeals Rules, Rules III—XIII, but also Rules 72 through 76 of the Federal Rules of Civil Procedure dealing with civil appeals. We have had for our study the ideas of the Supreme Court in 1934, its ideas in 1938, eight years of experience with the former ideas[18] and four years with the latter.

One of the important problems in connection with appeal is the procedure to be adopted in cases of direct appeal from the district court to the Supreme Court. I believe I am correct in saying that all such appeals are taken by the government.[19] The present Criminal Appeals Rules do not seem to cover such appeals.[20] Most such appeals are taken before verdict, so that only

[17]That the remedy still exists and is not limited by the time limits fixed in Rule II, see Robinson v. Johnston, (C.C.A. 9th Cir. 1941) 118 F. (2d) 998, 1000. For a detailed analysis of the writ of error *coram nobis*, see Orfield, Writ of Error Coram Nobis, (1932) 10 Neb. L. Bull. 314; Orfield, Writ of Error Coram Nobis in Nebraska, (1933) 11 Neb. L. Bull. 421; Orfield, The Writ of Error Coram Nobis in Civil Practice, (1934) 20 Va. L. Rev. 423. See also Note, (1924) 37 Harv. L. Rev. 744; Note, (1941) 39 Mich. L. Rev. 963, 966; Note, (1940) 19 Neb. L. Bull. 150.

[18]For the considerable number of cases interpreting the Criminal Appeals Rules, see annotations in 18 U. S. C. A. (1942 Supp.) sec. 688. See also Note, (1939) 52 Harv. L. Rev. 983; Orfield, Criminal Appeals in America, (1939) 253-258; Orfield, The Criminal Appeals Rules as Interpreted in the Decisions, (Dec. 1942) North Carolina L. Rev.

[19]Orfield, Criminal Appeals in America, (1939) 245-246.

[20]Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, (1936) sec. 163; Orfield, Criminal Appeals in America, (1939) 253; cf. Nye v. United States, (1941) 313 U. S. 33, 43-44, 61 Sup. Ct. 810, 85 L. Ed. 1172. The Act of May 9, 1942, ch. 295, 56 Stat. at L. 271, 18 U. S. C. A. sec. 682, expressly authorizes rule making with respect to direct appeals by the government under the Criminal Appeals Act of 1908. It is to be noted that the Attorney General in his prepared rules transmitted to the Chief Justice on May 26, 1933, expressly excepted "Proceedings under the Criminal Appeals Act of March 2, 1907, ch. 2564, 34 Stat. at L. 1246."

a very narrow range of cases could be covered even if there was an intention to cover them. Rule 72 of the Federal Rules of Civil Procedure lays down the procedure as to direct civil appeals. The civil rule did not improve the existing procedure but left it substantially as it was. It seems to me that the criminal rule ought to improve upon the civil rule by abolishing the petition for allowance of appeal and the citation on appeal and substituting a notice of appeal as is done in Criminal Appeals Rule III and Civil Rule 73 (a), governing appeals to the Circuit Courts of Appeals. If it be provided in cases of appeal by the defendant that bail shall be allowed only when it appears that a substantial question is involved, a separate rule should be laid down as to bail where the government appeals. In the case of a government appeal, the fact that a substantial question is involved ought to diminish and not increase the possibility of obtaining bail. It is questionable whether the rules should imply that the government will appeal where no substantial question is involved. The solution may be a rule such as Section 439 of the American Law Institute Code of Criminal Procedure leaving the matter to the discretion of the courts. Possibly the defendant should be admitted to bail on his own recognizance as provided in the Government Appeals Act of 1942.[21]

Rule III. Under the present law when the government appeals, it is given thirty days in which to take its appeal. Criminal Appeals Rule III gives the defendant only five days after the entry of judgment of conviction in which to take his appeal. Possibly the time for the government should be reduced to correspond more nearly.[22] An alternative solution may be to increase the time of

[21]Act of May 9, 1942, ch. 295, 56 Stat. at L. 271, 18 U. S. C. A. sec. 682.

[22]"III. *Appeals.* An appeal shall be taken within five (5) days after the entry of judgment of conviction, except that where a motion for a new trial has been made within the time specified in subdivision (2) of Rule II, the appeal may be taken within five (5) days after entry of the order denying the motion.

"Petitions for allowance of appeal, and citations, in cases governed by these rules are abolished.

"Appeals shall be taken by filing with the clerk of the trial court a notice, in duplicate, stating that the defendant appeals from the judgment, and by serving a copy of the notice upon the United States Attorney. The notice of appeal shall set forth the title of the case, the names and addresses of the appellant and appellant's attorney, a general statement of the nature of the offense, the date of the judgment, the sentence imposed, and, if the appellant is in custody, the prison where appellant is confined. The notice shall also contain a succinct statement of the grounds of appeal and shall follow substantially the form hereto annexed." Identical periods of sixty days are fixed for the defendant and the government in secs. 429 and 430 of the American Law Institute Code of Criminal Pro-

the defendant up to thirty days. Appeal by the government is a hardship to the defendant, hence the rights of the government should at the most equal those of the defendant.[23] Possibly, however, the rights are not entirely comparable, since the defendant usually appeals from a conviction, while the government under existing statutes can never appeal from an acquittal.[24] Moreover, the defendant takes his appeal at the close of the trial, while the government takes its appeal before or during trial.

The present Criminal Appeals Rule III, paragraph 3, covering appeals to the Circuit Courts of Appeals, requires that appeals by the defendant must be taken within five days after entry of judgment of conviction, except that where a motion for a new trial has been made within the three day period allowed in Rule II, the appeal may be taken within five days after the entry of the order denying the motion. But it has been held that a motion for a new trial on the ground of newly-discovered evidence, which may be made within sixty days after final judgment, does not extend the time for appeal.[25] If appeal is to be truly available and effective as to all kinds of injustice done to the defendant, it should be made available here, too.[26] To avoid abuse such appeal, after a certain period, might be made discretionary with the trial court or the appellate court.[27]

It has just been seen that the five day period prescribed in Criminal Appeals Rule III is not adequate with respect to appeals where a motion for new trial on the ground of newly-discovered evidence is denied. But that is not the only case of inadequacy. Suppose a motion to correct an illegal sentence is made and denied after the defendant has served several years in the penitentiary. Suppose also that a rule of court be adopted permitting a motion

cedure. It should be noted that the present five day period with respect to appeals by the defendant as laid down in Criminal Appeals Rule III was a reduction from the prior statutory period of three months.

[23]If the government could appeal from the sentence on the ground that it is illegal, there would then be a case where the rights of the parties should be the same.

[24]Orfield, Criminal Appeals in America, (1939) 62-63; 262-266.

[25]Fewox v. United States, (C.C.A. 5th Cir. 1935) 77 Fed. (2d) 699; Note, (1939) 52 Harv. L. Rev. 983, 984.

[26]Under sec. 429 of the American Law Institute Code of Criminal Procedure (1930) the defendant may appeal within sixty days after the denial of a motion for a new trial based on the ground of newly-discovered evidence.

[27]Sec. 2 of the Criminal Appeals Rule Making Act, 48 Stat. at L. 399, 18 U. S. C. A. sec. 688, 28 U. S. C. A. sec. 723a, provides that the "right of appeal shall continue in those cases in which appeals are now authorized by law." See note 2, supra. But where new and additional rights are created it would seem that they might be made discretionary.

in the trial court for correction of an illegal sentence at any time. Does not fairness require that the defendant should have the right to appellate review of the denial of the motion within some reasonable period after such denial? At least should there not be the possibility of review if the trial court or the appellate court in their discretion give leave? The Fifth and the Tenth Circuit Courts of Appeals have recently solved the problem by holding that Criminal Appeals Rule III, paragraph 1, is not applicable and that the rule in effect prior to the Criminal Appeals Rule must be resorted to.[28] The same view was taken by the Supreme Court whose decision referred to this as a "casus omissus."[28a]

A different kind of hardship appears where the defendant is at Alcatraz and his motion is made in Maine or some other distant point. Five days after the entry of the order denying the motion is scarcely adequate though it is certainly much better than five days after the entry of judgment of conviction.

There is also inadequacy as to cases where the writ of error *coram nobis* or its substitute by way of motion is denied. The time for making that motion is not limited by Rule II;[29] possibly there is no time limit upon it. Should there not be the possibility of at least discretionary review in case of denial of the motion? Is it not clear from all of this that appeals from orders denying motion for correction of sentence, or motions for new trials on the ground of newly discovered evidence, or the writ of error *coram nobis*, or any other order made after entry of judgment of conviction should be treated differently than appeals taken from judgment of conviction, certainly as to the time when the period for taking an appeal starts to run, and possibly also as to the length of the period after it has started to run?

Or, suppose the defendant is not represented by counsel or is represented by assigned counsel? May not the solution here be a rule that when the court imposes sentence on such a defendant, the court must ask the defendant whether he wishes to appeal, and if he answers in the affirmative, the court must direct the clerk to file and serve a notice of appeal or must extend the time for such filing.[30] Another solution may be to permit the appellate court in

[28]Meyers v. United States, (C.C.A. 5th Cir. 1941) 116 F. (2d) 601, 603; Gilmore v. United States, (C.C.A. 10th Cir. 1942) 124 F. (2d) 537, 539.

[28a]United States ex rel. Coy v. United States, 316 U. S. 342, 62 Sup. Ct. 1137, 86 L. Ed. 1517.

[29]Robinson v. Johnston, (C.C.A. 5th Cir. 1941) 118 F. (2d) 998, 1000.

[30]Cf. Boykin v. Huff, (U.S. Ct. of App. D. C. 1941) 121 F. (2d) 965, noted (1941) 27 Iowa L. Rev. 133; (1941) 14 Rocky Mt. L. Rev. 69; (1942) 27 Wash. U. L. Q. 272.

its discretion to extend the time for taking an appeal as may be done in England.[31]

A number of problems may arise as to the contents of the notice of appeal. Under the present Criminal Appeals Rule III, paragraph 3, the notice must contain a general statement of the nature of the offense. Perhaps this is unnecessary. Possibly a brief description of the decision appealed from with its date is sufficient. The Criminal Appeals Rule requires the notice to contain a "succinct statement of the grounds of the appeal." If the pattern of the Civil Rules is followed, this requirement may be dropped and instead there may be substituted a statement of points as prescribed in Civil Rule 75 (d). The Criminal Appeal Rule is silent as to signature of the notice of appeal though Forms No. 1 and 2 call for signature by the appellant. Possibly there should be an express rule requiring signature by the appellant or by the attorney for the appellant or by the clerk in the circumstances under which he should be required to prepare it. The Criminal Appeals Rule III, paragraph 2, abolished petitions for allowance of appeal and citations. This should perhaps be repeated in the new rules lest it be argued that silence or repeal of the Criminal Appeals Rule revived the rule existing prior to the adoption of the Criminal Appeals Rules.

Rule IV. It is possible that Rule IV, paragraph 3, of the Criminal Appeals Rules dealing with motion to dismiss an appeal may be modified in such a way as to give greater protection to the defendant. This might be done by a provision that before dismissing the court shall be free to dispose of the case on the merits if it finds upon examination of papers on file with the clerk that serious error has probably been committed by the district court.[32]

[31]Orfield, Criminal Appeals in America, (1939) 126; Criminal Appeals Act, (1907) sec. 7 (1), paragraph 2.

[32]Orfield, Criminal Appeals in America, (1939) 271. "IV. *Control by Appellate Court.* The clerk of the trial court shall immediately forward the duplicate notice of appeal to the clerk of the appellate court, together with a statement from the docket entries in the case substantially as provided in the form hereto annexed.

"From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal including the proceedings relating to the preparation of the record on appeal.

"The appellate court may at any time upon five (5) days' notice, entertain a motion to dismiss the appeal, or for directions to the trial court, or to vacate or modify any order made by the trial court or by any judge in relation to the prosecution of the appeal, including any order for the granting of bail."

Rule V. On the other hand it may be that Rule V[33] on supersedeas is over lenient to the defendant in making a stay automatic on the taking of an appeal unless the defendant elects to enter upon the serving of his sentence. This may encourage frivolous appeals. Should the defendant not be required to take an affirmative step if he desires a stay? Under the present rules the stay is automatic unless the defendant elects to begin service of his sentence.[34] Would it not be well to provide that where the sentence is imprisonment, such sentence shall be executed unless not only has an appeal been taken but the defendant has elected with the approval of the court to remain in detention pending appeal or has been admitted to bail; and that where the sentence is a fine the sentence shall be executed unless not only an appeal has been taken but execution has been stayed by the District Court or the Circuit Court of Appeals?[35]

Rule VI. Criminal Appeals Rule VI, dealing with bail, may perhaps be somewhat improved by adding a provision that the court granting bail may at any time increase the amount thereof, or revoke the order admitting the defendant to bail. This would correspond as to a later stage of the proceeding with the last sentence of Criminal Appeals Rule I: "Pending sentence, the court may commit the defendant or continue or increase the amount of bail." It may also be desirable to provide that appeal bonds are to be filed in the trial court. Finally, it may be well to adopt for criminal appeals the simple method now provided for taking judgment against the sureties on appeal and supersedeas bonds in civil actions by Civil Rule 73 (f). That is to say the surety by entering into a bond submits to the jurisdiction of the court and appoints the clerk of the District Court as his agent for the service of papers affecting his liability. No independent action is necessary.

Rule IX. One of the important problems of appeal is that of the docketing of the appeal and the record on appeal. It seems to

[33]For rule V, as amended Oct. 21, 1940, see 311 U. S. 731, 61 Sup. Ct. CLII, 85 L. Ed. 90. "V. *Supersedeas.* An appeal from a judgment of conviction stays the execution of the judgment, unless the defendant pending his appeal shall elect to enter upon the service of his sentence. The trial court or the circuit court of appeals may stay the execution of any sentence to pay a fine or fine and costs upon such terms as it may deem proper. It may require the defendant pending the appeal to pay to the clerk in escrow the whole or any part of such fine and costs, to submit to an examination as to his assets, or to give a supersedeas bond, and it may likewise make any appropriate order to restrain the defendant from dissipating his assets and thereby preventing the collection of such fine."

[34]Tinkoff v. Zerbst, (C.C.A. 10th Cir. 1936) 80 F. (2d) 414.

[35]Cf. Orfield, Criminal Appeals in America, (1939) 171-173.

me that at this point uniformity between civil and criminal cases is highly desirable. In line with Civil Rule 73 (g), why not provide that the record on appeal must be filed with the appellate court and the proceeding there docketed within forty days from the date the notice of appeal is filed in the district court? Hardship in cases where more time is necessary might be avoided by a provision that the district court or the appellate court might for good cause shown extend the time for filing and docketing. Three questions arise at this point. First, should the district court have less power than the appellate court to extend the time? Second, should the extension be applied for within the original forty-day period? Third, should there be a limit with respect to the length of the extension that may be granted?

Under Criminal Appeals Rule IX the district judge has less power than the appellate court to extend the time for the settling and filing of the bill of exceptions.[36] Under this same rule the district judge can extend the time only if he acted within the thirty-day period normally allowed. But under Criminal Appeals Rule IV the circuit court of appeal can fix an indefinite period at any time.[37] A highly flexible rule would allow either trial or

[36]Ray v. United States, (1937) 301 U. S. 158, 162, 57 Sup. Ct. 700, 81 L. Ed. 976; (1939) 52 Harv. L. Rev. 983, 985. "IX. *Bill of Exceptions.* In cases other than those described in Rule VIII, the appellant, within thirty (30) days after the taking of the appeal, or within such further time as within said period of thirty days may be fixed by the trial judge, shall procure to be settled, and shall file with the clerk of the court in which the case was tried, a bill of exceptions setting forth the proceedings upon which the appellant wishes to rely in addition to those shown by the clerk's record as described in Rule VIII. Within the same time, the appellant shall file with the clerk of the trial court an assignment of the errors of which appellant complains. The bill of exceptions shall be settled by the trial judge as promptly as possible, and he shall give no extension of time that is not required in the interest of justice.

"Bills of exceptions shall conform to the provisions of Rule 8 of the Rules of the Supreme Court of the United States.

"Upon the filing of the bill of exceptions and assignment of errors, the clerk of the trial court shall forthwith transmit them, together with such matters of record as are pertinent to the appeal, with his certificate, to the clerk of the appellate court, and the papers so forwarded shall constitute the record on appeal.

"The appellate court may at any time, on five (5) days' notice, entertain a motion by either party for the correction, amplification, or reduction of the record filed with the appellate court and may issue such directions to the trial court, or trial judge, in relation thereto, as may be appropriate."

[37]Ray v. United States, (1937) 301 U. S. 158, 57 Sup. Ct. 700, 81 L. Ed. 976. Under Civil Rule 6 (b), both the district and the circuit courts might extend after the expiration of the forty day period. Ainsworth v. Gill Glass Furniture Co., (C.C.A. 3rd Cir. 1939) 104 F. (2d) 83; Holtzoff, Practice Under the Federal Rules of Civil Procedure, (1940) 20 Boston U. L. Rev. 179, 289.

appellate court to extend the time, would allow them to extend at any time, and would allow them to extend for any length of time. On the other hand, it should not be forgotten that the existing criminal rule was adopted because of inexcusably long delays in the settling and filing of the record.[38] Nor should it be forgotten that under Rule 8 of the Rules of the Supreme Court, as amended February 27, 1939, the appellant may set forth the record in full instead of in narrative form and thus not so much time is needed in preparing the record.[39]

Rules VII, VIII, and IX of the Criminal Appeals Rules still preserve the old fashioned bill of exceptions and assignment of errors.[40] The Civil Rules have abolished them[41] and permit the parties to determine the contents of the record on appeal. The appellant and the appellee designate the portions of the record which they desire to be transmitted to the appellate court and the clerk makes up the record according to such designations. The judge need not approve the record, but settles disputes between adverse counsel if they arise. It seems to me that a brief rule is desirable to the effect that the rules governing the preparation and form of the record in civil cases shall apply to the record on appeal in criminal cases. The late Federal Circuit Judge Rufus E. Foster has pointed out that "formerly there was no difference between the practice on appeal in civil cases at law and criminal cases."[42]

One of the chief problems with respect to the record on appeal is whether or not it should be printed or how much of it should be printed. The Criminal Appeals Rules are silent on the matter though under Rule XII it seems to be left to local rules by the Circuit Courts of Appeals. Civil Rule 75 (1) expressly leaves regulation of printing to the Circuit Courts of Appeals. Possibly

[38]Note, (1939) 52 Harv. L. Rev. 983, 986; Orfield, Criminal Appeals in America, (1939) 127-129, 253-254. A study prior to the Rules showed the average time between sentence and filing of the record in the circuit court as to fifty cases taken in order from the United States Supreme Court docket to be 188 days. Orfield, Criminal Appeals in America (1939) 127.

[39]See note, (1939) 52 Harv. L. Rev. 983, 986; Federal Circuit Judge Rufus E. Foster, Criminal Appeals Rules, (1939) 1 Fed. Rules Dec. 261.

[40]Orfield, Criminal Appeals in America, (1939) 156-157, 255-256, 268-269.

[41]For a concise summary of the changes in appellate procedure brought about by the adoption of the Civil Rules, see Sunderland (1939) 13 U. Cin. L. Rev. 129-131.

[42]Criminal Appeals Rules, An address by Federal Circuit Judge Rufus E. Foster at the Judicial Conference of the Fifth Circuit, May 22, 1939, 1 Fed. Rules Dec. 261.

the time has now come when the Supreme Court itself should regulate the matter, at least in criminal cases. A number of solutions suggest themselves. The most far reaching of them is to allow the use of typewritten records on appeal to the Circuit Courts of Appeals.[43] In 1936 with respect to civil appeals, only eleven states required printed records.[44] The saving in expense and time would be a real benefit to numerous defendants who can ill afford to pay for printing. A less sweeping change would be a rule that the appellant should first state the parts of the record he desires to print, the appellee should then state the parts of the record which he desires to print, and that the parts of the record designated by both should be printed in the order in which they appear in the record. This should give a clear, accurate, realistic picture of what happened below. In contrast to the appendix form, it does not divide the record into two parts; it does not by division produce a discontinuous record. In contrast to the procedure under the present Criminal Appeals Rules this method has the advantage of individual designation without the necessity of agreement in the lower court. A third solution is the appendix form of record.[45] Under this plan the appellant would print as an appendix to his brief the judgment appealed from, any opinion or charge of the court, and such other parts of the record material to the question presented as the appellant desired the court to read. The brief of the appellee would contain as an appendix such parts of the record as the appellee desired the court to read not printed in the appellant's brief. The appellant might then set forth in an appendix to the reply brief such additional parts of the record as he desired the court to read in view of the parts printed by the appellee. In particular cases the appellate court might order additional parts or the whole of the record to be printed. The First, the Third, and the Fourth Circuits, and the Court of Appeals for the District of Columbia have adopted such a plan. It has been used in the Fourth Circuit since 1939 where, according to Clerk Claude M. Dean, litigants have been saved thousands of dollars of expense.[46]

Under Criminal Appeals Rule VI it is possible for a defendant

[43]Orfield, Criminal Appeals in America, (1939) 151-156.

[44]Ferdinand F. Stone, The Record on Appeal in Civil Cases, (1937), 23 Va. L. Rev. 766, 793.

[45]Orfield, Criminal Appeals in America, (1939) 146-147, 155-156.

[46](1940) 42 North Carolina Bar Association Reports 71. See also Federal Circuit Judge John J. Parker, Improving the Administration of Justice, (1940) 19 Neb. L. Bull. 185, 195, reprinted (1941) 27 A. B. A. J. 71, 75.

who is denied bail by the district court to "shop around" for bail by applying to the Circuit Court of Appeals without being required to state what happened to his prior applications.[47] Under Criminal Appeals Rule IV the same seems to be true with respect to extension of time for settling and filing of the bill of exceptions. Should this not be eliminated by a rule that the application be on notice and that the application must show either that it is not practicable to apply to the district court for the relief or that the application has been made to it and denied with the reasons given by it for the denial? The Judicial Conference of Senior Circuit Judges has recommended the substance of such a rule.[48]

Rule X. Criminal Appeals Rule X provides that preference "shall be given to criminal appeals over appeals in civil cases." The congestion of civil cases in some circuits may require special treatment. For that reason some phraseology like "as far as practicable" might be added.

Rule XI. Under Criminal Appeals Rule XI petition to the United States Supreme Court for writ of certiorari to review a judgment of the Circuit Court of Appeals must be made within thirty days after the entry of the judgment of that court. This rule seems to deprive the court of the power to grant all extensions whether within the thirty-day period or later.[49] In view of the tendency towards flexibility with respect to time provisions as illustrated in Civil Rule 6 (b), in view of proposals that there be no time limit on applications for new trial on the ground of newly-discovered evidence, that the time limit for motions in arrest of judgment or for new trial may be extended if motion is made during the original three-day limit, that the time limit for with-

[47]But see United States v. Hansell, (C.C.A. 2d Cir. 1940) 109 F. (2d) 613. "VI. *Bail.* The defendant shall not be admitted to bail pending an appeal from a judgment of conviction save as follows: Bail may be granted by the trial judge or by the appellate court, or, where the appellate court is not in session, by any judge thereof or by the circuit justice.

"Bail shall not be allowed pending appeal unless it appears that the appeal involves a substantial question which should be determined by the appellate court."

[48]Report of the Judicial Conference of Senior Circuit Judges. (1941) 8-9. See also, Orfield, Criminal Appeals in America, (1939) 257.

[49]Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, (1936) secs. 381, 386. "XI. *Writ of certiorari,* Petition to the Supreme Court of the United States for writ of certiorari to review a judgment of the appellate court shall be made within thirty (30) days after the entry of the judgment of that court. Such petition shall be made as prescribed in Rules 38 and 39 of the rules of the Supreme Court of the United States."

drawal of a plea of guilty be extended up to sentence, that the time limit for filing an appeal be extended in certain cases where a defendant is not represented by counsel or represented by counsel assigned to him by the court and that both the trial and appellate courts be authorized to extend the time for filing and docketing the appeal, it may seem quite logical to authorize the Supreme Court or a justice thereof for good cause shown to extend the time for petitions for certiorari. It may be, however, that experience has indicated that no hardships or injustices arise out of the present rule. Or it may be that, if the rule is to be changed, it should be required that applications for extension be made within thirty days and that the periods for extension be limited.[50]

Rule XIII. The provision in Rule XIII, the final one of the Criminal Appeals Rules, with respect to time differs with the corresponding provision of the Civil Rules in Rule 6 (a).[51] Under Rule 6 (a) when the period of time prescribed is less than seven days, intermediate Sundays and holidays are to be excluded in the computation. It would follow that as to a longer period Sundays and holidays would be included thus cutting down the time. Under Criminal Appeals Rule XIII, on the other hand, Sundays and holidays are excluded in the computation whether the period involved was more or less than seven days. Civil Rule 6 (a) treats half-holidays as ordinary days. The Criminal Appeals Rule is silent as to half-holidays. To avoid confusion the rule in criminal cases should be brought into harmony with that in civil.

I have said nothing of the scope of appeal. Should the Circuit Court, like the English Court of Criminal Appeal, be authorized to review the facts in the sense of hearing new testimony and new witnesses?[52] Should the Circuit Court, like several of our state appellate courts, be authorized to reduce sentences on the ground that they are criminologically excessive though not illegal?[53] I be-

[50]Rule XV of the Proposed Rules transmitted by the Attorney General to the Supreme Court on May 26, 1933, contained this proviso with respect to the thirty-day period: "Provided, that for good cause shown such period may be extended not exceeding thirty (30) days by a Justice of the Supreme Court."

[51]Rule XIII, paragraph 2: "For the purpose of computing time as specified in the foregoing rules, Sundays and legal holidays (whether under Federal law or under the law of the State where the case was brought) shall be excluded."

[52]On review of the facts, see Orfield, Criminal Appeals in America, (1939) 79-91.

[53]On review of the sentence, see Orfield, Criminal Appeals in America (1939) 101-121.

lieve that Congress can and should do these things.[54] But it is not clear that the statute empowering the Supreme Court to prescribe the Criminal Appeals Rules gives the Court power to act. Section 2 of that Act provides:

"The right of appeal shall continue in those cases in which appeals are now authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of *certiorari* and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed."

It seems to me that it might be argued in favor of the power to make rules that the right of appeal will still continue in those cases in which appeals are now authorized by law and will also exist in favor of the defendant in a new class of cases where it does not now exist. It seems to me the statute simply prevents the destruction of the right to appeal where it now exists but does not prevent the creation of new rights. Furthermore, it might be argued that prescribing the manner of taking appeals to a certain extent involves the power to limit the scope of appeal. The Federal Rules of Civil Procedure regulated and increased the scope of appeal in jury-waived cases.[55]

[54]48 Stat. at L. 399, 18 U. S. C. A. sec. 688, 28 U. S. C. A. sec. 723a.

[55]Shapiro, Criminal Appeal on the Facts and the Federal Judicial System, (1939) 34 Ill. L. Rev. 332.