



---

**The chapter from which  
this excerpt was taken  
was first published by  
IICLE® in the 2026 edition  
of Federal Criminal  
Practice and is posted or  
reprinted with permission.**

---

The Book containing this chapter and any forms referenced herein is available for purchase at [www.iicle.com](http://www.iicle.com) or by calling 217-787-2080.

# 4

## Initial Appearance and Preliminary Hearing

**GABRIEL A. FUENTES**

**U.S. Magistrate Judge  
Northern District of Illinois  
Chicago**

The author wishes to acknowledge the assistance and advice of the following persons in connection with the 2026 revision of this chapter: Northern District of Illinois Chief Pretrial Services Officer Amanda Garcia, Chief Deputy Scott Porter, retired Pretrial Services Officer Tiffany A. Minarik; University of Chicago Clinical Professor of Law and Federal Criminal Justice Clinic Director Alison Siegler; Chicago Federal Defender Program Staff Attorneys Mary Judge and Daniel J. Hesler; U.S. District Judge Jonathan E. Hawley of the Central District of Illinois; and U.S. Magistrate Judges Beth W. Jantz of the Northern District of Illinois and Gilbert C. Sison of the Southern District of Illinois.

**I. [4.1] Introduction — Scope of Chapter****II. [4.2] Initial Appearance**

- A. [4.3] General Applicability of Rule 5
  - 1. [4.4] Place of Initial Appearance and “Removal Hearings”
  - 2. [4.5] Timing and “Unnecessary Delay”
    - a. [4.6] Timing of the Initial Appearance in the Northern District of Illinois
    - b. [4.7] Calculating the Time Expended Before the Initial Appearance
    - c. [4.8] Suppression of Postarrest Statements As a Consequences of Delay
  - 3. [4.9] When Charged by Indictment
- B. [4.10] Substance of the Initial Appearance and Right to Counsel
  - 1. [4.11] Preparing for the Initial Appearance
  - 2. [4.12] Rule 5’s Subject Matters To Be Communicated to Defendants
    - a. [4.13] The Charging Instrument
    - b. [4.14] Right To Retain Counsel or To Seek Appointed Counsel
    - c. [4.15] Circumstances of Possible Pretrial Release
    - d. [4.16] Preliminary Hearing Right
    - e. [4.17] Right To Not Make a Statement
    - f. [4.18] Consular Notification
    - g. [4.19] *Brady* Notification
- C. [4.20] Detention Issues at the Initial Appearance
- D. [4.21] Crime of Violence
- E. [4.22] Initial Appearances for Misdemeanors and Petty Offenses
- F. [4.23] Initial Appearances for Arrested Juveniles
- G. [4.24] Pretrial Services and the Initial Appearance

**III. [4.25] Preliminary Hearing**

- A. [4.26] Preliminary Hearings: An Overview
- B. [4.27] The Preliminary Hearing’s Limited Purpose
- C. [4.28] The Government’s Preliminary Hearing Case
- D. [4.29] The Defense’s Preliminary Hearing Case
- E. [4.30] Timing of Preliminary Hearing
- F. [4.31] Place of Preliminary Hearing
- G. [4.32] Probable Cause at the Preliminary Hearing
- H. [4.33] Rule 26.2 Discovery at the Preliminary Hearing
- I. [4.34] Waiver of the Preliminary Hearing
- J. [4.35] Right to Counsel at the Preliminary Hearing
- K. [4.36] Record

## Chapter Summary

This chapter offers a detailed look at federal procedures governing initial appearances and preliminary hearings, covering the timing, location, and required elements of Rule 5 proceedings, the right to counsel, and detention issues arising under the Bail Reform Act at the initial appearance. It also addresses the limited role of preliminary hearings and provides targeted guidance for immigration-related matters, misdemeanor and juvenile cases, and the function of Pretrial Services, with an emphasis on statutory compliance and recent developments in the Northern District of Illinois and other federal jurisdictions.

### I. [4.1] INTRODUCTION — SCOPE OF CHAPTER

For many defendants, the initial appearance under Federal Rule of Criminal Procedure 5 will be the first exposure to a courtroom in the federal criminal justice system after an arrest. Rule 5 requires these hearings to be held “without unnecessary delay.” Fed.R.Crim.P. 5(a)(1)(A). For a newly arrested defendant, many significant events happen at once or in quick succession. Federal agents took the defendant into custody, having held the person at an agency office in custody or overnight at a police station or detention facility pending the hearing. The defendant’s knowledge of the charging instrument is likely limited to a brief consultation with retained or soon-to-be-appointed counsel before the initial appearance. The defendant may have little more than a general idea of the nature of the charges. The situation presents many challenges from the start. The initial appearance and the events surrounding it will provide defense counsel with early opportunities to build rapport and confidence in the representation. The proceeding also offers prosecutors a similar opportunity to start their case with a smooth and confident first impression on the defendant and defense counsel. A preliminary hearing, though rare in most federal judicial districts, may soon follow, presenting prosecutors with an opportunity to demonstrate probable cause through a direct examination of a live witness in open court and presenting defense counsel with an opportunity to challenge probable cause, to cross-examine the government witness, and to try to learn new details about the government’s case. For all counsel, a thorough knowledge of procedures at the initial appearance and preliminary hearing is required.

This chapter discusses initial appearance and preliminary hearing procedures, as well as practical and strategic considerations associated with both hearings. The initial appearance has changed somewhat in recent years amid an evolving understanding of what is prescribed in Rule 5 and the Bail Reform Act of 1984, Pub.L. No. 98-473, Title II, ch. I, 98 Stat. 1976, and specifically 18 U.S.C. §3142(f). This chapter will discuss those and other developments in detail.

### II. [4.2] INITIAL APPEARANCE

Fed.R.Crim.P. 5(a)(1)(A) states that an officer making an arrest, with or without a warrant, must take the arrested person before a federal magistrate judge without unnecessary delay. If the person was arrested without a warrant, a complaint must be filed promptly in the district of the offense. Fed.R.Crim.P. 5(b).

### A. [4.3] General Applicability of Rule 5

If a federal judge is unavailable, the arrested person must be taken before a “state or local judicial officer.” Fed.R.Crim.P. 5(a)(1)(A). See also Fed.R.Crim.P. 5(c)(1)(B). Under most circumstances in modern federal practice in Illinois, a federal magistrate judge will be available, typically under a “duty” arrangement in which the prosecutor promptly notifies the judge’s chambers and a Federal Defender Program “duty” attorney (or a retained attorney if one is in place and is known to the government) of the arrest and the need for a Rule 5 initial appearance.

Most initial appearances will be conducted under Rule 5, with a few exceptions, as follows

- The arresting agency does not need to bring the defendant before a judge for a Rule 5 initial appearance if the person was arrested pursuant to a warrant issued on a complaint charging solely unlawful flight to avoid prosecution (UFAP) or to avoid giving testimony (18 U.S.C. §1073, known as a UFAP warrant). In that case, the arrested person must be taken into the custody of the appropriate state or local authorities in the district of arrest, and the government must move promptly in the district in which the UFAP warrant was issued to dismiss the federal UFAP complaint. Fed.R.Crim.P. 5(a)(2)(A).
- If the arrest is for an alleged violation of probation conditions or of a condition of supervised release, Fed.R.Crim.P. 32.1 provides for a separate set of initial appearance procedures. Fed.R.Crim.P. 5(a)(2)(B). Practitioners should expect that the judge will follow Rule 32.1 in these types of initial appearances.
- If the arrest is for a warrant issued in another judicial district based on an alleged failure to appear in another district or based on a violation of pretrial release conditions imposed in another district, Fed.R.Crim.P. 40 applies. Fed.R.Crim.P. 5(a)(2)(C). Rule 40 states that the initial appearance should be conducted under Rule 5(c)(3), which provides for a form of initial appearance known as a “removal” hearing, discussed further below. Although Rule 5(a)(2)(C) describes the initial appearance in these circumstances as an “exception” to Rule 5, this form of hearing is another type of Rule 5 hearing.

Rule 5 applies to all federal arrests (or self-surrenders). Rule 5(d) sets forth a specific set of procedures to be followed in felony matters. Rule 58 sets forth a separate and slightly different set of procedures for initial appearances in misdemeanor or petty offense matters. Misdemeanor or petty offense matters are not exceptions to the Rule 5 requirement of holding initial appearances before a judge without unnecessary delay, but Rule 58 dictates how initial appearances in these non-felony cases should be conducted.

#### 1. [4.4] Place of Initial Appearance, and “Removal Hearings”

For arrests that occurred in the district in which the charges were lodged, Fed.R.Crim.P. 5(c)(1) provides that the initial appearance must be in that district. Customary practice in federal courts in Illinois is to conduct the initial appearance within the district’s division in which the arrest occurred. Arrests in Rockford, or elsewhere in the Western Division of the Northern District of Illinois, would typically occur at the Stanley J. Roszkowski United States Courthouse in Rockford. Arrests in the

Eastern Division, which encompasses Chicago, result in initial appearances at the Everett McKinley Dirksen Courthouse in downtown Chicago. The Central District of Illinois maintains divisions in Peoria, Urbana, Springfield, and Rock Island. The Southern District of Illinois maintains divisions in Benton and East St. Louis. When the district of arrest is not the charging district, the initial appearance must be in either (a) the district of arrest or (b) an adjacent district if (1) the appearance can be held more promptly in the adjacent district, or (2) the offense was alleged to have been committed in the adjacent district and the initial appearance is held on the same day as the arrest. Fed.R.Crim.P. 5(c)(2).

In practice, most initial appearances on charges filed in a district other than the district of arrest will happen in the district of arrest. These hearings are known as “removal hearings.” Rule 5(c)(3) sets forth the procedures to be followed in the removal hearing for how the matter is transmitted to the appropriate charging district for further prosecution. The rule instructs the judge to inform the defendant of Fed.R.Crim.P. 20, which governs how a defendant may agree to plead guilty or nolo contendere and then have the out-of-district matter sent to the district of the defendant’s presence for plea and sentence. Fed.R.Crim.P. 5(c)(3)(A). See also Fed.R.Crim.P. 20. Upon the government’s presentation of reliable electronic copies of the out-of-district charging instrument and arrest warrant, coupled with an affidavit of removal indicating that the defendant was charged in the charging district and arrested in the district in which the defendant is present, Rule 5(c)(3) provides for the judge to transfer the defendant to the charging district upon a finding that the defendant is the person charged in the out-of-district charging instrument. A defendant may opt for an “identity hearing.” The standard of proof applicable to the government on the identity issue is probable cause to believe that the defendant is the person named in the charging instrument. *United States v. Castro*, Case No. 21 CR 661, 2021 WL 5937773, \*6 (N.D.Ill. Dec. 16, 2021). The transfer to the other district would occur so long as a Rule 5.1 preliminary hearing does not need to be conducted in the district of arrest. Defendants in these removal hearings may waive the right to a preliminary hearing altogether (Fed.R.Crim.P. 5.1(a)(1)), or they may elect to have the hearing held later in the charging district. Fed.R.Crim.P. 5(b). Defense counsel in the district of arrest should consider carefully (after consultation with counsel in the charging district, if possible) which of these avenues may be in the client’s best interest. At felony removal hearings, the defendant also should receive the information required to be provided at all initial appearances under Rules 5(d) and 5(f).

## 2. [4.5] Timing and “Unnecessary Delay”

The requirement that an arrested defendant be brought before a federal judge without unnecessary delay derives directly from the text of Rule 5. Fed.R.Crim.P. 5(a)(1)(A). The requirement also is rooted in concerns about deprivation of federal constitutional due process. See *Baker v. McCollan*, 443 U.S. 137, 61 L.Ed.2d 433, 99 S.Ct. 2689, 2695 (1979) (rejecting claim that three-day delay over holiday weekend was due process deprivation, but suggesting that due process violation could result if arrestee under valid warrant continues to be detained after “the lapse of a certain amount of time” and “in the face of repeated protests of innocence”). The question occasionally arises in civil litigation under 42 U.S.C. §1983, alleging a constitutional tort for prolonged detention without a court appearance after arrest. Citing *Baker*, the Seventh Circuit has held that an 18-day state detention without a judicial appearance is a due-process violation. *Coleman v. Frantz*, 754 F.2d 719, 723 – 724 (7th Cir. 1985). The length of time between arrest and

an initial appearance is not likely to arise often. 754 F.2d at 723 (referring to “structural limitations on the opportunity afforded litigants to raise the issue in federal courts”). In modern federal practice, the government may avoid any claims concerning prolonged postarrest detention by promptly arranging for the initial appearance.

*a. [4.6] Timing of Initial Appearances in the Northern District of Illinois*

In September 2020, the Northern District of Illinois did away with its “17-hour rule,” which had required, absent exceptional circumstances, an initial appearance within 17 hours for anyone arrested in the district. See N.D.Ill. General Order No. 20-0026 (2020 Memorandum of Understanding), [www.ilnd.uscourts.gov/\\_assets/\\_documents/\\_forms/\\_clerksoffice/rules/pdf-orders/generalorder\\_20-0026-17hourruleordervacated.pdf](http://www.ilnd.uscourts.gov/_assets/_documents/_forms/_clerksoffice/rules/pdf-orders/generalorder_20-0026-17hourruleordervacated.pdf). Under the 2020 Memorandum of Understanding, “[t]he Court expects that initial appearances will take place at 2 p.m. on the next business day after an arrest.” In practice, the start times of initial appearances vary depending on the volume and timing of arrests on any given day. In the Northern District of Illinois, the 17-hour rule contributed to a practice of holding initial appearances as soon as practicable, and that culture continues, consistent with Rule 5’s requirement that the initial appearance take place without unnecessary delay.

Typically in the Northern District of Illinois, defendants arrested on a weekend or holiday are held in custody until they can be presented before a judge during business hours on the next business day. Largely due to issues of building public access, security, and staffing, weekend initial appearances are not generally held in the Northern District of Illinois. Under the 2020 Memorandum of Understanding, Northern District of Illinois magistrate judges have the discretion to hold weekend initial appearances hearings for defendants who are not subject to automatic detention hearings, in order to facilitate release of bondable persons arrested late Friday or over the weekend and thus to avoid unnecessary weekend detentions. But in practice, holding weekend initial appearances continues to pose logistical issues that may prevent such hearings from happening. In the Northern District of Illinois, weekend arrests of bondable defendants continue to occur occasionally. Prompt weekend hearings for defendants for whom the government could not seek or was not seeking detention have been held on rare occasions, for the sole purpose of issuing a release order for compelled appearance the following Monday. Generally speaking, procedures for weekend initial appearances for bondable defendants may continue to evolve in the Northern District of Illinois. However, in the less populated Central and Southern Districts, weekend initial appearances generally do not occur because weekend arrests almost never occur.

*b. [4.7] Calculating the Time Expended Before the Initial Appearance*

What constitutes an unnecessary delay must be determined under all the circumstances of the case. Advisory Committee Notes, 2002 Amendment, Fed.R.Crim.P. 5. Delay itself is typically measured from the time the suspect is arrested on federal charges. *United States v. Alvarez-Sanchez*, 511 U.S. 350, 128 L.Ed.2d 319, 114 S.Ct. 1599 (1994). However, the time may be measured from the commencement of state custody when a defendant demonstrates that state and federal authorities were working together and the arrangement allowed federal officials to obtain information from the defendant without bringing the defendant before a federal judge. *United States v. Carter*, 910 F.2d 1524, 1528 (7th Cir. 1990). See also *United States v. Broadhead*, 413 F.2d 1351, 1358 (7th Cir. 1969) (time spent in local custody counted when local officers conducted roadblock and arrest at FBI request, lineup was conducted by FBI, and city jail was detention site).