AGENDA
CRIMINAL RULES COMMITTEE MEETING

October 12 - 13, 1992
Seattle, Washington

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

August 18, 1992

TO THE MEMBERS OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

For your information, the next meeting of the Committee will be held on October 12-13, 1992, at the Stouffer Madison Hotel, 515 Madison Street, Seattle, Washington. The meeting will start each day at 9:00 a.m.

Arrangements have been made for a block of rooms at the hotel for the nights of October 11-13, 1992, at the rate of $79 per night for single occupancy and $99 per night for double occupancy. A choice of one king or two double beds is available. Please make your own reservations by calling the hotel directly at 1-206-583-0300 by Friday, September 21, 1992, identify yourself as being a member of the Criminal Rules Committee, and specify the nights you will be staying at the hotel.

For the non-judiciary Members, please make your travel reservations through the National Travel Service by calling 1-800-445-0668. The identification Code you should use is "The Administrative Office Rules Committee."

I have attached a map of Seattle and material describing the hotel's amenities. On behalf of Judge Hodges, I am also making dinner arrangements for the Committee for Monday evening, October 12, at 6:00 p.m. Additional information, including a copy of the dinner menu, will be forwarded shortly to you.

If you cannot attend the meeting or have any questions, please call Judy Krivit at (202) 633-6021.

John K. Rabiej

2 Attachments

cc: Honorable Robert E. Keeton
Mr. William R. Wilson
Professor David A. Schlueter
Mr. William B. Eldridge

AGENDA
CRIMINAL RULES COMMITTEE
MEETING

October 12-13, 1992
Seattle, Washington

I. PRELIMINARY MATTERS

A. Introduction and Comments.

B. Approval of Minutes of April 1992, Meeting.

C. Report of Style Committee (Memo).

II. CRIMINAL RULES UNDER CONSIDERATION

A. Rules Approved by Standing Committee at June 1992 Meeting and Forwarded to Judicial Conference (No Memo).

1. Rule 12.1, Production of Statements.

2. Rule 16(a), Discovery of Experts.

3. Rule 26.2, Production of Statements.

4. Rule 26.3, Mistrial.

5. Rule 32(f), Production of Statements.

6. Rule 32.1, Production of Statements.

7. Rule 40, Commitment to Another District.

8. Rule 41, Search and Seizure.

9. Rule 46, Production of Statements.

10. Rule 8, Rules Governing § 2255 Hearings.

11. Technical Amendments.

B. Rules Approved by Standing Committee; To Be Published for Public Comment (No Memo).

1. Rule 16(a)(1)(A), Disclosure of Statements by Organizational Defendants.

2. Rule 29(b), Delayed Ruling on Judgment of Acquittal.

C. **Other Criminal Procedure Rules Under Consideration by the Advisory Committee.**

1. Rule 5(a), DOJ Proposal to Amend Rule 5 re Appearances for Persons Arrested for UFAP Offenses (Memo).

2. Rules 10 & 43, Proposal from Bureau of Prisons to Permit In Absentia Arraignments (Memo).

3. Rule 11, Advising Defendant of Impact of Negotiated Factual Stipulations (Memo).

4. Rule 16, Proposal from Professor Ehrhardt re Government Disclosure of Materials which Implicate the Defendant (Memo).

5. Rule 16, Proposal from Mr. Bill Wilson that Committee Examine Discovery Practices (Memo).

6. Rule 32, Judge Hodges' Proposal to Amend (Memo).

7. Rule 40(d), Proposal from Judge Collins re Conditional Release of Probationer, etc. (Memo).

8. Rule 43(b), Proposal from DOJ re Sentencing of Absent Defendant (Memo).

9. Other Rules.

D. **Rules Pending Before Standing Committee.**

1. Rule 57, Promulgation of Local Rules (Memo).

2. Rule 59, Proposal re Authority to Make Technical Amendments (Memo).

III. EVIDENCE RULES UNDER CONSIDERATION

A. **Proposal to Create Separate Rules of Evidence Subcommittee (No Memo).**

B. **Evidence Rules Approved by Standing Committee and Forwarded to Judicial Conference (Copy of Rules; No Memo).**

C. Evidence Rules Considered by Standing Committee and Remanded to Advisory Committees.

1. Fed. R. Evid. 804 (Memo).

D. Evidence Rules Pending Before Standing Committee.

1. Fed. R. Evid. 1102 (Memo).

E. Evidence Rules Under Consideration by Congress.

1. Fed. R. Evid. 412 (Memo).

IV. MISCELLANEOUS

V. DESIGNATION OF TIME AND PLACE OF NEXT MEETING.

Agenda Item I.A.
9/92-Crim

ADVISORY COMMITTEE ON CRIMINAL RULES

9/1/92

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Agenda Item IB
Com - 9/92

MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE

April 23, 24, 1992
Washington, D.C

The Advisory Committee on the Federal Rules of Criminal Procedure met in Washington, D.C. on April 23 and 24, 1992. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Keenan, acting chair, called the meeting to order at 9:00 a.m. on Thursday, April 23, 1992 at the Administrative Office of the United States Courts. The following persons were present for all or a part of the Committee's meeting:

Hon. Wm. Terrell Hodges, Chairman
Hon. James DeAnda
Hon. John F. Keenan
Hon. Sam A. Crow
Hon. D. Lowell Jensen
Hon. B. Waugh Crigler
Prof. Stephen A. Saltzburg
Mr. John Doar, Esq.
Mr. Tom Karas, Esq.
Mr. Edward Marek, Esq.
Mr. Roger Pauley, Jr., designee of Mr. Robert S. Mueller III, Assistant Attorney General

Professor David A. Schlueter
Reporter

Also present at the meeting were: Judge Robert Keeton, Chairman of the Standing Committee on Rules of Practice and Procedure, Mr. Joe Spaniol, Mr. Peter McCabe, Mr. David Adair, Ms. Judith Krivit, and Mr. John Robiej of the Administrative Office of the United States Courts, and Mr. William Eldridge of the Federal Judicial Center. Judge Harvey Schlesinger was not able to attend.

I. INTRODUCTIONS AND COMMENTS

Due to the temporary absence of Judge Hodges, Judge Keenan welcomed the attendees and noted that all of the members were present with the exception of Judge Hodges, who was expected shortly and Judge Schlesinger whose docket prevented him from attending the meeting. Judge Keenan extended a welcome to the two new members, Judge Jensen and Magistrate Judge Crigler. He noted that Mr. William

Wilson, Standing Committee member acting as liaison to the Advisory Committee, was not able to attend due the recent death of his wife. On behalf of the Committee, Judge Keenan extended deepest sympathies to Mr. Wilson.

II. APPROVAL OF MINUTES

Judge Crow moved that the minutes of the Committee's November meeting in Tampa, Florida be approved. Mr. Karas seconded the motion which carried by a unanimous vote.

III. CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

A. Special Order of Business: Request by Federal Bureau of Prisons Regarding Arraignments

Mr. J. Michael Quinlan, Director of the Federal Bureau of Prisons spoke briefly to the Committee, urging it to reconsider proposed amendments to the Federal Rules of Criminal Procedure which would permit arraignment of detainees through closed-circuit television or some similar arrangement. He noted that problems of security and the sheer numbers of arraignments involving detainees threatened to gridlock the system. He added that there are approximately 119,000 such hearings a year. In particular he asked the Committee to consider amending Rules 10 and 43 to permit arraignments without the defendant actually appearing in court. Judge Keenan and the Reporter indicated that the matter would be placed on the Fall 1992 agenda.

B. Rules Approved by the Supreme Court and by Congress

The Reporter informed the Committee that several Rules approved by the Supreme Court and sent to Congress had become effective on December 1, 1991: Rule 16(a)(1)(A) (Disclosure of Evidence by the Government), Rule 35(b)(Reduction of Sentence) and Rule 35(c)(Correction of Sentence Errors). In addition, technical amendments in Rules 32, 32.1, 46, 54(a), and 58 became effective on that date.

C. Rules Approved by the Standing Committee and Circulated for Public Comment

The Reporter indicated that a number of rules which had been approved by the Standing Committee for public comment were back before the Committee for its reconsideration. He indicated that very few written comments had been received on the proposed amendments and that most of those had been positive. The Reporter also noted that the "Style"

subcommittee of the Standing Committee had presented its suggested changes in the language to all of the Rules and that unless otherwise noted, those changes should be a part of the approved versions forwarded to the Standing Committee. Judge Keeton added that it was not the intent of the Standing Committee that the style committee make any substantive changes to the Rules themselves. The Committee then addressed each of the proposed Rules.[1]

1. Rule 12(i). Production of Statements.

The Reporter indicated that no written comments had been received on the proposed amendment. After brief discussion in which it was noted that the introductory language in the Rule should refer to "these Rules," Mr. Karas moved that the Rule be forwarded to the Standing Committee. Mr. Marek seconded the motion which carried by a unanimous vote.

2. Rule 16(a). Disclosure of Experts.

The Reporter informed the Committee that the proposed amendment to Rule 16(a) had generated some comments from the public. Several had raised the issue of the scope of the rule, the lack of specific timing requirements, the relationship between this provision and others in Rule 16, and the difficulty of knowing in advance of trial which experts would be called to testify.

Mr. Karas moved that the Rule be approved and forwarded to the Standing Committee for its approval. Mr. Doar seconded the motion.

Mr. Pauley referred to a letter sent by the Justice Department to the Advisory Committee which expressed strong opposition to the amendment. He noted that there did not seem to be any real problems which required the amendment and that the Committee should consider the full panoply of experts that would potentially fall within this amendment. In particular, he noted that "summary" experts would be covered and that the amendment did not cover problems which would arise if the government did not know in advance of trial which witnesses it would call. Judge Hodges noted the the Department's letter in opposition to the amendment had been received by the Committee almost two months after the official comment period ended.

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1. Although the rules are noted here in chronological order to facilitate referencing, they were not discussed in this exact order.

Professor Saltzburg endorsed the concept of the amendment. He indicated that the language "at the request of the defendant," should stay in and observed that if problems develop with application there will be time for any further amendments. He indicated that the problem of the parties not knowing who the witnesses would be could be addressed by extending the amendment only to those witness that a party "expected" to call. Mr. Marek echoed Professor Saltzburg's support for the amendment and disagreed with the Department's assertions that defendants are not currently being surprised by government experts.

Judge DeAnda spoke in favor of the amendment and noted that the timeliness requirements would affect both the government and the defense. Judge Jensen added that the underlying concept of the Rule was good but that he was opposed to the requirement for a written report. Mr. Pauley again expressed concern about the amendment and added that it would require the government to present its theory of the case to the defendant before trial.

After some additional discussion on the options available to the Committee, the chair called the question on the existing motion to send the amendment forward as published. That motion failed by a vote of 8 to 2.

Professor Saltzburg then moved that changes be made in the amendment which would address some of the concerns raised during the discussion:

> "At the defendant's request, the government must disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703 and 705 of the Federal Rules of Evidence as evidence-in-chief at trial. This summary must describe the opinions of the witnesses, the bases and reasons therefor, and the witnesses' qualifications."

Mr. Marek seconded the motion. Mr. Doar expressed some concern about whether the new language should leave out the reference to the underlying data relied upon by the expert witness. Mr. Pauley noted that the new language addressed some of the concerns raised by the Department of Justice but in an extended discussion of the issue, stated that the amendment and the debate it would generate were not needed because currently no problem exists. In his view, the amendment goes far beyond what is necessary and will generate needless litigation. The suggestion was made that the Committee Note to the amendment note some distinction between non-expert "summary" witnesses.

The Committee's vote on the motion was 5 to 5. But the motion ultimately carried on the tie-breaking vote by the Chair, Judge Hodges. Professor Saltzburg then moved that the Committee recommend to the Standing Committee that no further public comment be sought on the amendment. That vote as well was a tie vote (5 to 5) but ultimately carried when the Chair voted in the affirmative.

Professor Saltzburg thereafter moved that conforming changes be made in Rule 16(b)(1)(C), that they be forwarded to the Standing Committee with the recommendation that no futher public comment be solicited. That motion was seconded by Mr. Marek and carried by a unanimous vote.

In further discussion on Rule 16, Judge Keenan suggested that the Committee Note should indicate the potential problems with fungible experts and the amendment is not intended to create unreasonable procedural hurdles. Mr. Marek expressed concern about disclosure of experts who are not fungible. It was noted by several members during the ensuing discussion that Rule 16(d) provides an avenue of relief for both sides.

3. Rules 26.2 and 46. Production of Statements.

The Reporter informed the Committee that the public comments on the amendment to Rule 26.2 were generally supportive of the change. One commentator suggested that similar amendments be extended to the rules addressing dimissal of indictments (Rule 12(b)(1)) and motions for new trials (Rule 33). That same commentator pointed out that there would be difficulty producing statements at pretrial detention hearings and hearings held under Section 2255. Another commentator indicated that the term "privileged information" should be defined.

Mr. Pauley referred to the letter prepared by the Department of Justice which opposed the amendment to Rule 26.2 and Rule 46 insofar as those amendments would apply to disclosure of statements at pretrial detention hearings. He had no problem with the concept of Rule 26.2 but expressed concern about the extension of production requirements to pretrial proceedings. A major problem, he noted, would be the difficulty of gathering statements at such an early stage in the prosecution. He added that there are no real problems requiring the amendment, that the amendment will simply cause additional litigation, and will pose dangers to government witnesses.

Mr. Karas responded that there can be a real problem where individuals are detained for lengthy periods of time. Further, he noted that the Supreme Court in Salerno

recognized the importance of the court receiving accurate information in deciding pretrial detention issues. Professor Saltzburg suggested that the Committee note reflect that the parties are expected to proceed in good faith and that if statements are later discovered they should be given to the court and let it decide whether to reopen the issue of detention. Mr. Marek also spoke in favor of the amendment noting that a recent report from the Judicial Conference indicated a growing crisis in pretrial detentions; in his view, there was a real need for accurate information at that stage. He emphasized that the government attorney can simply tell his or her witnesses to bring their statements with them. Subsequently discovered statements would trigger a re-opening of the issue if they demonstrated a material difference with the witness's testimony.

Magistrate Crigler raised concerns about the scope of the rule and queried whether the rule envisioned that statements of affiants and hearsay declarants would be produced. After some discussion on that point, the Reporter observed that the word "affidavit" in Rule 26.2 and other similiar rules posed some problems because Rule 26.2(a) apparently only envisions that the witness's "testimony" would trigger the disclosure requirements.

Mr. Pauley moved that any references to pretrial detention hearings be removed from the proposed amendment to Rule 26.2. Magistrate Crigler seconded the motion.

Judge Keeton, in response to the Reporter's observations regarding the use of affidavits indicated that the term should probably remain because prosecutors often produce affidavits as part of their proof. He added that in his view, the rule would not extend to hearsay declarants.

The motion was defeated by a margin of 7 to 1.

Mr. Pauley subsequently stated that the Committee Note should be revised to reflect that only testimony of a witness would trigger the rule. Judge Jensen moved that the reference to affidavits should be removed from Rule 46 itself. Mr. Karas seconded the motion which carried by a 7 to 1 vote with one abstention.

Mr. Karas moved that Rule 46, as amended, be forwarded to the Standing Committee for its approval. Professor Saltzburg seconded the motion which carried by an 8 to 1 vote.

Judge Jensen then moved that the reference to affidavits should be removed from the other pending

amendments (and accompanying Committee Notes) addressing production of witness statements: Rule 32(f), Rule 32.1, and Rule 8 in the Rules Governing § 2255 Hearings. Professor Saltzburg seconded the motion which carried by a 6 to 1 margin with two absentions.

Mr. Marek moved that the amended Rule 26.2 be fowarded to the Standing Committee for its approval. Mr. Karas seconded the motion which carried by a vote of 9 to 1 with one absention.

4. Rule 26.3. Mistrial.

The Reporter informed the Committee that only one comment had been received on the proposed change and that it was favorable. Mr. Pauley moved that the amendment be forwarded to the Standing Committee for approval. Judge DeAnda seconded the motion. The motion was approved by a unanimous vote.

5. Rule 32(f). Production of Witness Statements.

The Reporter advised the Committee that only one comment had been received on Rule 32(f) and it related to the potential problem of defining "privileged information." Mr. Marek thereafter moved that the Committee approve the amendment (with references to affidavit removed) and Judge Keenan seconded the motion. It carried by a 9 to 0 margin with one absention.

6. Rule 32.1. Production of Witness Statements.

The Committee was informed by the Reporter that no written comments were received on this proposed amendment. Mr. Marek moved that the proposed amendment (with the references to affidavits removed, supra) be fowarded to the Standing Committee for its approval. Professor Saltzburg seconded the motion which carried by a 9 to 0 vote with one absention.

7. Rule 40. Committment to Another District.

The Reporter indicated that the single comment on the proposed amendment suggested that a nonfacsimile copy be transmitted promptly so that it could be included in the court documents. There was some discussion on whether the rule should be amended to include other means of "electronic transmission," e.g., computer-modem transmissions. The consensus was that it should not because the types of documents involved in Rule 40 proceedings did present special concerns about authenticity of the original documents, as opposed to other court "papers" which would

normally not involve such issues. The suggestion was made that the Committee Note should refer to the decision not to include provision for other electronic transmissions. Magistrate Crigler moved that Rule 40 be approved and forwarded to the Standing Committee with the recommendation that it be sent to the Judicial Conference. Professor Saltzburg seconded the motion which carried by a unanimous vote.

8. Rule 41. Search and Seizure.

The Committee was informed that only one comment was received on this proposed amendment and it, as with the comment on Rule 40, supra., suggested that the rule require prompt transmission of the original documents to the court. Although no action was taken on that suggestion it was suggested that the Committee Note could observe that the issuing magistrate could require that the original written affidavit be filed. After additional discussion it was agreed that the word "judge" following the words, "Federal magistrate" should be removed. Professor Saltzburg moved that the proposed amendment be approved and fowarded to the Standing Committee for its approval. Mr. Pauley seconded the motion which carried by a unanimous vote.

9. Rule 46. Production of Statements.

[This proposed amendment was discussed, and approved, in conjunction with the proposed amendment to Rule 26.2, discussed supra].

10. Rule 8. Rules Governing Section 2255 Hearings.

The Reporter indicated that the only written comment received on this proposed amendment reflected concerns about the difficulty of obtaining statements from witnesses which had been made perhaps years earlier. Mr. Marek moved that the Rule be approved and forwarded to the Standing Committee for its approval. Mr. Karas seconded the motion which carried by a margin of 9 to 0 with one absention.

D. Reports by Subcommittees on Rules of Criminal Procedure

1. Report of Subcommittee on Rules 3, 4, and 5, Oral Arrest Warrants and Time Limit for Hearing by Magistrate.

Judge Hodges reported that after additional discussion and study the Subcommittee on Rules 3, 4, and 5 had determined that no changes should be made at this time to those rules.

2. Report of Subcommittee on Rule 32. Allocution Rights of Victims.

Judge Hodges provided background on proposed amendments to Rule 32 concerning use of a model rule to govern sentencing proceedings and that the time may have come to revisit the issue of whether Rule 32 itself should be revised. He had thus circulated to the Subcommittee a draft revision of Rule 32. Judge DeAnda noted that the Subcommittee had failed to reach any consensus on the best way to provide for victim allocution rights. There was extensive discussion on what, if any, changes should be made. Mr. Marek moved that the matter be referred back to the Subcommittee for further study. Judge Jensen seconded the motion.

Mr. Marek provided a lengthy analysis of what he perceived to be four major areas of concern: (1) the role of the probation officer (e.g. to what extent the probation officers should resolve factual and legal disputes; (2) the issue of what burden of proof should apply to sentencing evidence; (3) the problem of victim allocution rights; and (4) the question of disclosure of the probation officer's recommendation. He noted that there would also be less important issues to be addressed. Judge Hodges encouraged the Committee to offer its thoughts on those and other issues which could be addressed in any further amendments. Most of the discussion centered on the role of the probation officer. Some observed that the system seems to work well while others questioned whether using the probation officers was the more efficient method. The consensus seemed to be that there was really no viable substitute for using the probtion officers, although some attention should be given to what their roles should be.

Professor Saltzburg observed that Judge Hodges" draft was a good starting point and that the Committee should consider sending it out for public comment.

[At this point further discussion was deferred until later in the meeting]

After additional discussion on the issue, Judge Hodges indicated that he would work further on his draft and that with the assistance of the Reporter he would circulate that draft, along with a Committee Note, to members of the Subcommittee. That matter would then be placed on the Fall 1992 agenda. He also appointed Judge Keenan to the Subcommittee to replace Judge Everett, who was no longer a member of the Advisory Committee. Judge Hodges' action thus

mooted the need to vote on Mr. Marek's earlier motion to refer the matter back to the Subcommittee

3. Report of Subcommittee on the Federal Rules of Evidence.

Professor Saltzburg reported on the work of the Subcommittee and indicated that it was prepared to offer several suggested amendments to the Rules of Evidence.

a. Rule 407. Subsequent Remedial Measures.

Professor Saltzburg indicated that the Subcommittee had considered and rejected a draft amendment to Rule 407 prepared by the Reporter. That amendment would have applied the Rule's limitations to strict liability cases. He noted that there is a split in the circuits, and that commentators have targeted the Rule as a candidate for an amendment. But the Subcommittee believed that the differences in application of strict liability principles was sufficiently to pose real problems of defining strict liability for purposes of Rule 407. He thereafter moved that the Committee not approve any amendment to Rule 407 concerning strict liability cases. Judge Crow seconded the motion which carried unanimously.

At this point the Committee entered into an extensive discussion on the issue of whether an additional Advisory Committee should be formed to handle evidence amendments. Judge Hodges provided some background information on Judge Becker's proposal to create a free-standing Advisory Committee on the Rules of Evidence. Judge Keeton indicated that as part of the process of reviewing the need for the existing Advisory Committees, Judge Becker's proposal would be on the agenda for the Standing Committee's June 1992 meeting. He indicated that three options existed: First, create a new Evidence Advisory Committee. Second, create an ad hoc committee composed of some new members and members from the Criminal and Civil Rules Committee. And third, maintain the status quo with some clarification on which Committee would have primary jurisdiction. He urged the members of the Committee to consider those options and make their views known to the Standing Committee.

Professor Saltzburg provided an in-depth account of how the Criminal and Civil Rules Committees had agreed some years ago to deal with amendments to the Rules of Evidence. He indicated that the Judicial Conference had asked the Chief Justice to appoint an Evidence Advisory Committee. But when no action was taken on that proposal, the Chairs of the Criminal Rules and Civil Rules Committees had agreed that the primary responsibility for monitoring the evidence rules

would reside in the Criminal Rules Committee. The Committee, he reminded, has routinely monitored and considered proposed evidence amendments which affect both civil and criminal practice. For example, in the late 1980's the Committee undertook the major project of gender-neutralizing the Rules of Evidence.

Judge Hodges conducted an informal straw poll of the Committee. The members indicated unanimously that they did not favor establishment of a new free-standing Evidence Advisory Committee. In the extensive discussion which followed, several members noted the distinction between rules of evidence and rules of procedure; the rules of evidence which do not require the sort of close monitoring and changes that rules of procedure do. There was also concern that a new committee would be inclined to set an active agenda which would almost certainly take on a life of its own and generate unnecessary amendments. Several observed that despite suggested changes from academic commentators, the rules of evidence have worked well.

Ultimately, Professor Saltzburg moved that the Standing Committee be advised that the Criminal Rules Advisory Committee recommends that the Committee's name be changed to the "Advisory Committee for Rules of Criminal Procedure and Rules of Evidence" and that some provision be made for additional input from the Civil Rules Committee, such as the addition of several members who would be permitted to vote on proposed evidence amendments. Judge Keenan seconded the motion. The motion carried by a vote of 9 to 1.

In the following discussion, Professor Saltzburg reflected that there were several key points to be considered in deciding to continue using the Criminal Rules Committee as the primary committee for the evidence rules. First, the Committee agrees with Judge Becker's view that the rules of evidence should be monitored. Second, it is important to fix the authority for doing so. Third, the rules of evidence have worked well since they went into effect in 1975. Where changes have been necessary they have been made. For example, the Criminal Rules Committee in the last two years has recommended amendments to Rule 404 and 609 which were ultimately made. Fourth, there is some relationship between the rules of procedure and the rules of evidence and it makes sense to have one of the procedural "rules" committees involved in the process of recommending amendments to the rules of evidence. Fifth, to the extent that there may be a conflict between the civil and criminal practice, those conflicts can be addressed through coordination with the Civil Rules Committee. Finally, the Criminal Rules Committee has the background, experience, and institutional memory for dealing with the evidence rules.

He added that it would be helpful for the public to see that despite the absence of massive amendments to the rules of evidence, the Committee has been active in considering amendments which specifically and direct target a needed change. He queried whether the Committee's actions regarding the rules of evidence could be published in the Federal Rules Decisions.

b. Rule 801(d). Definition of Hearsay.

Professor Saltzburg indicated that the Reporter had also circulated to the Subcommittee a draft amendment to Rule 801(d)(2)(E) which would address, in part, the problem addressed by the Supreme Court in Bourjaily v. United States. That case indicated that in deciding whether a conspiracy existed, for purposes of admitting a co-conspirator's statement, the court could consider the statement itself. The Subcommittee believed that the time was not yet ripe for tackling that issue and moved to table the proposed amendment. Judge Crow seconded the motion and it carried unanimously.

c. Rule 412. Rape Cases; Relevance of Victim's Past Behavior

The evidence subcommittee had also considered amendments to Rule 412 which would apply that rule to all civil and criminal cases. Professor Saltzburg noted that both the Reporter and he had circulated proposed amendments. The Reporter's version tended to be narrower in scope and required fewer changes to the existing rule. His was broader in scope and amounted to a major change in text.

Mr. Pauley had no objection to extending the rule to civil cases but expressed concern about completely rewriting a rule that was drafted by Congress.

There was some discussion on what, if any, action was contemplated by Congress regarding possible amendments to Rule 412. Several commented that although the Congress had taken no action, there was still time in the current legislative session to do so.

Professor Saltzburg moved that the Committee approve the concept of the amendments to Rule 412 and recirculate a draft for the next meeting. Magistrate Crigler seconded the motion which carried by a 9 to 0 vote with one absention.

d. Rule 804. Child Hearsay Statements.

Professor Saltzburg noted that the Reporter had also circulated a draft amendment to Rule 804 which would

specifically address child hearsay statements. The Reporter's version would add an "unavailability" provision to Rule 804(a) and a specific child hearsay exception in Rule 804(b). Professor Saltzburg believed that the issue could be addressed by simply adding language to Rule 804(a)(4) to provide for declarants of tender years. That provision would cover not only children but also adults who have the mental age of children. Assuming a declarant was unavailable under that provision, the catch-all provision in Rule 804(b)(5) could be relied upon for the exception itself.

In the following discussion there was general support for the amendment although a number of members expressed concern about going too far with the exception. They believed the exception should only apply to children.

Judge DeAnda moved that Rule 804(a)(4) be amended to include declarants of tender years and that it be forwarded to the Standing Committee for public comment. Mr. Pauley seconded the motion. It carried by a 9 to 1 vote.

d. Proposal from DEA to Amend Rules of Evidence

Professor Saltzburg noted that the DEA has suggested a possible amendment to the Federal Rules of Evidence which would make DEA Form 7 as prima facie evidence. After a brief discussion, Magistrate Crigler moved that the issue be referred to the Justice Department for its views. Mr. Doar seconded that motion which carried by a unanimous vote.

e. Rules 702, 703, and 705. Expert Testimony.

Professor Saltzburg observed that there were still serious problems with the proposed amendments to Rules 702, 703, and 705. The Reporter observed that a recent poll of trial judges indicated that although there was support for limiting expert testimony, a significant number of respondents noted that they were not inclined to see the rule applied to criminal cases. Professor Saltzburg moved that the Standing Committee be apprised that the Committee still opposed the proposed amendments to Rules 702, 703 and 705 and recommended that the Standing Committee table those amendments pending resolution of the jurisdiction question. Judge Keenan seconded the motion which carried unanimously.

E. Other Rules Under Consideration by the Advisory Committee

1. Rule 6(e). Grand Jury Testimony.

Judge Hodges indicated that the Department of Justice had proposed several amendments to Rule 6. In an extensive discussion of the issue, Mr. Pauley presented the Department's reasons for the amendments. The first was an attempt to overrule the Supreme Court's decision in United States v. Sells Engineering in that it would permit the sharing of grand jury information with government attorneys investigating civil law violations or claims. Sells, he indicated, greatly restricted the ability of the civil attorneys to investigate civil law issues. The second amendment would address issues raised in United States v. Baggot which held that other government agencies could not have access to grand jury information unless litigation was pending. He cited several examples of the inconsistencies of these cases and the problems which had resulted.

Mr. Pauley moved that the requested amendments to Rule 6(3)(3)(A) be approved and forwarded to the Standing Committee. Judge Jensen seconded the motion.

Professor Saltzburg agreed with the concept in the Department's memo but stated that there is an issue of whether it should be announced that material is being shared with the civil attorneys. Judge Hodges observed that if such material would be more widely shared that there might be a move for a bill of rights for grand jury witnesses. Mr. Marek queried whether there was really a problem requiring the amendment. And Mr. Doar expressed concern about the amendments. In his view, criminal and civil cases should be kept separate. The fact that before Sells the government was able to share grand jury information does not mean that it was right to do so.

The motion was defeated by a 3 to 5 vote with 2 absentions. Professor Saltzburg thereafter moved that the the Chair solicit the views of the Civil Rules Committee on this amendment. Judge Keenan seconded the motion which carried by a 9 to 1 vote.

Regarding the second amendment, Mr. Pauley moved that Rule 6(e)(3)(C) be amended and forwarded to the Standing Committee for publication. Judge Keenan seconded the motion.

Mr. Pauley urged the Committee to view this amendment as simply efficient use of governmental resources. In the discussion which followed, several Committee members noted the role of secrecy in grand jury proceedings and the dangers posed by sharing testimony with other agencies. Those dangers, responded Mr. Pauley, could be monitored by the courts. Professor Saltzburg observed that the proposed amendment would make a major change in the way the

government used grand jury testimony, which might be a good change. Nontheless, he favored sending the matter to the Civil Rules Committee first. Mr. Pauley strenuously objected to that suggestion.

The Committee ultimately rejected the motion by 4 to 5 with one absention.

2. Rule 11. Proposal to Require Advice Concerning Consequences of Guilty Plea

Judge Hodges informed the Committee that Mr. James Craven had suggested that Rule 11 be amended. The amendment would require that any defendant who was not a United States citizen be advised that a plea of guilty might result in deportation, exclusion from admission to the United States, or denial of naturalization. The brief discussion which followed focused on the practical problems associated with giving this, and similar advice which really focuses on the potential collateral consequences of a guilty plea. Judge Keenan moved that the proposed amendment be disapproved. Judge DeAnda seconded the motion which carried unanimously.

3. Rule 16. Proposal to Consider Amendments.

Judge Hodges indicated that Mr. Wilson had suggested that Rule 16 be considered in light of growing concerns about federal criminal discovery. But in his absence, the matter would be carried over to the Fall 1992 meeting.

4. Rule 16(a)(1)(A). Disclosure of Statements by Organizational Defendants

The Reporter indicated that in response to the Committee's direction at the November 1991 meeting, he had drafted proposed amendments to Rule 16 concerning disclosure of statements by organizational defendants. In a brief discussion it was noted that the Rule and the Committee Note should differentiate between statements by agents which would be discoverable as party admissions and an agent's statements concerning acts for which the organization would be vicariously liable. Mr. Karas moved that the amendment be forwarded to the Standing Committee for public comment. Judge Crow seconded the motion. It carried unanimously.

5. Rule 29(b). Proposal to Delay Ruling on Motion for Acquittal.

The Committee continued its discussion of an amendment to Rule 29(b) which had been suggested by the Department of Justice and addressed at the November 1991 meeting. Additional drafting of the amendment made clear that the

judge could only consider evidence admitted at the time of the motion in considering whether to grant a deferred motion. Judge Crigler moved that the amendment be forwarded to the Standing Committee for public comment. Judge Keenan seconded the motion which carried by an 8 to 2 vote.

6. Rule 32(e). Proposal to Repeal.

Mr. Pauley moved that Rule 32(e), a provision addressing probation, be repealed because it no longer reflected the law and that it be treated as a technical amendment. Professor Saltzburg seconded the motion. The motion carried by a unanimous vote.

7. Rule 49. Proposal to Require Two-Sided Printing.

Judge Hodges informed the Committee that the Environment Defense Fund had recommended amendments in the various rules of procedure to require that only double-sided, unbleached paper, be used for all court documents. After a brief discussion, Judge Keenan moved that the Chair communicate with the proponent of the amendment and explain that the whole matter of using alternatives to paper filings was being considered by other committees in the Judicial Conference. Mr. Karas seconded the motion which carried unanimously.

8. Rule 57. Proposal Regarding Local Rules.

The Reporter indicated that the Standing Committee had asked the various reporters for the Committees to draft appropriate language which would provide additional guidance on the promulgation of local rules. The Reporter indicated that he had drafted suggested language for inclusion in Rule 57, which governs local rules. That language was intended to avoid unnecessary duplication between the Criminal Rules themselves and the local rules and to provide for possible uniform numbering systems by the Judicial Conference. After brief discussion, Mr. Karas moved that the amendment be forwarded to the Standing Committee for public comment. Professor Saltzburg seconded the motion which carried unanimously.

9. Rule 59. Technical Changes.

The Reporter informed the Committee that the Standing Committee had also directed the Reporters to explore the possibility of amending the various Rules to provide authority to the Judicial Conference to make purely technical changes to the Rules without the need for forwarding them through the Supreme Court to Congress for action. The Reporter had suggested such amendments to Rule

59 and Federal Rule of Evidence 1102. Professor Saltzburg moved that the amendments be approved and forwarded to the Standing Committee as follows:

> "The Judicial Conference of the United States may amend these rules or explanatory notes to conform to statutory changes, to correct errors in grammar, spelling, cross-references, or typography and to make other similar technical changes of form or style."

The motion carried a provisio that if the Standing Committee believed that any reference to statutory changes should be deleted, the Advisory Committee would concur. Judge Crow seconded the motion. The motion carried by a unanimous vote.

VI. MISCELLANEOUS AND DESIGNATION OF TIME AND PLACE OF NEXT MEETING

A. Continuation of Advisory Committee on Criminal Rules

The Committee was advised that every five years the Judicial Conference considers whether to continue in existence the individual committees, including the Advisory Committees. After a brief discussion, Judge Crow moved that the Standing Committee recommend the continuation of the Criminal Rules Committee. Judge Keenan seconded the motion. It carried by a unanimous vote.

B. Designation of Next Meeting

Judge Hodges announced that the next meeting of the Committee would be held in Seattle, Washington on October 12 and 13, 1992.

The meeting adjourned at 11:40 a.m. on Friday, April 24, 1992.

Agenda Item IC.
Crim - 10/92

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Work of "Style Committee"

DATE: September 2, 1992

The Standing Committee's "Style Committee" has been at work reviewing various drafts of proposed amendments. I learned yesterday that they have recently completed a proposed rewrite of the Civil Rules; eventually they will focus on the Criminal Rules. Assuming the Advisory Committee decides to propose specific amendments for consideration by the Standing Committee at its December 1992 meeting, the Style Committee will review the drafts and make recommended changes.

Attached is a two-page report of the Style Committee which explains its function and offers a "preliminary note on style."

REPORT OF SUBCOMMITTEE ON STYLE

We have reached a common understanding on many points of style. We follow a meticulous practice on the use of "shall", "may", "must", and "is". We insist on the serial comma and observance of the rules about "that" and "which". We have agreed-on rules (in large measure taken from what the Civil Rules Committee has always done) on capitalization of the titles of rules and of subdivisions of rules and on the names used to refer to parts of rules. We hyphenate phrasal adjectives but otherwise are stingy with hyphens. We hope soon to have prepared a short list of rules that we will give to the Reporters so that they may know in advance the style that the Subcommittee regards as desirable.

In its work, the Subcommittee is operating under guidelines concerning when we do or do not propose a change. These are described in the Preliminary Note that we intend to append to each set of rules as we send it forward to the Judicial Conference.

Preliminary Note on Style

It is important that rules adopted by the Supreme Court, and having the force of law, be grammatically and stylistically correct, but it is even more important that they be stated with as much clarity as the subject matter permits. Accordingly in 1992 the Standing Committee on Rules of Practice and Procedure created a Subcommittee on Style to review proposed amendments with these goals in mind. As the Notes to particular rules indicate, a number of changes have been made for reasons of style.

The Subcommittee has reviewed only those rules for which other amendments are submitted for substantive or technical reasons. This means that stylistic changes are here proposed even though the original form of words remains unchanged in other rules. So that this will not itself lead to unclarity in the rules, the Subcommittee has used the following guidelines in determining when to propose changes.

1. Clarity of meaning. Where it will clarify the meaning of a rule, style changes have been made in a proposed amendment of an existing rule, even if this places the style of the amended rule at odds with the style of other rules that are not being amended.

For example, the word "shall" is used in several different ways in the rules. It is sometimes used in a permissive rather than a mandatory sense, it sometimes purports to impose an obligation on the wrong actor, and it is sometimes used as a future-tense modal verb rather than as a mandatory verb. In those rules now being amended, the following principles have been followed: (1) "shall" is used only to denote that the subject of the clause has a duty to act (*the court shall*, but not *the judgment*

shall); (2) "must" is used if the duty lies elsewhere than in the subject of the sentence (*the judgment must*); (3) "is entitled to" is used to denote a right; (4) "may" is used to denote permission; and (5) "may not" is used to denote a prohibition.

2. Substantive changes. Stylistic changes do not change the substance. If it is unclear whether a change in the interest of clarity would alter the substantive meaning of a rule, this has been reviewed with the Advisory Committee to be sure that there is no substantive change.

3. Departure from prevalent style in other rules. Changes that are purely stylistic and that also depart from the prevalent style in other rules have been avoided. The stylistic improvement that might be made is outweighed by the cost in reader uncertainty on why one form of words is used in one rule and a different form in many other rules.

4. Style changes without cost. If a change improves style, even though not essential to clarity, the change has been made if there is no significant likelihood that anyone will be confused by it.

For example, there is great variation among the various sets of rules promulgated by the Supreme Court, and even within a particular set, on whether and how to capitalize words in the titles of rules or subdivisions of rules. If the capitalization in the titles in a rule to be amended for other reasons departs from the prevalent usage, a change is here proposed.

5. Debatable matters of style. On points of style that are quite debatable even among experts in English usage, a change has been proposed only if one view seems clearly preferable.

Charles Alan Wright
Chairman

June 16, 1992

Agenda Item IIA

Copies of the Proposed Rules Changes Approved by the Standing Committee at their June 1992 Meeting and Forwarded to the Judicial Conference will be Available at the Meeting.

Agenda Item IIC.
C. 1.

Rule 5(a).

DOJ Proposal to Amend Rule 5

Re: Appearances for Persons Arrested for UFAP Offenses (Memo).

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Proposed Amendment to Rule 5(a); Exceptions for UFAP Arrests

DATE: September 1, 1992

The Department of Justice has recommended that Rule 5(a) be amended to reflect several interrelated problems in processing persons who have been arrested for violating 18 U.S.C. § 1073 (unlawful flight to avoid prosecution)(UFAP). Suggested language and a memo detailing the reasons for an amendment are attached.

As the attached memo indicates, for all practical purposes, § 1073 offenses are rarely prosecuted. Instead, the statute serves as justification for federal authorities to assist state and local authorities in arresting fugitives wanted for non-federal offenses. Rule 5, however, recognizes no exceptions for the prompt appearance requirement before a federal magistrate. As the memo indicates, this can sometimes pose problems of delay and transportation. The suggested solution is that Rule 5(a) be amended to specifically exempt those persons arrested solely on grounds of violation of § 1073, provided that the federal authorities promptly deliver the person to state officials and promptly move to dismiss the complaint.

This item is on the agenda for the Committee's October meeting. The issues before the Committee are whether the problem articulated in the DOJ memo is widespread enough to require an amendment to the Rules of Criminal Procedure and secondly, whether the amendment to Rule 5(a) is the most appropriate means of solving the problem.

U.S. Department of Justice

Washington, D.C. 20530

AUG 26 1992

MEMORANDUM

TO: Honorable William Terrell Hodges

FROM: Roger A. Pauley
RAP

SUBJECT: Rule 5/UFAP Arrestees

Per our conversation enclosed is a copy of the Justice Department memorandum Judge Crigler seems inadvertently to have omitted in his letter to you, as well as draft DOJ (not necessarily endorsed by Judge Crigler) amendatory language for Rule 5.

Hopefully, this will facilitate placing this matter on the Committee's agenda for October.

cc: Honorable B. Waugh Crigler
Professor David A. Schlueter

Rule 5(a) of the Federal Rules of Criminal Procedure is amended by adding after the first sentence the following:

"Notwithstanding the foregoing sentence, an officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. §1073 may without unnecessary delay transfer the arrested person to the custody of appropriate State or local authorities in the district of arrest: Provided that, in such a case, an attorney for the government shall move promptly thereafter in the district in which the warrant was issued to dismiss the complaint.".

U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

MEMORANDUM

TO: Mary C. Spearing, Chief
General Litigation and
Legal Advice Section
Criminal Division

FROM: Jeffrey I. Fogel, Attorney
General Litigation and
Legal Advice Section
Criminal Division

SUBJECT: Southern District of Illinois Inquiry Regarding Unlawful Flight to Avoid Prosecution (UFAP) Post-Arrest Procedures

Assistant United States Attorney Joel V. Merkel, United States Attorney's Office for the Southern District of Illinois, has asked the Section to review legal authorities and policies controlling certain Unlawful Flight to Avoid Prosecution[1] (UFAP) post-arrest procedures. Of particular concern to his office is the timing of UFAP complaint dismissals following arrests made by the Federal Bureau of Investigation (FBI) of persons wanted for state criminal charges in other states, for which state rather than federal prosecution is expected to result.[2]

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[1] 18 U.S.C. § 1073

[2] Although procedures vary somewhat, a UFAP complaint and warrant are most often secured by the FBI in a district in which local law enforcement personnel have sought federal assistance in locating a fugitive who is believed to have fled the state. Most often, the FBI advises FBI field offices in areas to which the fugitive is believed likely to flee. If an FBI office in another state arrests the fugitive, the prisoner is taken to the U.S. Marshals Service office for processing and is then taken before a federal magistrate in that district. The federal magistrate normally authorizes the release of the arrestee to local police in the local jurisdiction in which that federal magistrate is located. Those local authorities proceed with state extradition processes to return the arrestee to the local jurisdiction in which the complaint was filed and the warrant was issued.

AUSA Merkel has advised that, for a variety of reasons, his office has endeavored to secure the dismissal of UFAP complaints immediately after federal UFAP arrests have been made in the Southern District of Illinois. This practice is intended to avoid the need for a first appearance before a federal magistrate in that district. According to Mr. Merkel, FBI agents in his district recently have insisted upon an appearance before a federal magistrate prior to dismissal of a federal UFAP complaint.[3]

The Southern District of Illinois inquiry is consistent with a recent pattern of UFAP and other post-arrest procedure issues reaching the Section. It appears that modern technology (particularly facsimile transmission equipment), criminal justice resource conservation efforts, changing standards of what constitutes "unreasonable delay" in criminal proceedings, and increased sensitivity to civil liability exposure are exerting conflicting demands upon various post-arrest procedures. The apparent requirement that UFAP arrestees be afforded a first appearance before a federal magistrate -- even when it is known that no federal prosecution will result and that substantial time and resources will be consumed in the process -- justifies a review of alternatives permitted by existing authorities.

Practical Considerations: There are several important practical advantages to the prompt dismissal of a UFAP complaint upon the federal arrest of a state fugitive, assuming that no federal prosecution is expected to result.[4] An initial court appearance which is intended to permit the defendant's federal release on a recognizance bond may require the participation of a pre-trial services officer, clerk, court reporter, Assistant United States Attorney, and arresting agent, in addition to the federal magistrate. The United States Marshals Service and the court clerk's office must also handle fingerprinting, photographing, and other arrest and bond administrative procedures if the federal proceedings advance to the stage of release on bond.

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[3] While the United States Attorney's Office would seem to have discretion in seeking the dismissal of a UFAP complaint, the FBI field office can exert practical control through the timing of its notification (to the United States Attorney's Office in the district of arrest and to the FBI field office in the district of the complaint) of a UFAP apprehension.

[4] Federal prosecution of UFAP charges is extremely rare, because the charge usually is used merely as a device to allow federal investigators to locate and apprehend a state fugitive. The charge is almost always dismissed following the apprehension of a state fugitive, either before or after preliminary proceedings conducted by a federal magistrate or other authorized state or local judicial officer.

The Southern District of Illinois also has identified practical geographic concerns which favor prompt dismissal of a UFAP complaint.[5] Defendants arrested in one of the 27 counties handled by that district's Benton division often must be kept in a county jail overnight, awaiting an appearance before a federal magistrate on the following day. An Assistant United States Attorney may be instructed to travel 100 miles to attend such a first appearance, as may other court officers if the personnel assigned to the Benton division are not available.[6] Since the Illinois state extradition process reportedly requires state extradition from the county of initial arrest, state authorities may then be required to transport the defendant as much as 150 miles from the Benton division, to the county in which he or she was apprehended by federal agents.[7]

The prompt dismissal of a UFAP complaint also assures that the United States Attorneys Office will not be determined to be "instituting" a removal proceeding without the approval of the Attorney General, Assistant Attorney General, or other designated officials; written approval is required by the statute.[8]

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[5] It is likely that the same administrative concerns exist in other districts, particularly rural districts in which significant travel distances and inadequate criminal justice staffing contribute to the inconvenience of federal first appearances for defendants who will not be prosecuted in the federal system.

[6] It is not known whether two other options exist in such Southern District of Illinois situations: 1) Taking the arrestee before a federal magistrate in another district if that magistrate is the "nearest available federal magistrate" (Rule 40); or, 2) Taking the arrestee before a state or local officer because the federal magistrate is "not reasonably available" (Rule 5) in view of the burden of transporting the arrestee to that federal magistrate.

[7] The Middle District of Georgia previously reported a similar problem. Upon dismissal of a federal UFAP complaint and warrant by a federal magistrate in Macon, Georgia: local authorities in the county of initial arrest refused to travel to Macon to take custody of the defendant; Macon authorities refused to transport the defendant to the county of initial arrest; and, federal agents apparently lacked authority to transport the prisoner anywhere due to the federal magistrate's dismissal of the federal complaint.

[8] In the Southern District of Illinois, the public defender and at least one magistrate reportedly have concluded that even the recommendation of bond pending a removal hearing constitutes "instituting" removal proceedings, and thus requires the prior authorization of the Attorney General or other designated official pursuant to 18 U.S.C. § 1073. Although we disagree with that view,

Legal Authorities:

Title 18 U.S.C. § 1073: The Fugitive Felon Act provides in pertinent part:

> "Whoever moves or travels in interstate or foreign commerce with intent...to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees...shall be fined not more than $5000 or imprisoned not more than five years, or both."

The Act further provides:

> "Violations of this section may be prosecuted... only upon formal approval in writing by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated."

Section 1073 is primarily intended to provide federal assistance to state criminal justice authorities in efforts to apprehend state fugitives.[9] It consistently has been understood that actual federal prosecutions under the act will be rare, since the purpose of the act is fulfilled when a state fugitive is apprehended and returned for local prosecution pursuant to state extradition processes. The 1961 insertion of the requirement of written approval from designated senior Department of Justice officials prior to federal prosecution for a violation of the act reflected Department practice and the expectation that actual federal prosecutions for violation of Section 1073 would be infrequent.

Rule 5, Federal Rules of Criminal Procedure: The provisions of Rule 5 (Initial Appearance Before the Magistrate) apply to §1073, since neither the rule nor the statute provide an exception. Although §1073 is unusual because there is rarely an intention to initiate a federal prosecution against someone charged with violating its terms, Rule 5 applies to anyone charged with violating that statute and in federal custody. The only

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other magistrates may reach the same conclusion. The United States Marshals Service has advised us that several magistrates in other districts have ordered federal removal of arrestees, despite the lack of the required written Justice approval and despite the objections of Assistant United States Attorneys, thus presenting the opposite problem.

[9] H.R. Rep. No. 827, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. and Ad. News 3242, 3243.

flexibility provided in the following Rule 5 text appears to be the "without unnecessary delay" language and the "state or local judicial officer" option:

> "An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. §3041."

United States v. McCord, 695 F.2d 823 (5th Cir.), cert. denied, 460 U.S. 1073 (1983): In McCord, the Court distinguished cases in which 18 U.S.C. §1073 served as "merely a tool used to detain the accused so that he could be returned [to face local charges]" from cases in which there was an intention to prosecute in federal court. In defending the use of a Rule 40 (Commitment to Another District) removal proceeding in McCord, in which federal prosecution was the intent, the court recognized that such a proceeding is not always necessary when federal prosecution is not anticipated. One such case distinguished by the court was United States v. Love, 425 F.Supp. 1248 (S.D.N.Y. 1977), in which the defendant sought but was refused Rule 40 removal proceedings because the defendant was facing eventual local, rather than federal, prosecution.

Department of Justice Policy:

October 1988 United States Attorneys' Manual Provisions: USAM 9-69.460 cites the 1961 amendments to the act, requiring the written approval of the Attorney General or designated subordinates, including an Assistant Attorney General, before initiation of federal prosecution for unlawful flight to avoid prosecution. The United States Attorneys' Manual interprets this language as prohibiting the filing of an information, seeking of an indictment, or initiation of federal removal proceedings without such written approval. The General Litigation and Legal Advice Section is identified as being responsible for the review of requests for Assistant Attorney General approval, though the actual authorization to prosecute in federal court for this federal offense must be granted by at least an Assistant Attorney General (since delegation of that authority to anyone below the level of an Assistant Attorney General is expressly prohibited in the statute). The timing of UFAP complaint dismissals is not discussed in that policy statement.

Federal Bureau of Investigation Policy:

February 1980 FBI Manual Provisions: Part I, Section 88 of the FBI policy manual advises at 88-5.1 that the primary purpose of the UFAP Act is to assist states in securing "the return of

heir fugitives for trial or reconfinement." The text recognizes that federal prosecution will occur only in rare instances, upon the formal approval in writing by the Attorney General or an Assistant Attorney General. The manual makes clear at 88-5.2(1) that "[i]t is not the purpose of this act to supersede state rendition procedures when interstate rendition can be accomplished without the assistance of the Federal Government." Accordingly, agents have been told that the Federal Government will generally not use its "removal machinery" for state fugitives.

March 1983 FBI Manual Provisions: Part I, Section 88 ("Unlawful Flight to Avoid Prosecution, Custody, Confinement, and Giving Testimony") of the FBI policy manual advises agents at 88-5.3 that "the Federal process should be dismissed" after the fugitive is apprehended and either is extradited by state authorities or is not extradited because state authorities are unwilling to institute extradition proceedings. It also is suggested that state authorities may request that the United States Attorney "institute action under the Fugitive Felon Act" to prosecute the person apprehended for a federal UFAP violation. That provision recognizes that the United States Attorney must obtain authorization from the Department of Justice before proceeding.

At 88-5.2 (2), FBI agents are advised to "immediately" notify he "wanting state authorities" of the fugitive's arrest and elated information. Immediate notification to the appropriate United States Attorney's Office is not expressly mandated.

December 1986 and August 1990 FBI Airtel Memoranda: The FBI transmitted memoranda from the FBI Director to the Jacksonville Senior Agent in Charge on December 24, 1986, and to all Senior Agents in Charge on August 24, 1990, regarding UFAP federal magistrate first appearance policy. Those memoranda expressed concern regarding agents' failure to "execute" federal UFAP warrants before defendants were transferred to local authorities for state extradition. The latter memorandum acknowledged that the practice was permissible when local authorities were present at and made the actual arrest, and the defendant was thus never in federal custody. However, Rule 5 of the Federal Rules of Criminal Procedure was cited as mandating that the defendant be taken without unnecessary delay to the nearest available federal magistrate for an initial appearance if the defendant was taken into federal custody. Those memoranda stress that "administrative inconvenience" does not constitute a permissible basis for failing to comply with that Rule 5 mandate.

The August 1990 memorandum was expressly based upon the conclusion that Rule 5 applies to all federal arrests, "regardless of the offense alleged." In addition to that legal basis, it xpressed a policy concern that "returning Unlawful Flight warrants o U.S. Magistrates unexecuted might, over a period of time, be

perceived as an abuse of the court system." All field offices were instructed to provide a justification to FBI Headquarters for any UFAP apprehension in which the federal warrant was "unexecuted."

The memoranda of 1986 and 1990 did not address the issue of the timing of dismissal of UFAP complaints following federal arrest, or the apparent loss of jurisdiction to conduct a first appearance before a magistrate after such complaint dismissals have been accomplished.

General Litigation and Legal Advice Section Policy: In response to an inquiry from the Middle District of Georgia, the Section[10] advised that district that the requirement of Assistant Attorney General approval before removal proceedings are "instituted" does not bar an appearance before a federal magistrate for the purpose of advice of rights, setting of bail, and arrangement of counsel. Rather, the Section advised that written permission is required before requesting the magistrate to order removal.

That response also advised the United States Attorney that the Section was aware of "no legal reason why a state fugitive arrested on an unlawful flight warrant needs to be brought before a magistrate before being turned over to state authorities for extradition." The response explained that an appearance before a judicial officer would be required if there would be undue delay in placing the person in state custody, though even then the judicial officer could be a state magistrate or similar state or local judicial officer if the federal magistrate was not immediately available. That conclusion was based in part upon the recognition that Rule 5 is intended to inform a defendant of his rights in defending himself against federal criminal charges; the legal protection to which a state fugitive facing only state prosecution is entitled is provided by state extradition law instead. That memorandum concluded that while the federal authorities always have the option of taking a state fugitive before a judicial officer before placing the fugitive in state custody for the purpose of state extradition, such an appearance is only necessary when there is an unreasonable delay in that transfer to state custody.

It does not appear that FBI headquarters considered that Criminal Division opinion, though it is assumed that the United States Attorney's Office provided the Section's position to the affected FBI field office.

Recently, the Section conducted a legal analysis of the merits of prosecuting violations of 18 U.S.C. §1073 under a blanket

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[10] John Bannon wrote the November 1990 legal memorandum and cover letter responding to the May 1990 inquiry of the United States Attorney Office for the Middle District of Georgia.

approval process as a means of enhancing the Department's violent crime initiative.[11] The Section adopted the position that a blanket approval policy for §1073 federal prosecutions would be inconsistent with the nondelegable formal approval process required by statute. Federal prosecutions falling within the U.S. Attorneys' Manual standard of cases in which "the interests of justice would be frustrated by a failure to prosecute" were recommended, consistent with the existing approval process.

This Section's most recent evaluation of Rule 40 is just being completed in response to an inquiry from the General Counsel of the United States Marshals Service.[12] The Section is expected to concur with the Marshals Service position that the requirement of an appearance before "the nearest available federal magistrate" is met when an arrestee is taken before a federal magistrate in another district (even if it is in another state) if that magistrate is closer to the arrest site than are available magistrates in the same district. That position is based upon the unambiguous language of Rule 40, as well as a recognition that the resulting practice accomplishes the intent of Rule 40 -- informing a defendant of a federal criminal prosecution of his rights.

Caveats: The topic of appropriate post-arrest procedures in UFAP matters is extremely complex, in large part because the recognized intent of this unusual statutory offense is to provide a basis for federal participation in the apprehension of fugitives sought for local prosecution, rather than to lead to federal prosecutions.

There is potential civil liability exposure as well as a risk of procedural error regardless of which post-arrest practices are followed. Prompt dismissal of UFAP complaints should avoid unnecessarily exposing the defendant to extended federal custody, federal custodial transport, and various federal proceedings after it is recognized that the defendant will not be prosecuted in federal court. In fact, an argument could be made that transporting a defendant 150 miles and detaining him overnight solely for federal proceedings which all parties know will not lead to federal prosecution is abusive. However, a pattern of prompt dismissals of UFAP complaints prior to appearance before a federal magistrate could be seen by some magistrates as an abuse of federal process, particularly if there is a perception that even minimal delays have been permitted in anticipation of UFAP complaint dismissal. Prompt complaint dismissal in situations which would otherwise require extended federal custody seems to be the less objectionable practice overall, since the statute unquestionably is

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[11] Art Norton prepared the memorandum for this Section.

[12] John Bannon drafted the proposed Section position, which is currently under review by affected offices.

intended to provide law enforcement assistance in the apprehension of local fugitives for local prosecution, and since subsequent state extradition procedures should meet all due process demands.[13]

Prompt dismissal of UFAP complaints does have a potential for various forms of abuse. The FBI position that there is neither an "administrative inconvenience" nor a Title 18 U.S.C. §1073 exception in the language of Rule 5 is correct. We must therefore expressly advise United States Attorneys offices that mere anticipation of dismissal is not an adequate basis for delaying a first appearance before a federal magistrate. Clearly, there will be a temptation to delay first appearances if UFAP complaint dismissal before a magistrate appearance becomes common, but that reaction must be avoided.

Dismissal of a UFAP complaint prior to appearance before a judicial officer requires an arresting agent to exercise a substantially greater level of discretion than is required if UFAP arrestees are always taken to the closest federal magistrate in the district of arrest. That discretion inherently represents an increased risk of civil liability or tainting of the resulting prosecution because mistakes may result. The increased complexity of determining whether a federal magistrate in another district is actually closer, whether logistical barriers make the use of a state or local judicial officer permissible, how an arrestee can be placed in local custody before federal jurisdiction is lost through complaint dismissal, and which of the complaint dismissal procedures is most appropriate makes these more flexible interpretations of existing authorities much less attractive to liability-conscious federal law enforcement officers. In contrast, routinely taking an arrestee before a federal magistrate in the same district probably shifts all responsibility for post-arrest procedures to the magistrate while fulfilling the apparent requirements of the applicable federal rules, thus relieving the federal officer of numerous concerns.

Additional due process and liability exposure concerns are caused by the termination of federal authority to detain a defendant at the time of the federal complaint dismissal, even if the local police are not present or prepared to take immediate

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[13] A scenario in which prompt UFAP complaint dismissal seemingly would be far superior to proceeding with a first appearance is the arrest on a UFAP warrant where the nearest available magistrate is across state lines, in the state in which the UFAP complaint originated. In that scenario, if the arrestee is taken to that federal magistrate, the state extradition process will become unnecessary (since federal officers will take the arrestee across the state line), yet it is not clear that the appearance before the federal magistrate will offer the same protection to the arrestee.

custody of the defendant upon dismissal of the federal complaint (at which time the defendant's release from federal custody becomes mandatory).

A complex related issue not raised in any of the inquiries received to date by the Section is the extent to which federal law enforcement agents can address gaps in federal authority by acting pursuant to state-granted peace officer or common-law powers in apprehending fugitives named in a state arrest warrant. Some states may extend peace officer or similar authority to federal officers, which state authority could be the basis for arrest or detention even without federal process. This authority may also raise its own liability problems. Such peace officer or police officer powers exist to a varying degree in many local jurisdictions. In some jurisdictions a federal officer has no powers beyond his federal authority and his status as a lawfully armed civilian. In other jurisdictions, a federal officer has a wide range of state police or peace officer powers based upon the inclusion of federal officers in the state statutory definition of persons vested with such powers.

With rare exceptions, federal officers do not rely upon common-law civilian powers or state-granted peace officer powers in the performance of their federal mission. While those powers represent a potential source of authority for arrests by federal officers to avoid federal processes or to avoid the impact of a lack of federal jurisdiction upon dismissal of a UFAP complaint, that is an unattractive and unreliable alternative.

Conclusions: The bringing of a defendant before a magistrate (or other judicial officer) is required by Rule 5. That requirement seemingly lapses with the dismissal of the underlying federal complaint. There is no due process, Department of Justice Policy, Rule 5, Rule 40, or statutory prohibition against the prompt dismissal of a UFAP complaint following the arrest of a defendant sought for state prosecution. In view of the history of the federal UFAP process, such prompt dismissal does not seem to constitute abuse of federal process, since both the legislative history and judicial interpretations of 18 U.S.C. §1073 recognize an intent that the vast majority of §1073 defendants not be prosecuted in federal court. As discussed above, prompt UFAP complaint dismissals will often spare both the Federal Government and the defendant unnecessary delay, the burden of custodial transport, federal processing, and other preliminary federal procedures. The federal procedures are neither required for state extradition nor helpful in protecting the defendant's rights in the state proceedings.

Despite the Section's previous endorsement of the practice of transferring a UFAP arrestee to local custody prior to an appearance before a federal magistrate, provided that such a procedure does not involve an unnecessary delay in bringing a

person in federal custody before a magistrate, there are practical and legal disadvantages to avoiding an appearance before a federal magistrate. One disadvantage is the exercise of increased discretion, discussed above, required of the arresting federal agent. Using local judicial officers may create problems as well, both in securing those judicial officers' consent to performing that function and in assuring that they fulfill the magistrate role as established by the federal rule. Attempting to use local police to arrest a fugitive may create logistical problems and conflict with existing federal agent performance evaluation systems.

Rule 10 & 43.

Proposal from Bureau of Prisons to Permit In Absentia Arraignments (Memo).

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Rules 10 & 43; Proposal from Bureau of Prisons to Provide for In Absentia Arraignments.

DATE: September 1, 1992

Mr. J. Michael Quinlan, Director of the Federal Bureau of Prisons has proposed that the Committee consider an amendment to Rules 10 and 43 which would permit in absentia arraignments which could be accomplished by video teleconferencing. The attached materials include suggested amending language to both rules, along with supporting information. Mr. Quinlan points out in his correspondance that a December 1991 poll of judges in the 9th and 11th Circuits demonstrated significant support for use of video technologies for some pretrial court functions. As you may recall, Mr. Quinlan spoke briefly to the Committee at its April 1992 meeting in Washington, D.C.

A similar proposal was discussed and rejected by the Committee at its Fall 1990 meeting. I have attached copies of the materials which were considered by the Committee, including a copy of the Valenzuela-Gonzalez decision and an excerpt of the minutes of that meeting.

U.S. Department of Justice

Federal Bureau of Prisons

Office of the Director

Washington, DC 20534

April 29, 1992

Honorable William Terrell Hodges
U.S. District Court
U.S. Courthouse
Room 108
Tampa, Florida 33602

Dear Judge Hodges:

I am writing to thank you, as Chairman of the Advisory Committee on Federal Rules of Criminal Procedure, for the opportunity to make the informational presentation at the recent meeting of the committee.

Judge Keenan, as Acting Chair, indicated that the proposed rules change would be forwarded to the committee for their review and consideration. I have attached for your information, a copy of the draft changes in the rules.

Again, thank you for the opportunity to summarize for the Advisory Committee the law enforcement interests in the proposed rules change.

Sincerely,

J. Michael Quinlan
Director

Enclosure

PROPOSED RULES CHANGES

FEDERAL RULES OF CRIMINAL PROCEDURES, RULE 10, ARRAIGNMENTS

CURRENT RULE

Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called upon to plead.

PROPOSED RULE

Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called upon to plead. The use of video teleconferencing technology, where the defendant is not physically present in court, is consistent with the requirement of this rule.

FEDERAL RULES OF CRIMINAL PROCEDURES, RULE 43
PRESENCE OF THE DEFENDANT

CURRENT RULE

(a) Presence Required. The defendant shall be present at the arraignment at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

PROPOSED RULE

(a) Presence Required. The defendant shall be present at the arraignment at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. During pre-trial proceedings, the use of video teleconferencing technology, where the defendant is not physically present in court, is consistent with the requirement of this rule.

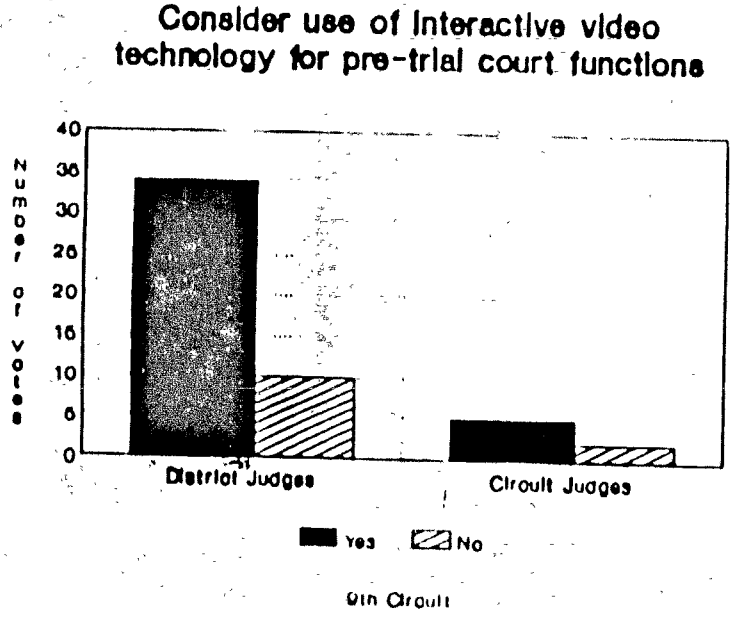
14. In order to preclude the necessity of moving an inmate to court from prison, would you consider the use of interactive video technologies useful for the conduct of some pre-trial court functions?

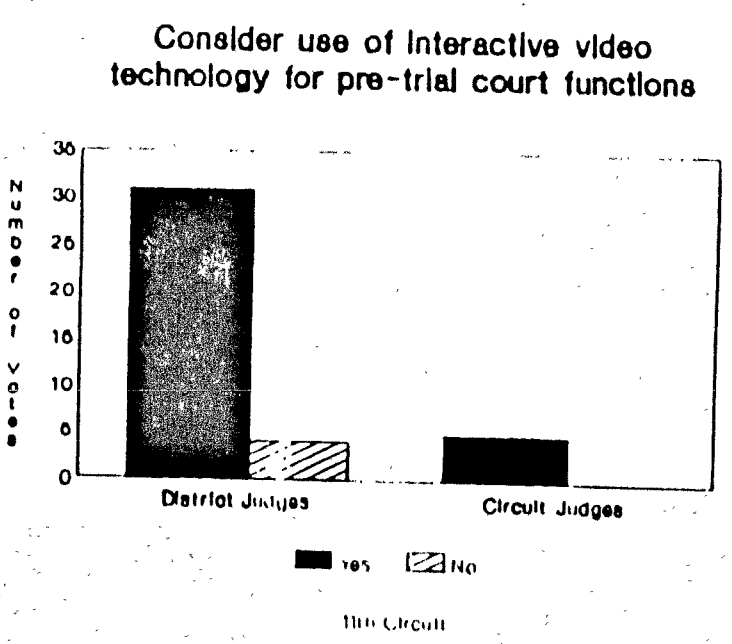
9th Circuit

	District Judge	Circuit Judge
NUMBER OF VOTES	44	7
Yes	34 (77.3%)	5 (71.4%)
No	10 (22.7%)	2 (28.6%)

11th Circuit

	District Judge	Circuit Judge
NUMBER OF VOTES	35	5
Yes	31 (73.8%)	5 (83.3%)
No	4 (9.5%)	0 (0.0%)


Consider use of interactive video technology for pre-trial court functions
Number of Votes
40
35
30
25
20
15
10
5
0
District Judges
Circuit Judges
Yes
No
9th Circuit


Consider use of interactive video technology for pre-trial court functions
Number of Votes
30
25
20
15
10
5
0
District Judges
Circuit Judges
Yes
No
11th Circuit

SURVEY QUESTION

QUESTION: (ASKED OF 9TH & 11TH CIRCUITS)

IN ORDER TO PRECLUDE THE NECESSITY OF MOVING AN INMATE TO COURT FROM PRISON, WOULD YOU CONSIDER THE USE OF INTERACTIVE VIDEO TECHNOLOGIES USEFUL FOR THE CONDUCT OF SOME PRE-TRIAL COURT FUNCTIONS?

	DISTRICT JUDGE	**CIRCUIT JUDGE**
NUMBER OF VOTES	79	12
YES	65 (82.3%)	10 (83.3%)
NO	14 (17.7%)	2 (16.7%)

MEMO TO: Criminal Rules Committee

FROM: Dave Schlueter

RE: Proposed Amendments to Rules 10 and 43 to Provide for Arraignment by Video

DATE: October 20, 1990

Judge Alfred Goodwin, Chief Judge of the Ninth Circuit, has suggested that the Committee consider the possibility of amending Rules 10 and 43 to permit defendants to be arraigned through closed circuit television. As he notes in his cover letter, the Ninth Circuit recently ruled in Valenzuela-Gonzales v. USDC (attached, see pp 7 et seq) that the procedure was not permitted by those rules, which require the personal presence of the defendant.

As that opinion indicates, at least two jurisdictions, Arizona and Missouri, do provide for video arraignments.

This item will be on the agenda for the November 1990 meeting.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALFRED T. GOODWIN
Chief Judge
United States Courthouse
125 South Grand
P.O. Box 91510
Pasadena, California 91109-1510

September 21, 1990

L. Ralph Mecham, Director
Administrative Office of the
U. S. Courts
Washington, D. C. 20544

Re: U.S. Judicial Conference
Advisory Committee on Criminal Rules

Dear Mr. Mecham:

I enclose a memorandum and an opinion recently filed in our court concerning the apparent conflict between Federal Rules of Criminal Procedure 10 and 43, and General Order 190 of the U. S. District Court for the District of Arizona which permits arraignment by closed circuit television.

While our court has not taken an official position on the matter, there is very substantial interest in having the Advisory Committee on Criminal Rules look into it. The pros and cons could be developed by the Rules Committee if there is interest in taking up the question.

Sincerely,

Ted

Alfred T. Goodwin
Chief Judge

Copy to: Judge Leland C. Nielsen, Chairman,
Advisory Committee on Criminal Rules

Judges Nelson, Reinhardt and Beezer

September 20, 1990

MEMORANDUM

TO: Chief Judge Goodwin

FROM: Judge Beezer

RE: U.S. Judicial Conference Agenda

Attached is an opinion in Valenzuela-Gonzalez v. USDC, No. 90-70350, which has been sent to the clerk for filing. The case deals with video arraignment in the District of Arizona. Both technology and efficiency make video arraignment possible and desirable. I think the Judicial Conference and its Criminal Rules Committee could profitably look at the Arizona program with an eye to suggesting that Congress amend the Rules of Criminal Procedure.

I will appreciate your comments.

Attachment

cc: Judge Nelson
Judge Reinhardt

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID VALENZUELA-GONZALEZ, Petitioner, v. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, Respondent, UNITED STATES OF AMERICA, Real Party in Interest.	)	C.A. No. 90-70350 D.C. No. CR-90-243-PGR OPINION

Petition for Writ of Mandamus to the
United States District Court for the District of Arizona

Submitted July 27, 1990*

Filed

Before: NELSON, REINHARDT and BEEZER, Circuit Judges

Opinion by Judge Beezer

BEEZER, Circuit Judge:

Valenzuela-Gonzalez petitions for a writ of mandamus vacating the district court's order that his arraignment be conducted by closed circuit television. We grant the writ and vacate the order of the district court.

*The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); Ninth Circuit Rule 34-4.

I

Valenzuela-Gonzalez is a federal prisoner who was arrested in May, 1990. Upon his arrest, he appeared before a federal magistrate of the District of Arizona, who scheduled his arraignment for July, 1990. His trial was set for August, 1990.

In June, 1990, the United States District court for the District of Arizona issued its General Order No. 190,[1/] amending the local rules to allow arraignment by closed circuit television.[2/] Shortly thereafter, the magistrate ordered that Valenzuela-Gonzalez's arraignment be conducted by closed circuit television.

[1/]General Order No. 190, entered June 22, 1990, provides:

> IT IS ORDERED that for a period of one year from the date of filing of this Order, in the discretion of any district judge or magistrate of the District of Arizona, initial appearances and arraignments of pretrial detainees may be conducted by video-conferencing. The attorney for the defendant may elect to be present by video with the defendant or may appear personally in the hearing room at the District Courthouse. A defendant having his initial appearance before a federal magistrate may be taken before such magistrate by video when authorized by that judicial officer.

[2/]This procedure has been instituted under a pilot project of the Federal Bureau of Prisons, Arizona District, Phoenix Division. Under the procedure, arraignment is conducted while the detainee remains in prison. Communication is established between the prisoner and the district court by a sophisticated video-teleconferencing or closed circuit television system with several voice-activated cameras and monitors in the courthouse and the federal prison. The system is designed to allow public viewing as well as confidential attorney-client conferences. It is augmented by fax machines for transmitting documents. See United States District Court, District of Arizona, Video Court Proceedings Committee Report and Recommendations (September, 1987).

Two days before his scheduled arraignment, Valenzuela-Gonzalez moved the district court for an order requiring that his arraignment be conducted in person. The district court heard the motion on an expedited basis on the day the arraignment was scheduled. The district court ruled that arraignment by means of audiovisual interactive technology did not violate the fifth or sixth amendments or Fed. R. Crim. P. 43.[3/] Valenzuela-Gonzalez immediately sought an order staying the district court's order, which we granted the next day. He now petitions for a writ of mandamus vacating the district court's order in this case.

This petition came on for hearing before us on July 27, 1990. We issued our order granting the writ and vacating the district court's order on July 27, 1990.[4/] This opinion follows.

[3/]The district court stated orally:

> The issue specifically is . . . does an arraignment conducted before the magistrate, where the defendant is present by means of audiovisual interactive technology, for the purpose of entering a not guilty plea, constitute a violation of Rule 43, F.R. Criminal Procedures, or the Fifth and Sixth Amendments of the United States Constitution.
>
> And this Court rules that review of the record and the arguments presented clearly show that there are no violations. And the motion is denied.

Reporter's Transcript of Proceedings at 50, United States v. Valenzuela-Gonzalez, No. CR-90-243-PHX-PGR (D. Ariz. July 18, 1990).

[4/]Our order of July 27, 1990, reads, in pertinent part:

> The district court is directed to arraign petitioner face to face with the petitioner physically present in the courtroom. See Fed. R. Crim. P. 43.

II

We must first determine whether we have jurisdiction to issue the writ that is requested. Under the All Writs Act, 28 U.S.C. § 1651(a),[5/] we unquestionably have the power to issue, in our discretion, a writ of mandamus in this case. Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943); United States v. Harper, 729 F.2d 1216, 1221 (9th Cir. 1984). We must nevertheless determine whether mandamus is a proper remedy here.

The government first argues that we lack jurisdiction to vacate General Order No. 190 because it was not entered in a case involving the specific petitioner before us. Valenzuela-Gonzalez does not contest this argument. We need not reach it in any event, for Valenzuela-Gonzalez has not requested us to review General Order No. 190. He requests only that we vacate the district court's order in his case. Without accepting the government's argument, therefore, we review the district court's order only to the extent it concerns Valenzuela-Gonzalez.

The government next argues that we lack jurisdiction to issue a writ of mandamus vacating the order concerning Valenzuela-Gonzalez because his arraignment has not yet taken place. Because the harm complained of has not yet occurred, the government contends, "nothing has occurred that the defense can object to." Furthermore, the government suggests that we cannot review the

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5/ 28 U.S.C. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

district court's decision until we know that "the arraignment would in fact proceed the way the court anticipated." Absent these two circumstances, the government argues, our opinion would be merely advisory in violation of Article III of the United States Constitution. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-41 (1937).

We disagree. First, we may easily evaluate the proposed arraignment procedure, since Valenzuela-Gonzalez's two co-defendants have already been arraigned under the exact procedures challenged by Valenzuela-Gonzalez. Our evaluation of the scheme as it affects Valenzuela-Gonzalez is not contingent upon any uncertain event that might not occur. Thomas v. Union Carbide, 473 U.S. 568, 580-81 (1985). Second, the standards for granting a writ of mandamus do not require that the challenged order be carried out before the writ can issue. See, e.g., Schlagenhauf v. Holden, 379 U.S. 104, 111 (1964)(excessively oppressive discovery order); Admiral Ins. Co. v. United States Dist. Court, 881 F.2d 1486, 1491 (9th Cir. 1989)(assertion of absolute privilege to discovery order). But for our stay, the harm Valenzuela-Gonzalez complains of is imminent. We conclude that the district court's order satisfies the "case or controversy" requirement of Article III.

The government concedes that the petition for writ of mandamus is otherwise an appropriate procedure for reviewing the order challenged here. We agree. The writ of mandamus is an extraordinary remedy reserved for situations where a trial court has exceeded its authority. Kerr v. United States, 426 U.S. 394,

402 (1976); Bauman v. United States, 557 F.2d 650, 654-55 (9th Cir. 1977). We have adopted five guidelines for determining if a writ of mandamus should issue:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires.
> (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal.
> (3) The district court's order is clearly erroneous as a matter of law.
> (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.
> (5) The district court's order raises new and important problems, or issues of law of first impression.

In re Allen, 896 F.2d 416, 419-20 (9th Cir. 1990)(quoting Bauman, 557 F.2d at 654-55). No single factor is determinative, Bauman, 557 F.2d at 655, and all five factors need not be satisfied at once. In re Cement Antitrust Litigation, 688 F.2d 1297, 1301 (9th Cir. 1982), aff'd mem. sub nom. Arizona v. United States Dist. Court, 459 U.S. 1191 (1983).

Mandamus is particularly appropriate when we are called upon to determine the construction of a federal procedural rule in a new context. Schlagenhauf, 379 U.S. at 111 (Fed. R. Civ. P. 35); La Buy v. Howes Leather Co., 352 U.S. 249, 251 (1957)(Fed. R. Civ. P. 53); United States v. Lasker, 481 F.2d 229, 235-36 (2d Cir.)(Fed. R. Crim. P. 48), cert. denied, 415 U.S. 975 (1973). Such a situation presents the rare case where both the fourth and fifth Bauman factors are satisfied: we are presented with a novel question of law that is simultaneously likely to be "oft-repeated." Bauman, 557 F.2d at 655; see Harper, 729 F.2d at 1222. In addition, the first Bauman factor is satisfied here: since

Valenzuela-Gonzalez's notice of appeal has not been certified for interlocutory appeal under 28 U.S.C. § 1292(b), he has no adequate means to obtain review. We conclude that a petition for writ of mandamus is an appropriate method for reviewing the district court's order.[6/]

We determine de novo whether the writ should issue. Seattle Times v. United States Dist. Court, 845 F.2d 1513, 1515 (9th Cir. 1988). Before the writ may issue, we must be "firmly convinced that the district court has erred," id., and that the petitioner's right to the writ is "clear and indisputable." Kerr, 426 U.S. at 403.

III

Valenzuela-Gonzalez argues first that the district court's order must be vacated because it violates his rights under the fifth and sixth amendments to the United States Constitution. The Supreme Court has long recognized that the accused has a right to be present at all critical stages of the proceeding against him.

[6/]We therefore exercise our power

> to determine all the issues presented by the writ of mandamus . . . and to formulate the necessary guidelines in this area . . . . This is not to say, however, that, following the setting of guidelines in this opinion, any future allegation that the district court was in error in applying these guidelines to a particular case makes mandamus an appropriate remedy. The writ of mandamus is not to be used when 'the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction.'

Schlagenhauf, 379 U.S. at 111-112 (quoting Parr v. United States, 351 U.S. 513, 520 (1956)). Readiness to issue the writ may defeat the intent of Congress to reserve for appellate review only final judgments. Kerr, 426 U.S. at 403.

Kentucky v. Stincer, 482 U.S. 730, 744-45 (1987); Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934); United States v. Lewis, 146 U.S. 370, 372 (1892). Arraignment, "far from a mere formalism," is a stage important enough to entitle the accused to the presence of counsel. Kirby v. Illinois, 406 U.S. 682, 689-90 (1972); Coleman v. Alabama, 399 U.S. 1, 7 (1970); Powell v. Alabama, 287 U.S. 45, 57 (1964).

Nevertheless, whether the fifth and sixth amendments prohibit the use of closed circuit television at an otherwise proper arraignment is not immediately apparent. Arraignment is not a procedure required by the due process clause of the fifth amendment. Garland v. Washington, 232 U.S. 642, 645 (1914); United States v. Coffman, 567 F.2d 960 (10th Cir. 1977). The sixth amendment right to confront witnesses is not implicated, since there are no witnesses. Snyder, 291 U.S. at 107. Moreover, the Supreme Court has held that closed circuit television may satisfy the confrontation clause in limited circumstances. Maryland v. Craig, 110 S. Ct. 3157, 3170 (1990).[7/]

We need not resolve this question, however, for the presence of the defendant at arraignment is required under two federal rules of criminal procedure, Fed. R. Crim. P. 10[8/] and Fed. R.

[7/]The use of closed circuit television for taking testimony of child witnesses has been approved by the Supreme Court. Maryland v. Craig, 110 S. Ct. at 3170. So long as the teleconferencing procedure is "functionally equivalent to that accorded live, in-person testimony," it will satisfy constitutional requirements. Id. at 3166. Approval of the procedure is dependent, however, on the state's making an adequate showing of necessity. Id. at 3169.

[8/]Fed. R. Crim. P. 10, "Arraignment," provides:

Arraignment shall be conducted in open

Crim. P. 43(a).[9/] The protection of these rules is broader than the constitution provides. United States v. Gordon, 829 F.2d 119, 123-24 (D.C. Cir. 1987); United States v. Christopher, 700 F.2d 1253, 1261-62 (9th Cir.), cert. denied, 461 U.S. 960 (1983). It is the rule in this circuit that although arraignment may not be required, conducting an arraignment in the defendant's absence violates the plain instruction of the rule.[10/] Id. at 1262. There is simply "no provision for arraignment in the defendant's absence." Id.

Similarly, there is no provision for arraignment by closed circuit television. Under Rule 43, the defendant must be present at arraignment. Under Rule 10, the arraignment must take place in open court. We hold that these rules together require that the

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> court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called upon to plead.

9/Fed. R. Crim. P. 43, "Presence of the Defendant," provides:

> (a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

An exception is provided for misdemeanors. Fed. R. Crim. P. 43(b)(2).

10/A defendant may waive, in writing, the right to appear in person at arraignment. Christopher, 700 F.2d at 1262. But see In re United States, 784 F.2d 1062, 1063 (11th Cir. 1986)(no waiver absent good cause).

district court must arraign the accused face-to-face with the accused physically present in the courtroom.

The government urges that the federal rules of criminal procedure are to be construed broadly under Fed. R. Crim. P. 2.[11/] We recognize that substantial compliance with the "open court" requirement of Rule 10 may satisfy the rule. Sweeney v. United States, 408 F.2d 121 (9th Cir. 1969); see also Fed. R. Crim. P. 10, advisory committee notes ("mere technical irregularity" does not warrant reversal). Moreover, the right to be present under Rule 43 is not absolute. United States v. Gagnon, 470 U.S. 522, 529 (1985)(in camera conference); Allen v. Illinois, 397 U.S. 337, 343 (1970)(unruly behavior at trial). Violations of Rule 43 are subject to the harmless error rule of Rule 52(a). United States v. Rogers, 422 U.S. 35, 40 (1975); United States v. Kupau, 781 F.2d 740, 743 (9th Cir.), cert. denied, 479 U.S. 823 (1986).

The District of Columbia Circuit has held that under certain circumstances, closed circuit television may satisfy the presence requirement of Rule 43, if the procedure is considered necessary by the court. See United States v. Washington, 705 F.2d 489, 497 n.4 (D.C. Cir. 1983)(per curiam)(unruly behavior at voir dire). The government, however, does not argue that the procedure is necessary as opposed to convenient here. Absent such a showing,

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[11/] Fed. R. Crim. P. 2 provides:

> These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

we hold that arraignment by closed circuit television does not constitute substantial compliance with either Rule 10 or Rule 43.

Several states, including Arizona,[12/] have adopted rules allowing the use of closed circuit television for arraignments, with the approval of their state courts. See, e.g., Commonwealth of Pennsylvania v. Terebieniec, 268 Pa. Super. 511, 408 A.2d 1120, 1123-24 (1979)(noting no "circus atmosphere" or unconstitutional prejudice).[13/] But one state court, examining statutes not explicitly authorizing the procedure, did not approve its use. See State ex rel. Turner v. Kinder, 740 S.W.2d 654, 656 (Mo. 1987)(en banc). After the state legislature amended the statute, the court gave its approval. See Guinan v. State, 769 S.W.2d 427, 430 (Mo.)(en banc), cert. denied, 110 S. Ct. 259 (1989).

"Strong reasons" support Federal Rules 10 and 43. In re United States, 784 F.2d 1062, 1063 (11th Cir. 1986). Their purpose is to ensure, at a minimum, that the defendant has a copy of the indictment, "know[s] what he is accused of and [is] able adequately to defend himself." United States v. Romero, 640 F.2d 1014, 1015 (9th Cir. 1981). "Without the presence of the defendant, the court cannot know with certainty that the defendant

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12/Ariz. R. Crim. P. 14.2 provides:

> The defendant shall be arraigned personally before the trial court or by video telephone.

13/At least one commentator has noted that, far from being prejudicial, the procedure can be beneficial to defendants, since it avoids the need to be kept in a "holding cell" awaiting arraignment and allows greater focus by the judge. See Note, The Use of Closed Circuit Television for Conducting Misdemeanor Arraignments in Dade County, Florida, 38 U. Miami L. Rev. 657, 672 (1984).

has been apprised of the proceedings." In re United States, 784 F.2d at 1063.[14/] Moreover, Rule 43 requires that the defendant be present at all stages of the trial, the plea and sentencing. Allowing the use of closed circuit television at arraignment without Valenzuela-Gonzalez's consent would amount to our tacit approval of its use at these other stages of the criminal proceeding as well.

Absent a determination by Congress that closed circuit television may satisfy the presence requirement of the rules, we are not free to ignore the clear instructions of Rules 10 and 43. We have held in other contexts that strict compliance with federal rules of criminal procedure is required. See United States v. Fernandez-Angulo, 897 F.2d 1514, 1516-17 (9th Cir. 1990)(en banc)(Fed. R. Crim. P. 32). We see no reason to reach a different conclusion here. So long as Congress has chosen to provide those persons accused of federal crimes with the right to be arraigned in open court, we hold that the plain language of the rules must be followed.

IV

Arraignment by closed circuit television constitutes a violation of Federal Rules of Criminal Procedure 10 and 43. The petitioner's right to a writ of mandamus is clear and

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14/To the extent the plea process is involved, the presence of the defendant may become even more important. Some district courts allow only pleas of not guilty to be entered at arraignment. See W. Herman, Rules of Criminal Procedure for the United States District Courts 91-92 (1990). This is the procedure anticipated in the District of Arizona. See Transcript, supra, n.3. Acceptance of a guilty plea at arraignment would raise questions concerning the requirements of Fed. R. Crim. P. 11, which we do not reach here.

indisputable. The writ of mandamus shall issue and the district court shall vacate the order requiring arraignment of Valenzuela-Gonzalez by closed circuit television.

WRIT GRANTED.

Counsel Listing

Robert McWhirter, Assistant Federal Public Defender, Phoenix, Arizona, for petitioner.

Janet L. Patterson, Assistant U.S. Attorney, Phoenix, Arizona, for respondent.

Mr. Marek, and Mr. Pauley, to consider the possibility of consolidating in one rule the application of Jencks Act statements at the various stages of trial and in related proceedings, i.e. detention hearings and § 2255 hearings.

(Note: Following the meeting, in an exchange of communications between the Reporter and Mr. Marek, the Committee member proposing the amendment to Rule 32(f), some uncertainty arose concerning the text of the amendment and especially the content of the last paragraph of the accompanying committee note. Accordingly, the Chairman (Judge Hodges) directed that the proposed amendment to Rule 32(f) not be sent forward to the Standing Committee until the report of the Subcommittee can be considered at the Advisory Committee's next meeting in May, 1991).

5. Rule 40(e), Arrest for Failure to Appear. The Committee had received a letter from a Magistrate raising a problem with application of Rule 40(e). The magistrate noted that a strict reading of that rule would not permit removal of a material witness to another district for failing to appear unless a subpoena had actually been issued. The Committee briefly discussed the point, including a possible amendment to Rule 40(e) which would cross-reference 18 U.S.C. § 3144 (subpoena not required where it would be impractical to do so). Ultimately, the Committee concluded that an amendment was not required. Judge Keenan moved that the matter be deferred to the Department of Justice. Professor Saltzburg seconded the motion. It passed unanimously.

6. Rule 41, Search and Seizure. The Committee briefly discussed possible amendments to Rule 41, in conjunction with amendments to Rule 4, which would address the availability of electronic means, including facsimile machines to transmit requests for search warrants. This matter is addressed at Rule 4, supra.

7. Rule 43, Presence of Defendant. The Committee had been informed that the Ninth Circuit recently ruled that Rules 10 and 43 barred arraignment by closed-circuit video, a procedure used in some state and local jurisdictions as a pilot program. The consensus of the Committee was that arraignment is a very important step in the trial process and that the defendant should stand personally before the judge or magistrate. Judge DeAnda noted that there is a danger in becoming too expedient. Following other generally negative comments about the prospects for such arraignments, Professor Saltzburg moved to reject any such amendments to Rules 43 and 10. Judge DeAnda seconded the motion. It passed unanimously.

U.S. Department of Justice

Federal Bureau of Prisons

Washington, DC 20534

SEP 4 1992

Professor David A. Schlueter
Reporter, Advisory Committee on
Criminal Rules
St. Mary's University, School of Law
San Antonio, Texas 78228

Dear Professor Schlueter:

As we discussed, enclosed please find a survey which we recently received showing the use and proposed use of video communications between courthouses and other facilities by various courts around the country.

This information appeared as a reader survey in the September/October 1991 Court Technology Bulletin and was forwarded to us by the National Center for State Courts. Although this survey may not include all courts that are now using video technology, it gives an idea of the acceptance by courts that this technology is receiving.

Please do not hesitate to contact me if you have any questions regarding this matter.

Sincerely,

Matthew W. Melkin
Assistant General Counsel

Post-it™ brand fax transmittal memo 7671 | # of pages ▸ 2

To Prof. David Schlueter	From Matt Melkin
Co. St. Mary's Law School	Co. Bureau of Prisons
Dept	Phone # (202) 307-2105
Fax # 512 436-3717	Fax #

Video Technology Applications in the Courts		
Reader Survey, Court Technology Bulletin, September/ October, 1991		
Indicated video communications between the courthouse & other facilities		
COURT	In Use	Under Development
18th Judicial District, Kansas	X	
5th Judicial Circuit, Florida		X
20th Judicial Circuit, Florida	X	
30th Judicial Circuit, Michigan		X
Colorado Springs, Municipal Court, Colorado	X	
Prince George Circuit, Maryland	X	
7th Judicial District, Iowa		X
Jackson Circuit Court, Florida		X
12th Judicial Circuit, Florida	X	
Pima County Superior Court, Arizona	X	
North County Municipal Court, California	X	
Oregon Administrative Office of the Courts	X	
Minnesota Supreme Court	X	
9th Judicial Circuit, Florida	X	
2nd Judicial District, Minnesota		X
U.S. District Court, Colorado	X	
32nd Judicial District, Pennsylvania	X	
Spartanburg Magistrate Court, South Carolina	X	
Denver County Court, Colorado	X	
San Bernardino County, California	X	
Pierce County District Court, Washington	X	
Alaska Court System	X	
Baton Rouge City Court, Louisiana	X	
Stanislaus County Municipal and Superior Cts, California	X	
Los Angeles Municipal Court, California	X	
Milwaukee Municipal Court, Wisconsin		X

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Rule 11, Advising Defendant of Impact of Negotiated Factual Stipulation

DATE: September 3, 1992

Mr. David Adair and Mr. Toby Slawsky have authored the attached article on Fact-Finding in Sentencing. A portion of that article (pp 63-68) addresses the issue of whether a negotiated factual stipulation is binding on the court in applying the sentencing standards. The authors note that there is a split of authority on that point and that it might be appropriate to consider amending Rule 11 to include specific recognition that a fact stipulation is or is not binding on the court in sentencing the defendant.

As noted in Mr. Adair's cover letter, he has provided a copy of the article with the thought that the Committee might be interested in reviewing Rule 11 and in working with the Judicial Center in conducting empirical research on the issue.

This item will be on the agenda for the meeting in Seattle.

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

WILLIAM R. BURCHILL, JR.
GENERAL COUNSEL

April 6, 1992

Honorable William Terrell Hodges
United States District Court
United States Courthouse, Suite 108
611 North Florida Avenue
Tampa, Florida 33602-4511

Dear Judge Hodges:

I am sending you an article authored by my colleague, Toby Slawsky, and me, which describes a number of issues about factfinding in the context of guideline sentencing. I thought you might be particularly interested in the section written by Toby on "Negotiated Stipulations," or stipulations of fact that are made as part of a plea negotiation.

The section notes that fact stipulations are sanctioned, to the extent that they are not misleading, by the guidelines at U.S.S.G. § 6B1.4, but are not mentioned in F.R.Crim.P. 11. Accordingly, there has been some confusion over the legal status of such stipulations. Many courts, for example, permit a defendant to withdraw a guilty plea if the court does not accept the full stipulation. The Sixth Circuit has gone so far as to equate a factual stipulation to a Rule 11(e)(1)(C) binding plea agreement.

I am advised that the Federal Judicial Center has expressed interest in conducting empirical research on the practices of district courts in handling negotiated fact stipulations. Perhaps the Advisory Committee would be interested in reviewing Rule 11 and in working with the Center to design research on the subject. Please advise if you have any questions.

Sincerely,

David N. Adair, Jr.
Assistant General Counsel

Enclosure

cc: David Schlueter

Looking at the Law

By David N. Adair, Jr. and Toby D. Slawsky

Assistant General Counsels, Administrative Office of the United States Courts

Fact-Finding in Sentencing

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

18 U.S.C. § 3661.

This virtually unbridled authority to consider information in sentencing, while originally established to support a system of discretionary sentencing, has been upheld by the courts of appeals for use in sentencing under the new sentencing guidelines. But have the courts seriously considered the implications of using a procedure developed for a sentencing system that permitted virtually unlimited discretion, without modification, for a system that significantly limits that discretion? This article will attempt to describe the case law that has developed regarding fact-finding under the sentencing guidelines—the role of the presentence report, the burden of persuasion in challenging the presentence report, the role of negotiated stipulations, and the quality of evidence and standard of proof required to establish guideline-relevant facts. Our review of the case law suggests that, while the courts of appeals have determined generally that the fact-finding rules developed prior to guideline sentencing are constitutionally valid, a number of decisions show discomfort with the use of those standards. We believe that the central goals of sentencing reform cannot be fully accomplished using old evidentiary standards.

Fact-Finding in Sentencing: Origin and Adoption

The broad authority section 3661 gives to the district court to consider information for sentencing was first enacted in 1970 as 18 U.S.C. § 3577[1] and was carried forward and renumbered by the Sentencing Reform Act of 1984.[2] The provision continues to be cited regularly by courts of appeals when rejecting challenges that the informal sentencing procedures developed prior to the Sentencing Reform Act are inappropriate to sentencing under a guideline system of sentencing.

That the language of section 3661 was intended to complement a system of sentencing discretion is unquestionable. The legislative history regarding the passage of section 3577 is sparse but, nonetheless, instructive. The House report simply cites *Williams* v. *New York*, 337 U.S. 241 (1949), in support of the passage of this provision.[3] That case, of course, was decided in the heyday of individualized, rehabilitative sentencing. The Supreme Court stressed that this "modern" philosophy of penology demanded that the sentencing judge impose a sentence that "should fit the offender not merely the crime." According to this view, the sentencing court should not be bound by the rules of evidence governing the trial because the trial is to determine the narrow issue of guilt of the offense charged; the sentencing hearing is to establish the appropriate sentence within the range of sentences available for the offense of conviction established by the legislature.

> [The sentencing judge's] task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. (Footnote omitted.) And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

337 U.S. at 247. *Williams* was also cited as support for the provisions of Federal Rule of Evidence 1101(d)(3), which exempt criminal sentencing from the application of the rules. *See* Rule 1101, Advisory Committee note on the 1972 Proposed Rules.[4]

Accordingly, under the system of discretionary sentencing, the courts needed maximum flexibility to consider information in order to craft a sentence that would assist in the complex task of rehabilitating the offender. As the Court stated in *Williams*:

> To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation.

337 U.S. at 249-50.

The Sentencing Reform Act largely rejected the sentencing philosophy expressed in *Williams* and still reflected in section 3661. The Senate report to S. 1762, the predecessor to the bill that became the Sentencing Reform Act, unambiguously announced the abandonment of the rehabilitation model:

> In the Federal system today, criminal sentencing is based largely on an outmoded rehabilitation model. The judge is supposed to set the maximum term of imprisonment and the Parole Commis-

> sion is to determine when to release the prisoner because he is "rehabilitated." Yet almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated. Since the sentencing laws have not been revised to take this into account, each judge is left to apply his own notions of the purposes of sentencing. As a result, every day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.

S. Rep. No. 98-225, 98th Cong., 1st Sess. 38 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3229-32 (hereinafter "Senate Report").

The Supreme Court, in *Mistretta v. United States*, 488 U.S. 361, 364-67 (1989), and several courts of appeals, in describing the purpose and intent of the Sentencing Reform Act, have cited the opinion in *Williams* as expressive of this now outmoded thinking. *See, e.g., United States v. Mejia-Orosco*, 867 F.2d 216, 218 (5th Cir.), *cert. denied*, 492 U.S. 924 (1989). *See also, United States v. Denardi*, 892 F.2d 269, 280 n. 13 (3d Cir. 1989) (Becker J., concurring in part and dissenting in part).[5]

But in rejecting the sentencing policy articulated in *Williams*, the Sentencing Reform Act, at least as implemented by the United States Sentencing Commission, has also necessarily changed the manner in which sentences are determined and imposed. The guidelines promulgated by the Sentencing Commission establish a set of rules that may be applied only when specific factual determinations are made. Nearly every step of the nine-step application instructions at U.S.S.G. § 1B1.1 requires findings of fact. Accordingly, as the determination of facts and the application of those facts to the sentencing guidelines result in a particular guideline range, those issues are increasingly important and become the focus of litigation, resulting in a more adversarial sentencing process. *See, e.g.*, Committee on the Administration of the Probation System, Judicial Conference of the United States, Recommended Procedures for Guideline Sentencing and Commentary (1987). As the Sentencing Commission has recognized, a more adversarial process requires more formality:

> In pre-guidelines practice, factors relevant to sentencing were often determined in an informal fashion. The informality was to some extent explained by the fact that particular offenses and offender characteristics rarely had a highly specific or required sentencing consequence. This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair.

U.S.S.G. § 6A1.3, comment (backgr'd).[6]

Where such formality and specificity is required, it is arguable that the *Williams* rationale is not applicable. Defendants have so argued, frequently citing *Specht v. Patterson*, 386 U.S. 605 (1967). In *Specht*, the Supreme Court held that more formal procedures were required when a defendant, convicted of certain sex offenses, was subject to a sentencing enhancement if the sentencing court found the defendant was a danger to the public or was a habitual offender and insane. The Court distinguished *Williams* on the ground that the sentencing enhancement at issue was based upon the making of a new charge after the defendant's conviction on another charge.

As will be discussed below, most courts have rejected any application of this holding to the sentencing guidelines. But there has been very little careful analysis of the impact upon procedures of the differences between indeterminate, discretionary sentencing and determinate, guideline sentencing. Most courts have simply relied upon *Williams* to answer due process challenges to the use of procedures developed for discretionary sentencing in sentencing under the Sentencing Reform Act. There remains, however, another difficulty that may be presented by use of the old procedures in this new context, unwarranted disparity.

A principal purpose of guideline sentencing is to reduce unwarranted disparity,[7] and the realization of that purpose demands a certain degree of accuracy in fact-finding. As Judge Becker suggests in his article elsewhere in this volume, fact-finding is a significant remaining area of discretion under guideline sentencing.[8] As one commentator has suggested, unreliable fact-finding can adversely impact on the operation of a guideline sentencing system.

> [I]n the war against disparity, the tacticians of the guidelines movement have paid insufficient attention to the procedures that develop the facts to which guidelines are applied. Tacking shiny, new sentencing guidelines onto the tail end of a system of criminal procedure which does an unreliable job of developing the facts . . . is a lot like putting a new coat of paint on an old clunker. The car looks good, but it still doesn't run much better. Ironically, sentencing guidelines may entrench a different kind of disparity — factual disparity.

Peter B. Pope, *How Unreliable Fact Finding Can Undermine Sentencing Guidelines*, 95 Yale L. J. 1258 (May 1986).

A procedure for finding facts that permits great discretion on the part of the fact-finder may result in similar sentences for defendants who face overwhelming proof of conduct that is relevant to guideline sentencing and defendants for whom there is only minimal evidence of such conduct. For example, a defendant with no prior record who was seized attempting to sell five kilograms of cocaine to a Government agent could be subject to a guideline range of 121 to 151 months in prison. U.S.S.G. § 2D1.1(a)(3). A similar defendant who was apprehended in the sale of 200 grams of cocaine, who would ordinarily be subject to a range of 33 to 41 months, could be subject to the

same range as the first defendant if the defendant's estranged girlfriend produced another five kilograms of cocaine that she convincingly claimed the defendant intended to sell. Under pre-guideline law, the court would have wide discretion to adjust the sentence of the second defendant to account for the reliability and amount of evidence. Under guideline sentencing, however, the three-fold increase in the prison sentence would be mandatory if the girlfriend's testimony was found to meet the minimal fact-finding standards that have been held applicable to guideline sentencing. While the old system may not have been ideal, it is arguable that requiring these two defendants to be sentenced within the same guideline range results in far more disparate treatment than would have resulted under the pre-guideline system.

Furthermore, too much fact-finding discretion may result in uncertainty in sentencing. One of the purposes for the establishment of guidelines and elimination of parole was to reduce uncertainty and establish predictability in sentencing.[9] If fact-finding is not subject to greater standards of accuracy, the resulting discretion could reintroduce sentencing uncertainty.

While a degree of fact-finding discretion is appropriate, the nearly unfettered discretion of pre-guideline fact-finding, as is true with other areas of sentencing, could result in the reintroduction of disparity. Lack of standards of fact-finding could also permit manipulation of the sentencing guidelines by permitting use of stipulations that contain misleading information. Neither Congress, in reenacting section 3661, nor the courts have seriously considered whether the revolutionary change in sentencing philosophy resulting from adoption of the guideline system should also result in changes in the fact-finding procedures developed to serve the repudiated philosophy.[10]

The Role of the Presentence Report

As indicated above, guideline sentencing creates a more adversarial process for the determination of the sentence. Yet the Sentencing Reform Act did not change the sentencing hearing into a trial-like proceeding in which each party presents its version of the factual circumstances with the court making the ultimate findings of fact and conclusions of law. Instead, Congress amended Rule 32(c), Federal Rules of Criminal Procedure, to provide that the presentence report contain not only information regarding the offense and the offender but also:

> the classification of the offense and of the defendant under the categories established by the Sentencing Commission; the kinds of sentences and the sentencing range suggested for such a category offense committed by such a category of defendant as set forth in the guidelines . . .; and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances . . . .[11]

The purpose of this amendment was to provide notice to the parties of the sentencing factors under consideration by the court, to insure that the court had sufficient information to impose sentence, and to provide a structure to the sentencing hearing.[12]

Rule 32(c) and 18 U.S.C. § 3552(d) require the disclosure of the presentence report to the parties at least 10 days prior to sentencing. If the presentence report has been carefully and accurately prepared, its disclosure will alert the parties to the issues before the court and will permit them to prepare any response. The importance of notice was recently reiterated by the Supreme Court in *Burns* v. *United States*, __U.S.__, 111 S. Ct. 2182 (1991), which held that a court may not depart upward from the applicable sentencing guideline range unless the grounds for that departure have been previously disclosed to the parties. The Court indicated that Rule 32 contemplates "full adversary testing of the issues relevant to a guidelines sentence and mandates that the parties be given an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." 111 S. Ct. at 2186. A meaningful right to comment demands notice of matters that may be relied upon in imposing sentence. The best, although not the only, form of such notice is the presentence report.[13] The Administrative Office of the United States Courts has suggested, therefore, that a section of the presentence report specifically identify any factors that may warrant departure. *See* Administrative Office of the United States Courts, Presentence Reports Under the Sentencing Reform Act of 1984, Publication 107, 46-47 (1987) (hereinafter "Publication 107"), and *Looking at the Law*, 54 Federal Probation 65 (March 1990).

The presentence report, if unchallenged, should constitute sufficient evidence to support a sentence under the sentencing guidelines. And, in setting forth a tentative guideline range, the report serves to structure any challenges by the defendant or the Government and to focus the issues for a determination at the sentencing hearing. *See* U.S.S.G. § 6A1.1 and Publication 107 at 1-2.

In *United States* v. *Wise*, 881 F.2d 970, 971-72 (11th Cir. 1989), the Eleventh Circuit described this practice in detail. In preparing the presentence report the probation officer sets out the details of the offense and the defendant's criminal history. The probation officer then applies the sentencing guidelines to those facts. Under the procedures established in many districts, the Government and the defendant may make objections to the report prior to the sentencing hearing. After consideration of these objections, the probation officer makes any corrections to the report and pre-

pares an addendum that identifies remaining issues to be determined by the court at the hearing. *See* Committee on the Administration of the Probation System, Judicial Conference of the United States, Model Local Rule for Guideline Sentencing (1987). At this stage, under this procedure, the sentencing hearing may proceed in a reasonably orderly manner.

> The presentence report and addendum thus serve the same purpose as a pretrial stipulation in a civil bench trial, the report establishing the factual and legal backdrop for the sentencing hearing and the addendum enumerating the disputed factual and legal issues that the court must resolve.

See also, United States v. *Prescott*, 920 F.2d 139 (2d Cir. 1990), and Judge Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Discretion*, 28 Am. Crim. L. Rev. 161, 168-175 (1991) (hereinafter "Heaney").

Burden of Persuasion

Amended Rule 32(c), which requires the presentence report to tentatively establish a guideline range, has simplified the process of establishing guideline relevant facts at the sentencing hearing. Any adjustments to those facts may be asserted by the parties. The courts of appeals have held uniformly that the party seeking to adjust the sentence in its favor bears the burden of proving the relevant facts in support of that adjustment. Consequently, any mitigating factors must be proved by the defendant and any aggravating factors proved by the Government. *United States* v. *Prescott*, 920 F.2d at 143 (2nd Cir. 1990); *United States* v. *Alfaro*, 919 F.2d 962 (5th Cir. 1990); *United States* v. *Blanco*, 888 F.2d 907, 908-9 (1st Cir. 1989); *United States* v. *Urrego-Linares*, 879 F.2d 1234, 1238 (4th Cir.), *cert. denied*, ___U.S.___, 110 S. Ct. 346 (1989); *United States* v. *Howard*, 894 F.2d 1085, 1089 (9th Cir. 1990); *United States* v. *Kirk*, 894 F.2d 1162, 1163-64 (10th Cir. 1990); and *United States* v. *McDowell*, 888 F.2d 285, 290-91 (3rd Cir. 1989).[14]

In practice, as noted above, the sentencing proceeding begins with the presentence report. When a party challenges a fact in the presentence report, the fact must be supported by the preponderance of the reliable evidence, as will be discussed below. If the challenge does not include information that undermines the accuracy of the presentence report, the report may still be sufficient to sustain a finding by the court. If, however, the challenge calls into question the accuracy or sufficiency of the factual assertion in the report, the Government must bear the burden to establish an aggravating sentencing factor and the defendant must bear the burden of proving a mitigating factor.

Quality of Evidence at Sentencing

Prior to the sentencing guidelines, the courts had firmly established the principle that sentencing judges could consider evidence at sentencing that would not be admissible at trial. *See, e.g., Williams* v. *New York*, 337 U.S. at 246-47. But regardless of the sentencing judge's discretion to consider a broad range of information, the introduction of evidence at sentencing has been subject to a due process standard of reliability. In *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948), the Supreme Court held that the defendant's right to due process in sentencing requires that a defendant not be sentenced on the basis of "materially untrue" information. In *Williams* v. *Oklahoma*, 358 U.S. 576, 584 (1959), the Supreme Court, relying on *Williams* v. *New York*, indicated that due process permitted consideration of "*responsible* unsworn or 'out-of-court' information." (Emphasis added.) This principle was also applied to forbid sentencing on the basis of "misinformation of constitutional magnitude," such as a felony conviction obtained without opportunity for assistance of counsel in *United States* v. *Tucker*, 404 U.S. 443, 447 (1972).

The question of what evidence may be considered — the "quality" of evidence — is different than, but related to, the question of how much evidence is needed to prove a fact — the "quantity" of the evidence. As will be demonstrated below, some evidence may be so unreliable that to use it would deprive a defendant of due process. On the other hand, a quantity of information that might be of questionable reliability could cumulatively meet a preponderance of the evidence test. As discussed below, the preponderance standard of proof has been held to require sufficient evidence to convince the trier of fact that the fact at issue is true. Under this standard, naturally, the issues of the quality and quantity of proof tend to merge. Nonetheless, it is useful to consider the issues separately.

Reliability

Despite the articulation of the "materially untrue" standard for sentencing fact-finding in *Townsend* v. *Burke* and other cases, a higher standard of reliability has been required than a demonstration that the information is "materially untrue." In *United States* v. *Weston*, 448 F.2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972), for example, the Ninth Circuit remanded for resentencing a case in which the district court had relied upon an unsubstantiated charge made by a Government agent and included in the presentence report. The court held that, although not materially untrue, the charge was completely unverified and without support. Nor was there any attempt

to show that the agent was reliable. The court declared that it was not rejecting *Williams* v. *New York*, but that *Williams* did not present a situation in which the defendant challenged the accuracy of unverified information.

In *United States v. Fatico*, 603 F.2d 1053 (2d Cir. 1979), the court determined that hearsay testimony by a confidential informant was admissable to enhance the defendant's sentence but only if corroborated by other evidence.[15] In *United States v. Baylin*, 696 F.2d 1030 (3d Cir. 1982), the court remanded for resentencing a case in which the sentencing court had inferred defendant's involvement in a crime from the mere fact that the Government had promised not to prosecute the crime. No other information of defendant's involvement was presented. The Third Circuit established the standard that such information must contain "minimum indicia of reliability beyond mere allegation." 696 F.2d at 1040.

The Sentencing Commission has recommended a standard of reliability that may be somewhat higher than that articulated in *Baylin* in U.S.S.G. § 6A1.3. That section suggests that information relied upon in sentencing should have "sufficient indicia of reliability to support its probable accuracy." While this standard could result in more accurate fact-finding and has been cited with approval by a number of courts of appeals, the section is a policy statement, and policy statements are not fully binding on the courts.[16] *See* 18 U.S.C. § 3572. In addition, it is questionable that the Sentencing Commission has authority to prescribe standards and procedures for sentencing.[17]

Thus, although section 3661, as well as *Williams* and its progeny, permit consideration of a broad range of information in sentencing, and although Rule 1101(d)(3) of the Federal Rules of Evidence provides that the rules of evidence do not apply to sentencing proceedings, the cases establish that evidence relied upon in sentencing must meet only a poorly articulated, but clearly minimum standard of reliability. *See, e.g., United States* v. *Kikumura*, 918 F.2d 1084, 1099-1100 (3d Cir. 1990); *United States* v. *Beaulieu*, 893 F.2d at 1181, and *United States* v. *Silverman*, 889 F.2d 1531 (6th Cir. 1989).[18]

Consistent with these principles, several courts have indicated that the presentence report may be sufficiently reliable without any additional corroboration because the report is based upon investigatory reports, interviews with the defendant and codefendant, and, where available, trial testimony.[19] Accordingly, the use of the presentence report to establish sentencing facts has been approved so long as it is sufficiently reliable. *See, e.g., United States* v. *Alfaro*, 919 F.2d 962, 966 (5th Cir. 1990); *United States* v. *Murillo*, 902 F.2d 1169, 1173 (5th Cir. 1990); and *United States* v. *Blanco*, 888 F.2d 907, 909 (1st Cir. 1989). *But see United States* v. *Fortier*, 911 F.2d 100 (8th Cir. 1990), discussed *infra*.[20]

In *United States* v. *Kikumura*, 918 F.2d at 1102-04, the Third Circuit cautioned that under certain circumstances a higher standard of reliability might be required than that articulated in *United States* v. *Baylin*. In a situation in which the court departs dramatically from the sentencing guideline range, the sentencing proceeding becomes nearly as important as the trial. In such a case, due process principles may require a greater standard of reliability since the amount of process due increases with the importance of the liberty interest involved in the proceedings. Accordingly, the Third Circuit established an intermediate test of reliability to be used in a case involving a substantial departure:

> The sentencing court must examine the totality of the circumstances, including other corroborating evidence, and determine whether the hearsay declarations are reasonably trustworthy.

918 F.2d at 1103.[21]

Admissibility of Information From Other Proceedings

These principles of admissibility have also been relied upon to permit use of information from other proceedings, such as the trial of a codefendant. The general rule appears to be that such information may be used, without more, in determining facts relevant to sentencing. The use of such information, however, must be preceded by notice to the defendant that it will be used. *See, e.g., United States* v. *Notrangelo*, 909 F.2d 363, 365 (9th Cir. 1990), and *United States* v. *Beaulieu*, 893 F.2d at 1180. In *United States* v. *Castellanos*, 904 F.2d 1490, 1496 (11th Cir. 1990), however, the Eleventh Circuit concluded that testimony from a trial of a codefendant may not, without more, be used in determining a defendant's sentence if the defendant has objected. The opinion seems to imply that the information must be corroborated in order to be used in the circumstances. Naturally, if a defendant disputes the accuracy of facts testified to in another proceeding, the court may be required to analyze that testimony to ensure that it contains sufficient indicia of reliability to support its accuracy. It is unclear from the opinion, but it is likely that the Eleventh Circuit would not require corroborating evidence outside of the testimony if such indicia of reliability is present in the testimony itself and the objections of the defendant do not call that indicia into question.

Right of Confrontation at Sentencing

Another issue regarding the use of information at sentencing is whether the right to confront adverse witnesses as guaranteed by the sixth amendment ap-

plies to the sentencing stage of the criminal proceedings and, accordingly, whether hearsay evidence may not be used to enhance the sentence unless it falls into one of the traditional exceptions to the hearsay rule. Most courts that have considered this issue have held that the Confrontation Clause does not apply at sentencing. *See United States* v. *Kikumura*, 918 F.2d at 1202; *United States* v. *Castellanos*, 904 F.2d at 1496; *United States* v. *Byrd*, 898 F.2d 450, 452-53 (5th Cir. 1990); *United States* v. *Beaulieu*, 893 F.2d at 1180-81.

The Sixth and the Eighth Circuits, however, have held that when a factual assertion in the presentence report is challenged, the court must undertake an analysis of whether the Confrontation Clause should be considered. *See United States* v. *Silverman*, ___ F.2d ___, 1991 WL 179608 (6th Cir. 1991), and *United States* v. *Fortier*, 911 F.2d 100 (8th Cir. 1990). The Sixth Circuit, finding that the *Williams* rationale for fact-finding discretion must be applied differently to guideline sentencing, held that, if the defendant disputes a fact material to the guideline sentencing decision, the Confrontation Clause requires a greater standard of reliability than was required under discretionary sentencing.[22] What that standard of reliability is and whether it precludes use of hearsay evidence is not clear from the opinion.

The Eighth Circuit in *Fortier* also held that the Confrontation Clause is applicable at sentencing when the defendant challenges a factual assertion. These holdings clearly reflect the Sixth and the Eighth Circuits' concern about the use of evidence to enhance a sentence without providing the defendant a meaningful opportunity to challenge the accuracy of the evidence.

Effect of Exclusionary Rule on Admissibility at Sentencing

Three circuits have held that the exclusionary rule does not apply to guideline sentencing as the rule's central objective, to deter unlawful police conduct, cannot efficiently be achieved by excluding evidence at sentencing. *United States* v. *McCrory*, 930 F.2d 63 (D.C. Cir. 1991), *petition for cert. filed*, No. 91-5973 (Oct. 1, 1991); *United States* v. Torres, 926 F.2d 321 (3d Cir. 1991); *United States* v. *Lynch*, 934 F.2d 1226 (11th Cir. 1991). "Generally, law enforcement officers conduct searches and seize evidence for purposes of prosecution and conviction—not for the purpose of increasing a sentence in a prosecution already pending. . . ." *United States* v. *Lynch* at 1236, quoting *United States* v. *Lee*, 540 F.2d 1205, 1211 (4th Cir.), *cert. denied*, 429 U.S. 894 (1976). Moreover, these courts have found that any slight benefit from exclusion of illegally seized evidence at sentencing is greatly outweighed by the mandate of 18 U.S.C. § 3661 that no limitation be placed on sentencing information.

Each of these circuits has expressed reservations as to whether its conclusions would be the same if there were a showing that the illegally seized evidence was gathered specifically for sentencing enhancement. *United States* v. *McCrory*, 930 F.2d at 69; *United States* v. *Torres*, 926 F.2d at 325; *United States* v. *Lynch*, 934 F.2d at 1237. Judge Silberman, in his concurrence in *McCrory*, went a good deal further and argued that sentencing guidelines, by making predictable the impact of additional evidence of criminality, increase the Government's incentive to illegally seize evidence solely for use at sentencing:

> If the police and prosecution know beforehand that they can get a conviction on a relatively minor offense, which has a broad statutory sentencing range and that they can guarantee a sentence near the maximum by seizing other evidence illegally and introducing it at sentencing, there is nothing to deter them from seizing the evidence immediately without obtaining a warrant, especially when a conviction on a "greater" crime would lead to a similar sentence.

United States v. *McCrory*, 930 F.2d at 71. Thus, Judge Silberman suggested the deterrence of the prophylactic exclusionary rule is needed rather than a subjective inquiry at sentencing as to what may have motivated police conduct in an individual case. However, Judge Silberman declined to dissent in recognition of the Supreme Court's recent hesitancy to extend the exclusionary rule.

The Role of Negotiated Stipulations

While 18 U.S.C. § 3661 provides that no limitation shall be placed on the information the court can consider at sentencing, in light of the "fact driven" nature of the guidelines a discernable trend has arisen whereby, with varying degrees of success, the prosecutor and defendant seek to control the facts available to the court at sentencing by agreeing to a factual stipulation as part of a plea agreement.

Controlling the facts through the use of stipulations demonstrates the fundamental tension between the goals of sentencing reform and the plea agreement process. Sentencing reform in part was intended to reduce unwarranted sentencing disparity and provide the public and the offender with "truth in sentencing"—sentences that provide retribution and deterrence because the public and the offender alike know in advance that real punishment will be imposed even-handedly and will not be eroded by significant good time awards or early release on parole.[23] Plea agreements, by contrast, are basically intended to allow the parties to avoid the uncertainty and risk of a trial by striking a bargain for a sentence or sentence exposure that both can accept in an individual case. Congress recognized that the plea process could undermine the

purposes of sentencing reform by substituting prosecutorial discretion in plea bargaining for judicial discretion in sentencing.[24] To avoid such consequences, Congress directed at 28 U.S.C. § 994(a)(2)(E) that the Sentencing Commission issue policy statements concerning acceptance of plea agreements.

But policing the plea agreement process with policy statements is no easy matter. Under Rule 11(e)(1) of the Federal Rules of Criminal Procedure, there are three types of plea agreements, often used in combination: (A) agreements to dismiss charges (hereinafter "charge bargains"), (B) agreements to make non-binding sentence recommendations (hereinafter "sentence recommendations"), and (C) agreements to a specific sentence (hereinafter "sentence bargains"). These types of agreements overlay the often widely varying criminal charges and penalties that can apply to the same or similar criminal behaviors. How much time in prison an offender is exposed to is initially controlled by how the charges are drawn up. Added to this mix is the recent proliferation of mandatory minimum sentences for drug offenses and mandatory consecutive sentences for some firearm offenses. Thus, where plea bargains used to be driven by a desire to control maximum statutory exposure, now such agreements are often driven as much by a desire to avoid mandatory minimums or consecutive statutory sentences.

The interplay of varying statutory maximum penalties and mandatory minimums makes plea bargaining complicated. The addition of sentencing guidelines can make it a labyrinth. The guidelines are not solely based on the real underlying criminal behavior, but on a combination of real behavior and the charged behavior,[25] and thus, as the statutory penalties can vary depending on the specific charges pleaded to, so can the guidelines vary regardless of the underlying behavior.[26] Furthermore, the guidelines are always intricate and technical. They are also often subjective, particularly as to adjustments for acceptance of responsibility and role in the offense. The motivation for a defendant to engage in plea negotiations is, at least in part, the desire to predict the sentence or the sentence exposure, but despite appearing to increase predictability, the sentencing guidelines often present the unwary with surprises at sentencing. These surprises are most frequently the result of the discovery of guideline-relevant facts in the presentence report that were not considered in the plea negotiations.

Negotiated factual stipulations are one method used to attempt to lessen the possibility of surprise under guideline sentencing by setting forth the agreed upon facts that in turn drive the guidelines. Some stipulations also attempt to control legal conclusions from the facts, such as whether an offense involved more than minimal planning or whether the defendant accepted responsibility.[27] Such stipulations can be detailed and lengthy and hotly negotiated, which can understandably give rise to expectations that they will have some significant impact. What is the legal significance of such stipulations—are they binding on the court or are they merely a recommendation?

The courts of appeals have differed in resolving these questions. Several have found that the stipulations are merely recommendations, while others have held that stipulations are a binding part of the plea agreement requiring that the plea can be withdrawn if the sentence does not reflect the agreement. The differences in these cases seem not to turn so much on different legal theories as on the level of expectation given the defendant regarding the stipulation. When the facts show that the defendant was informed by way of the plea agreement itself or at the plea colloquy that the court was not bound by the stipulation, then the stipulation is generally held to be merely a recommendation and the plea cannot be withdrawn notwithstanding that the court may find the facts to be different from those stipulated by the parties. But where the parties entered into an agreement that provides that the defendant will be allowed to withdraw the plea if the stipulation is not accepted, or there was an understanding by the court and the parties that if the agreement including the stipulation was accepted, it would control, courts have sentenced in compliance with the stipulation.

United States v. *Rutter*, 897 F.2d 1558 (10th Cir.), *cert. denied*, __U.S.__, 111 S. Ct. 88 (1990), is typical of those cases finding stipulations not binding on the court. Rutter pleaded guilty to one count of distribution in excess of 500 grams of cocaine. As part of a plea agreement, the parties stipulated that the defendant's base offense level was 26 and that he had accepted responsibility for the offense justifying a two-level reduction to offense level 24. Relying on information in the presentence report, the court found that the offense involved more than two kilograms of cocaine and that the base offense level was 28, that the defendant had a supervisory role in the offense justifying a two-level increase but that he had also accepted responsibility justifying a two-level decrease. The defendant argued that the district court should adhere to the facts as set forth in the stipulation. Rejecting this argument, the Tenth Circuit noted that the plea agreement expressly provided that the stipulation was not binding on the court and noted further that U.S.S.C. § 6B1.4(d) provides that "the court is not bound by the stipulation, but may, with the aid of the presentence report, determine the facts relative to sentencing." In accord is *United States* v. *Garcia*, 902 F.2d 324 (5th Cir. 1990) (citing U.S.S.C. § 6B1.4(d)), which rejected the

argument that the district court's acceptance of a plea agreement to dismiss a count of an indictment in exchange for a guilty plea constituted an acceptance of the factual stipulation to the amount of drugs involved in the offense. *See also United States* v. *Medina-Saldana*, 911 F.2d 1023 (5th Cir. 1990).

United States v. Torres, 926 F.2d 321 (3rd Cir. 1991), is factually very similar to *Rutter*. In *Torres*, the defendant made a bargain to plead guilty to a drug offense and agreed to a stipulation that would limit the amount of drugs involved, but that also explicitly provided that the stipulation did not bind the court. Relying in part on illegally obtained evidence, the court at sentencing found that more drugs were involved in the offense than those set forth in the stipulation. The court stated that "generally speaking, if the courts reject stipulations, defendants may not withdraw their pleas, particularly when they have been forewarned." *Id.* at 326. However, the court in *Torres* did allow the defendant to withdraw his plea, finding the case unusual as it presented a legal issue of first impression in the circuit—whether illegally seized evidence could be considered at sentencing—and that the defendant, prosecutor, and the court all reasonably believed at the time the plea was entered that illegally seized evidence would not be considered. Thus, the Third Circuit appears to establish a general rule that stipulations are not binding, except in extraordinary circumstances.

The direction from the Eleventh Circuit is not so clear. In *United States* v. *Jefferies*, 908 F.2d 1520 (11th Cir. 1990), a pre-guidelines case, the parties stipulated as part of a plea agreement that the offense involved 13 grams of cocaine, and they removed references in an earlier version of the agreement to imposition of a fine after an oral agreement that no fine would be imposed. The court ordered a presentence report, which showed that the offense involved a far greater amount of drugs, and the district court made a finding that 15 kilograms of cocaine were involved in the offense. The amount of drugs was relevant for parole consideration. The district court also imposed a $100,000 fine. The Eleventh Circuit held that both the prosecutor and the district court violated Rule 11(e)(3), which provides that if the court accepts the agreement, the agreement shall be embodied in the judgment and sentence. The court vacated the fine and ordered that the finding regarding the amount of drugs be modified and the modification communicated to the Parole Commission.

On the same day that the opinion in *Jefferies* was issued, a panel of the Eleventh Circuit consisting of two of the same judges who sat on *Jefferies* issued a per curiam opinion in *United States* v. *Munio*, 909 F.2d 436 (11th Cir. 1990), *cert. denied*, __U.S. __, 111 S. Ct. 1393 (1991). *Munio* held that a charge bargain, which included a prosecutor's recommendation for a reduction for acceptance of responsibility if the defendant cooperated in preparation of the presentence report, was not binding on the district court when the agreement clearly stated that the court could impose a sentence up to the statutory maximum and, in fact, the defendant had failed to cooperate. The court distinguished *Jefferies* by saying that case involved a "Rule 11(e)(3) agreement," and that *Munio* by contrast involved a non-binding recommendation pursuant to Rule 11(e)(1)(B). *Id.* at 440.

The Sixth Circuit has dealt with cases where the parties expressly and without contradiction from the district court sought to enter into binding stipulations. The Sixth Circuit has held that such stipulations are part of the plea agreement and once accepted by the district court are enforceable. However, the court's definition of what properly constitutes "acceptance" of a plea agreement has evolved in such a way as to substantially limit the ability of the parties to control the facts. In *United States* v. *Mandell*, 905 F.2d 970 (6th Cir. 1990), the defendant pleaded guilty to distribution of 150 pounds of marijuana in exchange for the dismissal of other charges. The plea agreement also provided that the defendant could withdraw his plea if the court departed from offense level 20, or if he was sentenced outside the range of 33 to 87 months. The district court accepted the agreement but, after review of the presentence report, found that the defendant was involved with an additional 73 kilograms of marijuana and that his offense level was 26 and sentenced him to 70 months. The court found that although the 70-month sentence was within the 33 to 87 month range, it was not based on the bargained-for offense level of 20. Citing *United States* v. *Holman*, 728 F.2d 809, 813 (6th Cir.), *cert. denied*, 469 U.S. 983 (1984), for the proposition that "once the district court accepts the plea agreement, it is bound by the agreement," *id* at 972, the court found that the agreement had been accepted and breached. Therefore, the defendant was entitled to withdraw the plea.

A few months later in *United States* v. *Kemper*, 908 F.2d 33 (6th Cir. 1990), another panel of the Sixth Circuit was faced with a similar case where the parties entered into a charge bargain with a stipulation that the offense involved 99 grams of cocaine, which would yield a guideline range of 27 to 33 months. The district court accepted the plea, then ordered a presentence investigation. The presentence report indicated that 102.09 grams of cocaine were involved, which increased the guideline range to 33 to 41 months. After review of the presentence report, the district court then rejected the stipulation and sentenced the defendant on the basis of the larger amount of drugs. The

Sixth Circuit rejected arguments from both the defendant and the prosecution that *United States* v. *Holman, supra*, required that once the plea agreement was accepted, it was binding on the court. Finding that *Holman* was overruled by amendments to Rule 11 and implementation of the sentencing guidelines, the court held that a plea agreement that included a factual stipulation could be characterized as a binding sentence bargain under Rule 11(e)(1)(C), but that before the district court could accept this type of agreement, U.S.S.C. § 6A1.1 required that the court consider the presentence report. In this case, although the district court stated that the plea was accepted prior to preparation of the presentence report, such an "acceptance" was contingent upon review of the presentence report. Once the report was considered with its showing that the facts in the stipulation were incomplete, the plea and its binding stipulation must be rejected and the defendant given the opportunity to withdraw the plea pursuant to U.S.S.C. § 6B1.2, which prohibits acceptance of a sentence bargain that is not within the applicable guideline range or departs without adequate justification.

In *United States* v. *Burns*, 893 F.2d 1343 (D.C. Cir. 1990), *rev'd other grounds*, __U.S.__, 111 S. Ct. 2182 (1991), the court was not squarely faced with the issue of whether a stipulation was binding, but rather dealt with a stipulation that was incomplete, which allowed the district judge to comply with the stipulation as far as it went, but still imposed a sentence that greatly exceeded the parties' expectations. Like the Sixth Circuit cases cited above, Burns entered into a plea agreement and factual stipulation that set forth a guideline range and provided that if the district court reached a different guideline range, the plea would be null and void. The district court agreed with the guideline range as bargained for by the parties, but departed upward so that the sentence imposed was twice the base of the guideline range.

After holding that there was no requirement that a sentencing court notify the parties of an intention to depart,[28] the District of Columbia Circuit noted that it was troubled, not by the parties' attempt to make a binding agreement, but by the ambiguity of the agreement. The court urged that prosecutors ensure that plea agreements either inform defendants of the possibility of departures or provide that defendants be allowed to withdraw their pleas if the sentencing court departs. The court thereby seems to be encouraging the use of binding stipulations, so long as they are unambiguous.

Part of the problem the parties and the courts may be having with factual stipulations is that they are not mentioned in Rule 11, leaving their legal effect unclear. Rule 11(e)(2) does provide that a plea agreement must be disclosed, and that the court may accept or reject a charge bargain or sentence bargain, or defer a decision on these types of bargains until consideration of the presentence report. As to a sentence recommendation, Rule 11(e)(2) provides that the court must warn the defendant that if the recommendation is not accepted, the defendant cannot withdraw the plea. The rule simply does not contemplate the impact or effect of a factual stipulation on guideline sentencing.

The Sentencing Commission's policy statements on plea agreements at U.S.S.G. § 6B1.1-4 attempt to fill the gaps left in Rule 11. The policy statements provide a relatively comprehensive procedure for dealing with pleas and stipulations to accomplish the congressional goal of preventing the plea process from circumventing the guidelines. Section 6B1.1 repeats the Rule 11 requirement that all plea agreements be disclosed to the court and that the court warn the defendant that any sentence recommendation is nonbinding and cannot be withdrawn. However, this policy statement goes beyond Rule 11 by providing that acceptance of charge and sentence bargains be delayed in the vast majority of cases until after review of the presentence report.[29] Section 6B1.2 makes it clear why such delayed acceptance is necessary by providing that the court should not accept plea agreements that undermine the guidelines. The court cannot know whether a bargain will undermine the guidelines until an independent investigation is conducted.[30] Section 6B1.3 provides that when a charge or sentence bargain is not accepted, the plea may be withdrawn. Finally, section 6B1.4 provides that stipulations not be misleading,[31] identify facts in dispute, and most importantly that they are nonbinding on the court. The commentary explains the Commission's approach:

> . . . it is not appropriate for the parties to stipulate to misleading or non-existent facts, even when both parties are willing to assume the existence of such "facts" for purposes of the litigation. Rather, the parties should fully disclose the actual facts and then explain to the court the reasons why the disposition of the case should differ from that which such facts ordinarily would require under the guidelines.
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> Even though stipulations are expected to be accurate and complete, the court cannot rely exclusively upon stipulations in ascertaining the factors relevant to the determination of sentence. Rather, in determining the factual basis for the sentence, the court will consider the stipulation, together with the results of the presentence investigation, and any other relevant information.

These policy statements are either not much understood or they are being disregarded.[32] The cases discussed above indicate that stipulations often omit the "actual facts"—the cases involving amount of drugs are perhaps the most glaring, but drug amount is by no means the only misstated fact. Further, there is

ambiguity, which sometimes appears to be intentional, as to whether stipulations are binding. To say the least, there is still turbulence between sentencing reform and the plea bargain process, and fact-finding at sentencing is the eye of the storm.

Although somewhat beyond the scope of an article on fact-finding at sentencing, it is worthwhile at least to note that there is another line of cases involving defendants' claims of surprise at the sentencing which follows plea agreements. These cases involve arguments that due process requires that the court inform the defendant of the guideline range before acceptance of a plea and seek withdrawal of a plea when the sentence is higher than the defendant expected. All circuits that have considered these claims have rejected them, holding that due process requirements are met when the defendant is informed of the statutory minimum and maximum. *See United States* v. *Fernandez*, 877 F.2d 1138 (2d Cir. 1989); *United States* v. *Henry*, 893 F.2d 46 (3d Cir. 1990); *United States* v. *Pearson*, 910 F.2d 221 (5th Cir. 1990), *cert. denied*, __ U.S.__, 111 S. Ct. 977 (1991); *United States* v. *Salva*, 902 F.2d 483 (7th Cir. 1990); *United States* v. *Turner*, 881 F.2d 684 (9th Cir.), *cert. denied*, 493 U.S. 871 (1989); *United States* v. *Rhodes*, 913 F.2d 839 (10th Cir. 1990), *cert. denied*, __U.S.__, 111 S. Ct. 1079 (1991).[33]

These courts recognize that certainty of outcome for defendants is not constitutionally required. As one court succinctly put it, "pleading guilty generally is not a trial voyage to test the sentencing waters for acceptable leniency." *United States* v. *Rutter*, 897 F.2d at 1564. While entry of a plea should not merely be a fishing expedition for leniency, the sentencing guidelines, by giving the appearance of predictability, raise expectations that the defendant will have a good idea of the sentence range when he enters the plea. Several courts have suggested that it would be helpful to the process whenever possible for either the prosecution or the court to estimate the guidelines for the defendant. *See United States* v. *Fernandez*, 877 F.2d at 1143; *United States* v. *Salva*, 902 F.2d at 488. The Second Circuit, particularly, has expressed its frustration at the escalating number of claims of unfair surprise under guideline sentencing:

> While these defendants may have entered their pleas "knowingly and voluntarily" in the constitutional sense, we are, given our own struggles with the guidelines, not unsympathetic to their claims that they did not appreciate the consequences of their pleas. . . . The net result is a steady parade of appeals that squander scarce judicial resources and waste the government lawyer's time.

United States v. *Pimentel*, 932 F.2d 1029, 1032-33 (2d Cir. 1991). Two members of the panel in *Pimentel* urge that increased use of sentence bargains may be a fair and efficient mechanism to avoid claims of surprise and the resulting litigation, then go on to urge that at the very least the prosecutor inform the defendant of the likely guideline range, and that the district court explain the likely sentence before acceptance of the plea.

Effective December 1, 1989, Rule 11(c)(1) was amended to require that the sentencing court advise the defendant prior to acceptance of a plea that the court will consider any applicable sentencing guidelines, but may depart from those guidelines in appropriate circumstances. The court is not, however, required to specifically advise the defendant of what guidelines will be applied in imposing sentence. The notes of the Advisory Committee to this amendment recognize that this is an imperfect means of satisfying all the defendant's information needs, but suggest it is an adequate way to insure that the defendant enters an intelligent plea:

> The advice that the court is required to give cannot guarantee that a defendant who pleads guilty will not later claim a lack of understanding as to the importance of guidelines at the time of the plea. No advice is likely to serve as a complete protection against post-plea claims of ignorance or confusion. By giving the advice, the court places the defendant and defense counsel on notice of the importance that guidelines may play in sentencing and of the possibility of a departure from those guidelines.

As demonstrated by the many cases claiming unfair surprise at sentencing (*Pimentel* gives a long list of such cases just in the Second Circuit), the compromise position represented by the 1989 amendment to Rule 11(c)(1) may not have accomplished the Advisory Committee's goal of meaningfully notifying defendants of the importance of guidelines and reducing the risks of uncertainty in guideline sentencing.

Surprise at sentencing, whether as the result of a factual stipulation that was found to be non-binding or other factors, serves no one and is the antithesis of truth in sentencing. If sentencing reform is to work as Congress intended it, and not merely be a shift of sentencing discretion from the judiciary to the prosecution, the defense counsel and prosecutor have to ensure that the facts relevant to sentencing are fully and fairly presented and not try to make an end run around the guidelines only to have the court upset the deal when the full facts are revealed. The practice of permitting the parties to stipulate to facts, without close review by the court to determine the accuracy of the stipulation, undermines the purposes of sentencing reform. Inaccurate facts, no matter how they are determined, lead to inaccurate guideline ranges and inappropriate sentences.

Courts can aid in the sentencing process by eliciting full and accurate facts at the plea colloquy when appropriate and, as suggested by the Sentencing Commission policy statements, by not accepting pleas until the presentence report is reviewed and the court is

assured that the plea will not undermine the guidelines.

Standard of Proof

Prior to the advent of guideline sentencing, the issue of the appropriate standard of proof to be used in sentencing did not receive a great deal of attention. As the Supreme Court noted in *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91 (1986), "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all."[34] In a sentencing system in which a court could fashion a sentence weighing a number of different facts, the determination of a single factual issue was not generally as important as it is under guideline sentencing. Because guidelines are applied based on the unique factual circumstances of each offense and of each offender, the establishment of each of these facts has become a more prominent part of the sentencing process. In addition, the application of the guidelines to the facts of a case are subject to appellate review, 28 U.S.C. § 3742, although the courts of appeals have held that review of the factual determinations of the district court will only be reversed if "clearly erroneous." *See, e.g., United States* v. *Mejia-Orosco*, 867 F.2d at 220-21 (5th Cir. 1989). It is inevitable, therefore, that the issue of the standard of proof required to prove these facts at sentencing has become a much litigated matter under sentencing guidelines.

The Sentencing Reform Act provides for no specific standard of proof, nor do the sentencing guidelines.[35] In resolving the issue, therefore, most courts have relied upon *McMillan* v. *Pennsylvania*, in which the Supreme Court determined that a Pennsylvania sentencing enhancement for the visible possession of a weapon during the commission of an offense, which provided a statutory preponderance of the evidence standard for proof of possession, met minimal constitutional standards of due process. The Court reasoned that, once guilt had been established beyond a reasonable doubt, the state may deprive the defendant of liberty up to the statutory maximum. The only determination remaining for the court at the sentencing stage of the proceedings is where within the permissible zone the sentence will fall. Such a determination may be based on a much lesser standard than the one required to establish guilt.[36] The Court noted that to apply even a clear and convincing standard of proof would "significantly alter criminal sentencing," thus requiring extended sentencing hearings that would resemble the trial of the guilt of the defendant.

Every circuit to have considered this issue has generally agreed that this minimum due process standard of preponderance of the evidence is a sufficient and appropriate standard of proof for guideline sentencing. *United States* v. *Kikumura*, 918 F.2d at 1098-1102 (3d Cir. 1990); *United States* v. *Frederick*, 897 F.2d 490, 493 (10th Cir.), *cert. denied*, __U.S. __, 111 S. Ct. 171 (1990); *United States* v. *Guerra*, 888 F.2d 247, 250-51 (2d Cir. 1989), *cert. denied*, __U.S. __, 110 S. Ct. 1833 (1990); *United States* v. *Ehret*, 885 F.2d 441, 444 (8th Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990); *United States* v. *Urrego-Linares*, 879 F.2d 1234, 1237-38 (4th Cir.), *cert. denied*, __U.S. __, 110 S. Ct. 346 (1989); and *United States* v. *Wright*, 873 F.2d 437, 441 (1st Cir. 1989). As noted above, an amendment to the commentary to U.S.S.G. § 6A1.3, effective November 1, 1991, expresses the view of the Sentencing Commission that a preponderance of the evidence standard is sufficient to meet due process requirements and policy concerns. U.S.S.G. § 6A1.3, comment (backgr'd).

Naturally, defendants have argued that the preponderance of the evidence standard may be insufficient where, as in guideline sentencing, the court's discretion is limited. Where the establishment of certain facts acts to deprive the defendant of his liberty, it is claimed that due process requires a higher standard of proof. This argument is particularly compelling when applied to facts regarding the defendant's involvement in criminal activity for which he has not been convicted, so-called relevant conduct, which must be considered pursuant to U.S.S.G. § 1B1.3 of the sentencing guidelines. *See generally*, Heaney. Indeed, in *McMillan* the Supreme Court specifically recognized that there could be circumstances in which the sentencing hearing could be characterized as the "tail which wags the dog of the substantive offense." 477 U.S. at 88.

This argument has been rejected by most circuits in which it has been considered, although a few have shown concern over the use of unconvicted conduct determined under the preponderance standard. In *United States* v. *Frederick*, 897 F.2d at 492-93, for example, the Tenth Circuit noted that the Supreme Court in *McMillan* had also considered a sentencing provision that limited the sentencing court's discretion. The Supreme Court disposed of the argument as follows:

> We have some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance. Nor is there merit to the claim that a heightened burden of proof is required because visible possession is a fact "concerning the crime committed" rather than the background or character of the defendant. *Ibid.* Sentencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment, and we have consistently approved sentencing schemes that mandate consideration of facts related to the crime, *e.g., Proffitt* v. *Florida*, 428 U.S. 242 (1976), without suggesting that those facts must be proved beyond a reasonable doubt.

477 U.S. at 92.

The Third Circuit, however, has suggested that in the case of an extreme departure, the sentencing hearing does, in fact, become the tail that wags the dog of the substantive offense and requires a clear and convincing standard of proof. In *United States* v. *Kikumura*, the defendant's guideline range for transporting explosives for a destructive purpose was between 27 and 33 months. Because of the nature of the offense and the risk it presented, the court departed from the guideline range and imposed a sentence of 30 years imprisonment. The court held that under these circumstances, where the sentence imposed was 10 times the applicable guideline range, the sentencing hearing became as important as the guilt phase of the proceeding in terms of the defendant's liberty interest and that certain of the procedural safeguards applicable at sentencing should be increased. Among these, the fact-finding underlying such an extreme departure must be established "at least by clear and convincing evidence." 918 F.2d at 1101. As noted earlier, *Kikumura* also established that in such extreme cases, the evidence used to support the departure might also be required to be more reliable. The Eighth and the Tenth Circuits have suggested that they might consider the *Kikumura* enhanced standard of proof in appropriate cases. *United States* v. *Townley*, 929 F.2d 365, 369-370 (8th Cir. 1991), and *United States* v. *St. Julian*, 922 F.2d 563, 569 n. 1 (10th Cir. 1990).

The difficulty of forcing the square peg of pre-guideline fact-finding procedures into the round hole of guideline sentencing is further illustrated by the tortured history of the Ninth Circuit's determination of the appropriate standard of proof. The case of *United States* v. *Restrepo*, 883 F.2d 781 (9th Cir. 1989) (*Restrepo I*), was originally decided on the issue of the interpretation of the sentencing guidelines' multiple count rules, U.S.S.G. §§ 3D1.2(d) and 1B1.3(a)(2). The court held that the guidelines required only consideration of offense conduct involved in the count of conviction. The court, relying on *McMillan* v. *Pennsylvania*, dismissed defendant's argument that the preponderance standard was constitutionally deficient under guideline sentencing. That opinion was withdrawn, however, and a petition for rehearing granted. 896 F.2d 1228 (9th Cir. 1990).

In the next opinion, the same panel of the Ninth Circuit reversed itself and held that the sentencing guidelines did require the aggregation of drug amounts involved in unconvicted criminal conduct in calculating the applicable guideline range. *United States* v. *Restrepo*, 903 F.2d 648 (9th Cir. 1990) (*Restrepo II*). Although the court had briefly dismissed in a footnote in *Restrepo I* the standard of proof issue, it greatly expanded the treatment of the issue in *Restrepo II*. The reason for the more serious consideration, of course, was that consideration of unconvicted criminal conduct under the holding of *Restrepo II* would seriously affect the length of the defendant's sentence. Under the holding of *Restrepo I* that unconvicted criminal conduct was not relevant to determining the guideline range, the sufficiency of a preponderance test was not of such great concern. But given the impact of this information under *Restrepo II*, the court attempted to define a special preponderance standard to be used "in criminal sentencing to increase the period of confinement."

Most courts of appeals, after having decided that the preponderance standard is sufficient to comply with due process, have not defined that standard.[37] The Ninth Circuit in *Restrepo II*, however, held that, for the determination of facts that could increase a defendant's sentence, preponderance "means a sufficient weight of evidence to convince a reasonable person of the probable existence of the enhancing factor." This standard, the court reasoned, was more consistent with the sentencing guidelines at U.S.S.G. § 6A1.3(a), which indicate that information used in guideline sentencing must have "sufficient indicia of reliability to support its probable accuracy." But in requiring the evidence to be sufficient to establish its probable truth, it appeared that the Ninth Circuit was establishing a new standard of proof that approached the clear and convincing standard.[38]

But the Ninth Circuit again withdrew its decision and granted a rehearing, this time *en banc*. 912 F.2d 1568 (9th Cir. 1990). In *United States* v. *Restrepo*, ___ F.2d___, 1991 WL 195100 (9th Cir. 1991) (*Restrepo III*), the court reaffirmed the constitutional adequacy of the preponderance standard but eliminated the special definition. Nonetheless, the court warned that the preponderance standard does not simply require an abstract weighing of the evidence to determine which side has produced the greater quantum of evidence. It requires sufficient evidence to convince the trier of fact of the truth of the proposition asserted. The court also noted the caution in *McMillan* that a higher standard might be required in circumstances in which a sentencing factor has an extremely disproportionate effect on the sentence relevant to the offense of conviction.

In a notable dissent, Judge Norris, joined by three other judges (two of whom would have required a beyond a reasonable doubt standard), strongly argued that *McMillan* does not support a preponderance standard under guideline sentencing. The dissent urged that the guidelines create a liberty interest in a sentencing range determined by the base offense level corresponding to the offense of conviction. When a sentencing range above that level is proposed, it was

argued that due process requires more than a preponderance to justify the additional loss of liberty.

Conclusion

A number of courts of appeals have expressed their discomfort in using sentencing procedures developed under a now rejected system that stressed the need for flexibility to devise sentences that were individualized to rehabilitate the offender and at the same time to protect society. While the courts of appeals have held that these procedures are constitutional as applied to guideline sentencing, it does not necessarily follow that the reasons supporting their use apply to a new system that establishes penalties not primarily for rehabilitation, but rather for the combined purposes of punishment, deterrence, protection of the public, and, finally, correctional treatment. 18 U.S.C. § 3553(a)(2).

Underlying the reasoning for the continued use of pre-guideline fact-finding procedures has been the well justified concern that more formalized fact-finding could result in a greatly increased workload for every entity within the criminal justice system. As courts have noted:

> [T]he adoption of a clear and convincing standard of proof "would significantly alter criminal sentencing," a change which the [Supreme] Court determined would be unnecessary and burdensome.

United States v. *Urrego-Linares*, 879 F.2d at 1238, quoting with approval *McMillan* v. *Pennsylvania*, 477 U.S. at 92. *See also United States* v. *Guerra*, 888 F.2d at 251, and Judge Norris' dissent in *Restrepo III*.

But the relaxed standard of proof developed in the age of discretionary sentencing does not well serve a system in which the determination of specific facts has specific, predetermined sentencing consequences. The adoption of the outmoded fact-finding system could result in the failure of the guideline sentencing system to accomplish its objectives, including the reduction of uncertainty in sentencing and the elimination of unwarranted disparity.

Nonetheless, at the present time, it is safe to say that the procedures that existed prior to the Sentencing Reform Act continue to be applicable to guideline sentencing in most circuits. Exceptions currently exist in the Sixth and Eighth Circuits, where the Confrontation Clause has been held to require additional safeguards in fact-finding and in the Third Circuit, where fact-finding must be supported by more proof in cases of significant departures. Workload aside, the concern that has been expressed by some courts about using fact-finding procedures developed for a repudiated sentencing system is well founded. Serious consideration should be given not only to the fairness of such procedures, but also to whether the continued use of these procedures significantly compromises the realization of the objectives of the new sentencing system.

Notes

[1]The original provision was enacted as part of the Organized Crime Control Act of 1970 (Pub. L. No. 91-452, Title 10, section 1001(a), 84 Stat. 951 (Oct. 15, 1970)).

[2]Pub. L. No. 98-473, Title II, section 212(a)(1), 98 Stat. 1987 (Oct. 12, 1984).

[3]H.R. Rep. No. 91-1549, 91st Cong., 2nd Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 4007, 4040. The enactment of section 3577 has been characterized as a codification of existing law. *See, e.g., United States* v. *Baylin*, 535 F. Supp. 1145, 1151 (D. Del), *rev'd other grounds*, 696 F.2d 1030 (3d Cir. 1982).

[4]Only minimal changes were made to this proposed rule by Congress. Pub. L. No. 93-595, 88 Stat. 1926 (Jan. 2, 1975). *See* H.R. Rep. No. 93-650, 93d Cong., 2d Sess. 17 (1973), *reprinted in* 1973 U.S. Code Cong. and Admin. News 7051, 7090.

[5]Ironically, *Williams*, while cited by some courts as reflective of outmoded penology, is cited by others in support of the use of the liberal pre-guideline fact-finding standards. *See, e.g., United States* v. *Beaulieu*, 893 F.2d 1177, 1180 (10th Cir.), *cert. denied*, __ U.S. __, 110 S. Ct. 3302 (1990).

[6]The Commission has not suggested, however, that any significant change in the pre-guidelines methods of establishing facts is warranted. In its 1991 amendments, in fact, the Commission suggests that the pre-guidelines standard of proof applies to guideline sentencing. *See* U.S.S.G. § 6A1.3, comment (backgr'd) and 56 Fed. Reg. 22762 (May 16, 1991), *reprinted in* U.S.S.G. App. C, amendment 387.

[7]*See* 18 U.S.C. § 3553(a)(6), 28 U.S.C. § 991(b)(1), and Senate Report at 52, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 3235.

[8]Judge Edward R. Becker, *Flexibility and Discretion Available to the Sentencing Judge Under the Guidelines Regime*, 55 Federal Probation __ (December 1991).

[9]Senate Report at 50-60.

[10]A notable exception is *United States* v. *Silverman*, 945 F.2d 1337 (6th Cir. 1991). *See also* Judge Norris' perceptive dissent in *United States* v. *Restrepo*, __ F.2d __, 1991 WL 195100 (9th Cir. 1991).

[11]Pub. L. No. 98-473, Title II, section 215(a), 98 Stat. 2014 (Oct. 12, 1984).

[12]*See* Senate Report at 71-72 and 157, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3254-55 and 3340; and Administrative Office of the United States Courts, Presentence Reports Under the Sentencing Reform Act of 1984, Publication 107, 1-2 (1987).

[13]The Supreme Court noted in *Burns* that the Government could meet the notice requirement by filing a prehearing submission listing factors that might warrant departure. It is possible that other forms of notice would also be adequate so long as the defendant has a meaningful opportunity to respond. *See Looking at the Law*, 54 Federal Probation 65 (March 1990).

[14]It should be noted that at least one district court has questioned this allocation of the burden of proof. In *United States* v. *Dolan*, 701 F. Supp. 138 (E.D. Tenn. 1988), *aff'd sub nom. United States* v. *Barrett*, 890 F.2d 855 (6th Cir. 1989), the court found that the Government should bear the burden of showing that a defendant should not receive a reduction in the sentencing guideline range for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1. The court reasoned that the criteria for the reduction were fairly objective and that the Government had as much access as the defendant to the relevant evidence. Accordingly, the court placed the burden on the Government.

[15]The *Fatico* cases are probably the most cited cases on the issue of reliability of sentencing information. *United States* v. *Fatico*, 579 F.2d 707 (2nd Cir. 1978) (*Fatico I*), on remand, 458 F.Supp. 388 (E.D. N.Y. 1978), *aff'd*, 603 F.2d 1053 (2nd Cir. 1979) (*Fatico II*), *cert. denied*, 444 U.S. 1073 (1980). For cases citing the *Fatico* decisions as authority for guideline sentencing standards of reliability, *see, e.g.*, *United States* v. *Zuleta-Alvarez*, 922 F.2d 33 (1st Cir. 1990), *cert. denied sub nom. Ramirez-Fernandez* v. *United States*, ___ U.S.___, 111 S.Ct. 2039 (1991), and *United States* v. *Beaulieu*, 893 F.2d 1177 (10th Cir. 1990). In *Fatico I*, the Government appealed the lower court's order that excluded evidence at the sentencing hearing. The evidence consisted of testimony of F.B.I. agents that confidential informants had linked the defendant with organized crime. The Second Circuit reversed because the district court has refused to permit the Government to produce corroboration of the hearsay evidence. The court of appeals held that out-of-court declarations by unidentified informants may be used if there is good reason for the nondisclosure of the informants' identity and there is sufficient corroboration by other means.

On remand, the Government produced a number of witnesses who corroborated the testimony, and the district court, finding that the corroboration established sufficient reliability, used the information to enhance the defendant's sentence. The court of appeals upheld the sentence in *Fatico II*, sustaining the district court's finding of reliability and also rejecting the defendant's claim that the evidence should have been established beyond a reasonable doubt. The district court had required the Government to produce evidence to meet a clear and convincing evidence standard, but the court did not comment on the district court's use of that standard. 458 F. Supp. at 402-412.

[16]The weight of policy statements is discussed in "Looking at the Law," 55 *Federal Probation* 69 (June 1991).

[17]Although the Sentencing Commission's views regarding sentencing procedures are entitled to deference as emanating from the agency Congress entrusted to develop sentencing guidelines, the Commission's authority to establish sentencing procedures under the provisions of 28 U.S.C. § 994(a) is far from clear. *But see United States* v. *Lynch*, 934 F.2d 1226, 1235 (11th Cir. 1991), *petition for cert. filed*, No. 91-5972 (Sept. 26, 1991), which seems to interpret 28 U.S.C. § 994(d) (providing the Sentencing Commission with authority to determine what factors will be relevant for sentencing) to authorize the Commission to establish a standard for reliability.

[18]*United States* v. *Silverman* was back before the Sixth Circuit recently to determine the applicability of the Confrontation Clause at sentencing. *See* discussion in this article under "Right of Confrontation at Sentencing."

[19]See Volume X, *Guide to Judiciary Policies and Procedures* (Probation Manual), Chapt. II, Part C. (1990). *But see* Heaney at 173, which concludes that most of the information used by probation officers in the presentence report comes from Government sources.

[20]Other kinds of information have also been permitted to be used in the sentencing so long as the defendant has had an opportunity to review and object. In *United States* v. *Curran*, 926 F.2d 59, 63 (1st Cir. 1991), the court considered certain letters that had been sent to it regarding the defendant. Although the letters were provided to the probation office, they were not mentioned in the presentence report. The court of appeals indicated that the defendant should have had a full opportunity to consider and object to the use of those letters. *See also United States* v. *Berzon*, 941 F.2d 8 (1st Cir. 1991).

[21]As discussed below, the Third Circuit, and perhaps the Sixth and Eighth Circuits, have also established a higher standard of proof in such circumstances.

[22]In *Silverman*, the Sixth Circuit prescribed a procedure to handle enhancements based on unconvicted criminal conduct. If the Government decides to urge the enhancement of a defendant's sentence for unconvicted criminal conduct, it should first proffer the conduct. Upon receipt of the proffer, the district court should determine whether the conduct, if proved, would result in an increased sentence. If the conduct would be immaterial to the sentence, the court should sentence the defendant without consideration of the conduct. If, on the other hand, the court determines that the conduct would result in an enhancement of the sentence, it must conduct an evidentiary hearing "in accordance with the Confrontation Clause."

[23]Senate Report at 50-60.

[24]Senate Report at 63, 167.

[25]*See* U.S.S.G. § 1A4(a).

[26]For an example of the guideline impact of the difference in charges, *see United States* v. *Stanley*, 928 F.2d 575 (2d Cir.), *cert. denied*, __ U.S.__, 112 S.Ct. 141 (1991).

[27]Factual stipulations can also be used to attempt to create predictability as to statutory exposure when a factual matter is a sentencing factor that controls the statutory penalty, as with drug offense penalties that are based on the amount of drugs. *See, e.g.*, 21 U.S.C. §§ 841(b), 960(b). All circuits that have considered the matter agree that the amount of drugs in such offenses is a sentencing factor that need only be proven by a preponderance of the evidence, not an element of the offense that must be proven beyond a reasonable doubt. *United States* v. *Madkour*, 930 F.2d 234 (2d Cir.), *cert. denied*, __ U.S. __, 1991 WL 185999 (1991); *United States* v. *Gibbs*, 813 F.2d 596 (3rd Cir.), *cert. denied*, 484 U.S. 822 (1987); *United States* v. *Moreno*, 899 F.2d 465 (6th Cir. 1990); *United States* v. *McNeese*, 901 F.2d 585 (7th Cir. 1990); *United States* v. *Wood*, 834 F.2d 1382 (8th Cir. 1987); *United States* v. *Kinsey*, 843 F.2d 383 (9th Cir.), *cert. denied*, 487 U.S. 1223 (1988); *United States* v. *Cross*, 916 F.2d 622 (11th Cir. 1990), *cert. denied*, __ U.S. __, 111 S. Ct. 1331 (1991). *But see, United States* v. *Rigsby*, 943 F.2d 631 (6th Cir. 1991) (expressing grave reservations with drug quantity as a sentencing factor ". . . because quantity under section 841 is such an important and disputable factual issue, it should be determined by the jury," but holding that the court was bound by controlling circuit precedent). Thus, the parties may enter into a factual stipulation as to the amount of drugs in an attempt to control both the mandatory minimum and the maximum statutory sentence. When a stipulation is entered into to control a statutory penalty, rather than a guideline, there is little chance that a defendant will be surprised at sentencing because Rule 11(c)(1) requires that the court inform the defendant prior to accepting the plea of the statutory maximum and minimum sentence. As discussed below, the court is not required prior to acceptance of the plea to inform the defendant of the applicable guidelines.

[28]The Supreme Court in *Burns* v. *United States*, __ U.S. __, 111 S.Ct. 2182 (1991), discussed in this article under "The Role of the Presentence Report," reversed the District of Columbia Circuit and held that F. R. Crim. P. 32 requires that the parties be notified of the sentencing court's intention to depart.

[29]Delay in the acceptance of the plea until completion of the presentence report is contemplated by F. R. Crim. P. 32(c)(1), which permits disclosure of the PSI prior to acceptance of the guilty plea.

[30]As discussed in this article under "The Role of the Presentence Report," F. R. Crim. P. 32(c) requires that probation officers prepare a comprehensive independent presentence report.

[31]Memorandum of Attorney General Dick Thornburgh to Federal Prosecutors, March 13, 1989, provides that plea agreements should not seek to circumvent the guidelines and should stipulate only the facts that accurately represent the defendant's conduct.

[32]For a discussion of the weight of policy statements, see "Looking at the Law," 55 *Federal Probation* 69 (June 1991).

[33]These cases also sometimes raise the claim of ineffective assistance of counsel for counsel's failure to accurately predict the guidelines. *See United States* v. *Turner*, 881 F.2d at 686; *United States* v. *Rhodes*, 913 F.2d at 834-44. Such claims have not been successful, the courts holding that merely inaccurate prediction does not amount to ineffective assistance.

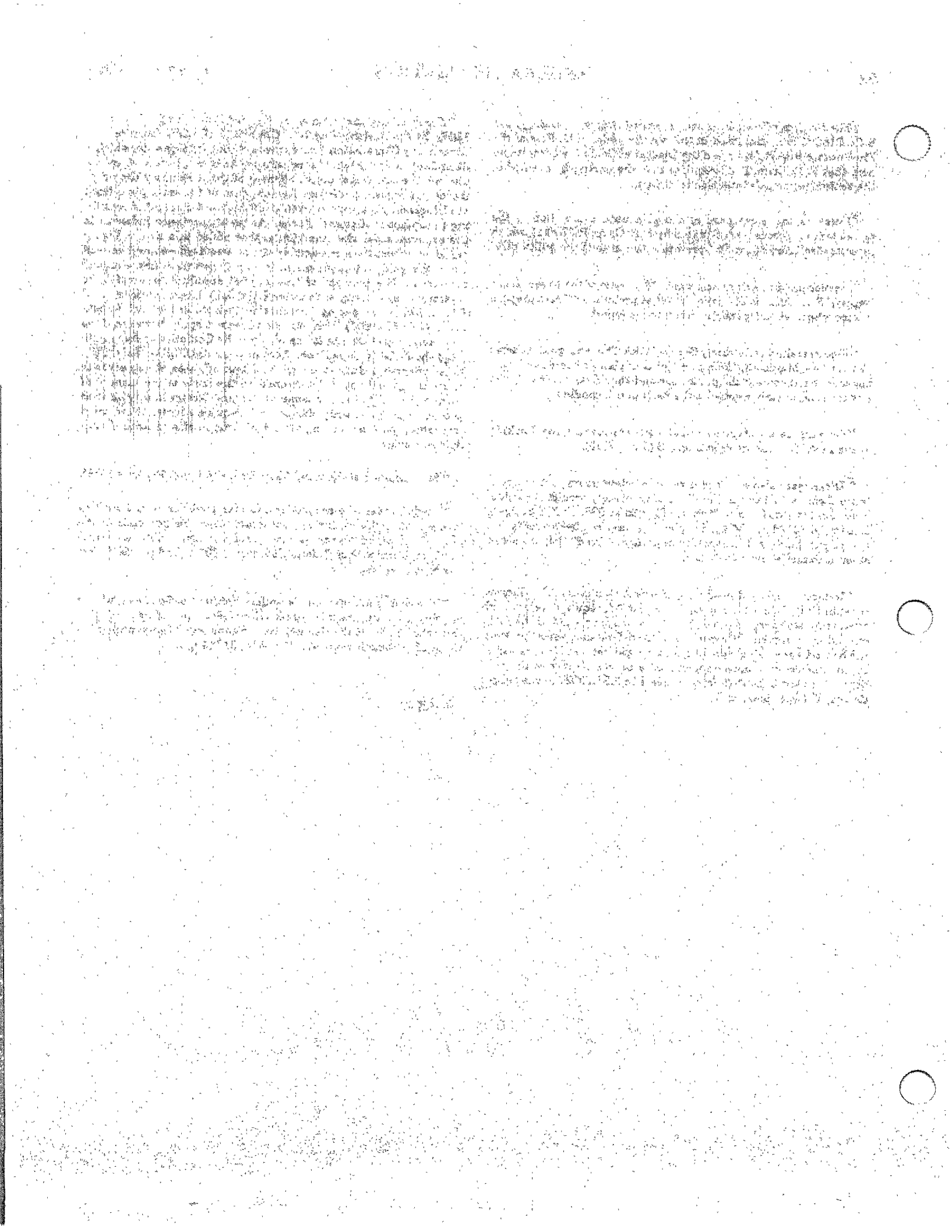
[34]In fact, courts had used very different standards. The district court in *United States* v. *Fatico*, *supra* note 15, required a clear and convincing standard of proof. The court of appeals noted the fact, but did not comment. It simply rejected defendant's assertion that the beyond a reasonable doubt standard was required. In the same circuit, the court of appeals approved a preponderance of the evidence standard in *United States* v. *Lee*, 818 F.2d 1052 (2d Cir.), *cert. denied*, 484 U.S. 956 (1987).

[35]*See* "Looking at the Law," 51 *Federal Probation* 50 (December 1987). In Application Note 5 to U.S.S.G. § 1B1.2(d), however, the Sentencing Commission has suggested that in a case in which a defendant is convicted of a conspiracy to commit more than one offense, the additional object offenses of the conspiracy should be treated as separate offenses for purposes of the multiple offense guidelines only if the court "would convict the defendant of conspiring to commit that object offense." As the Commission indicates in the explanation to the amendment that added this note, a higher standard of proof—a reasonable doubt standard—should prevail when the guideline application, in effect, creates a new count of conviction. The purpose of this special standard of proof is to "maintain consistency with other § 1B1.2(a) determinations . . . ." *United States Sentencing Commission Guidelines Manual*, Appendix C, Note 75 (1990). This provision does not apply, however, if the additional object offense is one of those the Commission has stipulated should be "grouped" together pursuant to U.S.S.G. § 3D1.2(d). These offenses include those, such as drug offenses, whose severity under the guidelines is determined on the basis of the amount of harm or loss. Accordingly, some sentencing factors in conspiracies to commit multiple drug offenses will require a lesser standard of proof than some sentencing factors in conspiracies to commit multiple robberies.

[36]*See*, "Looking at the Law," 53 *Federal Probation* 72 (June 1989).

[37]In civil cases, the preponderance standard has been described to mean that the evidence must show "that the existence of the proposition to be proved is more probably true than not true." Graham, *Handbook of Federal Evidence*, § 301.5 (2nd ed. 1986). *See Restrepo II* at 654.

[38]The clear and convincing standard has been defined as evidence which produces in the mind of the trier of fact "an abiding conviction that the truth of the factual contentions are highly probable." *Colorado* v. *New Mexico*, 467 U.S. 310, 316 (1984).



Rule 16.

Proposal from Professor Ehrhardt

Re: Government Disclosure of Materials which Implicate the Defendant (Memo).

United States District Court
Northern District of Iowa
Post Office Box 267
Sioux City, Iowa 51102
(712) 252-4238

Donald E. O'Brien
Chief Judge

June 24, 1992

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To: Ralph Mecham	From: Judge O'Brien
Co.	Co.
Dept.	Phone #
Fax #	Fax #

Honorable Richard Arnold
Mr. Ralph Mecham
Honorable William Hodges

Gentlemen:

After visiting with Judge Hodges and Mr. Adair of the Adminstrative Office, I contacted Professor Charles Ehrhardt, who is the Ladd Professor of Evidence at Florida State University. He is an old friend of mine who was also an Assistant U. S. Attorney during my tenure as United States Attorney. He has spoken at many federal judges' meetings and gets great marks on the Federal Judicial Center's questionnaires. He has in the past revised the evidence code in Florida and has a national reputation of knowing as much about the Federal Rules as anyone. He forwarded to me some proposals for amending Rule 16.

I am in a trial at Fort Dodge, Iowa and I have not had a good chance to look over his letter with the proposals. I thought I would send it on to each of you before I contacted Chairman Smith, with the understanding that I would do nothing until some sort of a consensus was reached by the four of us or anyone else you want to include. I suggest the possibility of a conference call with Professor Ehrhardt on the line. Mr. Smith has asked for some words; I don't think it is imperative that we answer him forthwith, but we should do something in the near future.

I am open to suggestions.

Best regards,

Donald E. O'Brien

Donald E. O'Brien

Enclosure

cc: Professor Charles W. Ehrhardt

10623

The Florida State University
Tallahassee, Florida 32306-1034

College of Law

June 23, 1992

Judge Donald E. O'Brien
U.S. District Court
Post Office Box 267
Sioux City, Iowa 51102

Dear Judge O'Brien:

I am enclosing the Proposed Amendments to Rule 16 which you requested that I draft.

There are three alternative proposals included which each require the government to specifically identify otherwise discoverable materials which name or directly implicate a defendant who files such a request. These amendments do not expand the materials which a defendant may discover under Rule 16 but only impose upon the government the obligation to identify those materials which specifically name a defendant.

Discoverable materials which specifically name the defendant should be identified. Additionally, other documents which refer to the defendant by an alias or nickname should be identified. The differing language used in Alternatives 1 and 2 seek to include these latter materials.

There was uncertainty as to whether these amendments would apply in prosecutions which only involve a single defendant. If that is the intent, which seems reasonable to me, then the phrase included in brackets in Alternatives 1 and 2 should be deleted.

All the alternatives seek to accomplish the same objective. The choice of one of them should be made on the basis of style and which alternative best fits Rule 16.

To address the concern that the prosecution may in good faith overlook a single document naming a defendant, I have included a provision which would deal with this problem. The provision gives the trial judge the discretion to rule in the interests of justice. It is modeled on a similar provision of the Florida Rules of Criminal Procedure, where it has worked well.

I appreciate the opportunity to provide input on this important issue. Please let me know if I can be of further assistance.

Very truly yours,

Charles W. Ehrhardt
Ladd Professor of Evidence

CWE:jvs

PROPOSED AMENDMENTS
TO RULE 16
OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

RULE 16(a)(1)(C).

Alternative 1

Upon request of a defendant [who is charged with a co-defendant in the same indictment or information], the government shall specifically identify and permit the defendant to inspect and copy or photograph books, papers, documents, photographs and tangible objects which directly implicate the defendant and which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

COMMENT

Alternative 1 adds paragraph (a)(1)(C) to Rule 16 and provides that upon the request of a defendant, the government must specifically identify materials which "directly implicate" the defendant and which are otherwise discoverable under Rule 16.

The bracketed language should be deleted if the decision is made that the provision is applicable in cases involving a single defendant.

The adoption of this amendment would require a renumbering of the present Rule 16(a)(1)(C).

Alternative 2

Upon request of a defendant [who is charged with a co-defendant in the same indictment or information], the government shall specifically identify and permit the defendant to inspect and copy or photograph books, papers, documents, photographs and tangible objects which specifically name the defendant or clearly refer to the defendant and which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belonging to the defendant.

COMMENT

Alternative 2 is the same as Alternative 1 except that the language provides that the government must specifically identify discoverable materials which "specifically name the defendant or clearly refer to the defendant."

Alternative 3

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant. Upon the request of a defendant, the government shall also identify any materials set forth in this paragraph which directly name the defendant or clearly refer to the defendant;

COMMENT

Alternative 3 adds a final sentence to the presently existing Rule 16(a)(1)(C) requiring the government to specifically identify discoverable materials which "directly name the defendant or clearly refer to the defendant."

Alternative 3 would not require a renumbering of Rule 16.

RULE 16(a)(4).

The court may prohibit the government from introducing in evidence any of the foregoing material not disclosed, so as to secure and maintain fairness in the just determination of the cause.

COMMENT

In order to deal with the inadvertent failure of the government to identify the materials which directly implicate a defendant, this amendment provides that the trial court has wide discretion in dealing with the matter in order to secure and maintain fairness in the just determination of the cause. This provision is identical to Florida Rule of Criminal Procedure 3.220(a)(1)(xiii).

The provision may be unnecessary in light of Rule 16(d)(2) which seems to provide this same discretion.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

July 10, 1992

Honorable Donald E. O'Brien
Chief Judge
United States District Court
P.O. Box 267
Sioux City, Iowa 51102

Dear Judge O'Brien:

In accordance with your letter of June 24, 1992, to Judge Arnold, Judge Hodges, and Mr. Mecham, and Judge Arnold's memorandum to you of June 30, 1992, we are formally referring Professor Ehrhardt's proposal to amend Rule 16 of the Federal Rules of Criminal Procedure to the Advisory Committee on Criminal Rules. We will advise you further of any action taken by the Committee.

Sincerely,

Judith W. Krivit
for

Joseph F. Spaniol, Jr.
Secretary

cc: Honorable Richard S. Arnold
Honorable William Terrell Hodges
Honorable Robert E. Keeton
Professor Charles W. Ehrhardt
Mr. L. Ralph Mecham

[By Fax]

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

Date: June 30, 1992

TO: Chief Judge O'Brien

cc: Judge Hodges
Mr. Mecham
Professor Ehrhardt

bcc: Mr. Macklin

FROM: RICHARD S. ARNOLD

Thanks for your letter of June 24 and the enclosures. I believe the proposed change in Rule 16 would be an improvement.

I do have one procedural concern, though: I would urge that we not go directly to Congress with this proposal until it has been exposed to the full consultative process of the Committee on Rules of Practice and Procedure. We consistently take the position that Congress should not consider proposed rules changes until they have been approved in this process.

Until this change, or something along its lines, is approved, I continue to believe that your point about the government's creating unnecessary expense for defense attorneys who are paid from federal funds is an excellent one.

Thanks for pursuing this. Please call me if you would like to discuss it further.

RSA

RSA

RSA/bk

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Rule 16, Proposal to Require Government to Disclose Materials Implicating the Defendant.

DATE: September 2, 1992

Attached is correspondance suggesting that various portions of Rule 16 be amended to require the Government, upon request, to identify otherwise discoverable materials which implicate the defendant. Professor Ehrhardt of Flordia State University School of Law has recommended specific amending language.

At this point, I am not familiar with the circumstances or reasons for the suggested amendment. Perhaps by the time of the meeting in Seattle, we will have such information and possibly a revised draft from Professor Ehrhardt.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Post Office Box 1620
Jacksonville, Florida 32201-1620

Wm. Terrell Hodges
Judge

July 20, 1992

Professor David A. Schlueter
St. Mary's University of San Antonio
School of Law
One Camino Santa Maria
San Antonio, Texas 78284

Dear Dave:

Here is an item for the fall agenda. Professor Ehrhardt tells me that he is working on a refinement of the proposed amendment. I will pass along any additional material I receive.

Warm personal regards.

Cordially,

Wm. Terrell Hodges

enclosure
c: Professor Charles W. Ehrhardt

Rule 16.

Proposal from Mr. Bill Wilson that Committee Examine Discovery Practices (Memo).

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Mr. Wilson's Proposal to Consider Amendments to Rule 16

DATE: September 2, 1992

As shown in the attached correspondance, Mr. Bill Wilson, has suggested that the Advisory Committee give consideration to the topic of federal criminal discovery vis a vis identity of government witnesses. I am also attaching a copy of a short law review article which also addresses the topic.

This material was originally included in the agenda book for the April 1992 meeting in Washington, but was put over until the Fall 1992 meeting.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

February 7, 1992

Mr. Wm. R. Wilson, Jr.
P. O. Box 71
Little Rock, Arkansas 72203

Dear Bill:

Thank you very much for your letter of February 4 concerning meaningful discovery under the Federal Rules of Criminal Procedure. This is a subject which has been addressed by the Advisory Committee at least once a year during each year I have served on the Committee. Nevertheless, as you request, I will ask Dave Schlueter, by copy of this letter to him, to include the matter on the agenda for discussion at our next meeting.

I enjoyed your tale about Roger Layne White, noting with particular interest your statement that he was a young lad "who had robbed a bank." You did not say that he was charged with robbing a bank or indicted for robbing a bank; rather, you said he robbed the bank, but you then proceed to complain about a lack of discovery??

Warm personal regards.

Cordially,

Wm. Terrell Hodges

c: Honorable Robert E. Keeton
Mr. Dave Schlueter

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February 4, 1992

RE: Meaningful Discovery under the Federal Rules of Criminal Procedure

The Honorable Terrell Hodges
U.S. Courthouse, Suite 108
611 N. Florida Avenue
Tampa, Florida 33602-4511

Dear Judge Hodges:

The other day I was just sitting back letting my mind run over desultory thoughts about "life its ownself."

All of the sudden it came upon me that we are less than a decade away from the 21st century, yet the discovery rules in criminal cases in federal district court have not moved into the 20th century!

I am vaguely aware of some efforts to modernize the discovery rules back in the 70's, but it seems to me that such efforts were thwarted either in the Standing Committee or in Congress, or in both. In any event, it seems to me that the time is always ripe to try to improve the system (I realize of course, that "improvement" is in the eye of the beholder).

I am aware that the federal prosecutors* contend that key witnesses will be slain, willy-nilly, if they are identified prior to trial.

Before getting to the danger to witnesses question, I would like to point out that it is manifestly unfair for a person to have to go to trial without having the benefit of meaningful discovery. In any venue in the United States in any type of a civil case, including a garden-variety fender bender, the party can discover the names and addresses of the opposing witnesses (in addition to a lot of other information). Yet, a defendant in a criminal case in federal district court cannot discover the names of these witnesses even if he is facing decades in the federal lock-up. No matter how you cut it, cube it, or slice it, this does not square with traditional notions of fair play and justice.

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* a/k/a "U.S. Attorneys", "representatives of the Justice Department", etc.

Arkansas came into the fold (of due process) many years ago. I am enclosing, for your ready reference, a copy of the applicable Arkansas discovery rules (reciprocal I point out).

Let me speak briefly to the issue of danger. I know that there are cases in which the defendant is extremely dangerous, and the disclosure of the witnesses against her or him would expose them to undue danger. It would be simple enough to have a provision that the court could enter an order against disclosure (at least until right before trial) in those cases where there is a bona fide danger. In the vast majority of cases, however, the witnesses would not be in any such danger.

This point puts me in mind of* one of my favorite clients, Roger Layne White. I was appointed to represent Roger Layne on bank robbery charges. He was a young, penniless lad from north Georgia who had robbed a bank across the river in North Little Rock. I filed a motion for discovery, citing the due process clause as my authority. I also attached affidavits from several civil practitioners who opined that a party could not properly prepare for trial without meaningful discovery. These affiants further expressed the opinion that the Federal Rules of Criminal Procedure did not provide for meaningful discovery. (I am amazed that outstanding civil lawyers are still shocked when they find out that there is no real discovery procedure in a criminal case in federal district court).

In its opposing pleadings, the federal prosecutors raised the specter of imminent danger to potential witnesses. They did this in the face of the fact that Roger Layne was a penniless, friendless young man who hailed from the red hills of north Georgia. In fact, he had so few intentional contacts with Arkansas that I often wondered if I could have prevailed upon a motion to dismiss for lack of in personam jurisdiction. Roger Layne had gotten drunk in a pub just over the Georgia line into Tennessee (just south of Chattanooga), and woke** up in North Little Rock - - where he decided to rob a bank to get money to go back home (or to get drunk again).

Furthermore, Roger Layne was under a bond so large that all of his living relatives could not have raised the funds to pay 10% to a bail bondsman - - even if the relatives had been so inclined, which they weren't. In other words, Roger Layne was of no danger whatsoever to prospective witnesses because he was

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* "reminds me of" in Florida and Massachusetts.

** "Waked" in Massachusetts, but not in Florida.

locked down for the duration, and he didn't have kith and kin who were interested in even trying to raise a bond for him, much less kill or maim a potential witness.

As you have already guessed, the district judge denied my motion (as well as my motion for permission to conduct voir dire examination). Whereupon, I "got myself out a writ" (as my pro se correspondents in the joint call appellate pleadings), and went to the Eighth Circuit. As you would again guess, I lost again (to borrow Casey Stengal's words again, "You can look it up" - - because it is a reported case).

My point is, again, there is no reasonable ground for denying meaningful discovery in the routine case.

I would appreciate it if you would consider putting this on the agenda for the next meeting of the Advisory Committee - - just for discussion. If a liaison to your Committee does not have authority to make such a request, then I do it amicus curiae.

I realize that this suggestion, coming from a lawyer who represents accused citizens, may lack weight, but, at least, I should have no less credibility than the prosecutors, who are also advocates. In truth and in fact*, both defense lawyers and prosecutors should support rules that will improve the system, come what may.

I have read many of the letters from lawyers who have written expressing opinions on the proposed changes to the Federal Rules of Civil Procedure. Most of them start off with a litany of their credentials. In keeping with this traditional, I would like to point out that I was, once upon time, a chief deputy prosecutor here in Arkansas, and, not so long ago, I was a special prosecutor in a case involving allegations of public corruption. Furthermore, I am a past Chair of the Arkansas State Police Commission. I say this to emphasize that I am not "for" criminals. To the contrary, I think that guilty persons should be convicted, by due process.

Cordially,

Wm. R. Wilson, Jr.

WRWJr:skm
Enclosure

* A redundancy perhaps, but a good one in my view.

cc: The Honorable Robert Keeton w/enclosure

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FAX [illegible]

February 10, 1992

Re: Real Discovery in Criminal Cases
in Federal District Court

The Honorable William Terrell Hodges
United States District Court
United States Courthouse, Suite 108
611 North Florida Avenue
Tampa, Florida 33602-4511

Dear Judge Hodges:

Many thanks for your letter of February 7, 1992.

I realize that I'm betting a long shot. At the same time, Lao-tzu said that, "A journey of a thousand miles begins with the first step." At least I think it was Lao-tzu who said this -- if he didn't, he should have.

Back to Roger Layne White. Before he was convicted, I did speak in terms of "bank robbery allegations." Unfortunately, the federal district court and the court of appeals confirmed beyond peradventure that he did, in fact, rob a bank. As a matter of fact, we pled ("pleaded" if you prefer) guilty, reserving the right to appeal.

Once upon a time a fellow told Mark Twain that there was a lot about the Bible that he did not understand, and that this worried him. Twain replied that he, too, did not understand a lot about the Bible, but it was the parts that he did understand which worried him. Likewise, there was a lot of evidence in Roger Layne's case that we did not know about (due to a lack of discovery), but it was the parts that we did know about which worried us; ergo, the guilty plea.

In any event, I sincerely appreciate your putting discovery on the agenda. I promise that my plea for it will be brief. If it conforms to usual practice, it will be somewhat inarticulate, but it will be heartfelt and fervent.

Cordially,

Wm. R. Wilson, Jr.

WRW:jkh

cc: The Honorable Robert E. Keeton
Professor David A. Schlueter

PRESUMED INNOCENT? RESTRICTIONS ON CRIMINAL DISCOVERY IN FEDERAL COURT BELIE THIS PRESUMPTION

Hon. H. Lee Sarokin[*]
William E. Zuckerman[**]

I. INTRODUCTION

It is an astonishing anomaly that in federal courts virtually unrestricted discovery is granted in civil cases, whereas discovery is severely limited in criminal matters. In other words, where money is involved, all parties receive all relevant information from their adversaries upon request; but where individual liberty is at stake, such information can be either withheld by the prosecutor or parcelled out at a time when it produces the least benefit to the accused.[1]

The rationale for restricting or delaying the turnover of information to criminal defendants and their counsel is primarily the fear of witness intimidation or tampering, and the possibility that the testimony of defense witnesses or the defendant might be altered to accommodate information received from the government.[2]

Obviously, the assumption of such improper conduct undermines the presumption of innocence accorded to the accused. In essence, the limitations on discovery anticipate that those who are presumed innocent will suborn or commit perjury, or will engage in witness intimidation or tampering.

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[*] United States District Judge, District of New Jersey.
[**] J.D. 1991, Rutgers University School of Law-Newark.

1. *See generally* Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279; Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960); Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C.L. REV. 437 (1972).

2. Goldstein, *supra* note 1, at 1193; Brennan, *supra* note 1, at 290 n.37 (quoting J. BENTHAM, POLICY OF THE LAW OF DISCOVERY § 347 (1842)).

> Said Sir John, "[e]xperience . . . has shown—or (at least) courts of justice in this country act upon the principle—that the possible mischiefs of surprise at the trial are more than counterbalanced by the danger of perjury, which must inevitably be incurred, when either party is permitted, *before* a trial, to know the precise evidence against which he has to contend. . . ."

The failure to provide full disclosure of the government's case early in the proceedings limits a defendant's ability to investigate the background and character of government witnesses and the veracity of their testimony. For example, strict compliance with the Jencks Act[3] necessitates frequent delays and adjournments. Counsel often need time to digest and investigate the information received. As a practical matter, any thorough investigation at that juncture of the proceedings may be impossible, and counsel must do the best that they can in the brief time usually allotted. The court and the jury are inconvenienced by even brief delays; the rights of the defendants are jeopardized because such delays, if granted, often are not sufficient. The restrictions, therefore, not only impinge upon the right of defendants to a fair trial, but also severely hamper the orderly progress of criminal trials. They are wrong in principle and cause delay in practice.

The potential encroachment upon the rights of the accused and the delays engendered thereby can be avoided by reversing the presumptions that underlie these restrictions on discovery. The burden should be placed upon the government to demonstrate that the risks of tampering, intimidation, or perjury exist. Absent such a showing, early and complete disclosure should be required. If, on the other hand, the government can make such a showing, a narrowly-drawn restriction on discovery may be imposed.[4]

Beyond the practical and unsubstantiated concern of preventing defendants' misconduct before and during trial, the argument in favor of continued restrictions on criminal discovery is usually premised on the theory that to allow criminal defendants greater access to the government's evidence is to undermine the adversary system of trial.[5] Furthermore, proponents of restricted discovery contend that the government's difficult standard of proof in criminal proceedings—beyond reasonable doubt—is simply too difficult if prosecutors are required to disclose all information to defendants.[6] The analogy to civil matters, they argue, is imprecise. In civil suits discovery is a two-way street, with each side free to request virtually anything from the other; but a criminal defendant's fifth amendment right against self-incrimination would limit disclosure by the defense even if the government's case were subject to open discovery, and the information would flow only one way.[7] Moreover, the current rules, though admittedly restrictive, do contain reciprocal discovery provisions.[8] It is thus reasoned that the current constraints on defendants' discovery balance the amount of information to which each side may gain access.[9]

Such arguments have validity, however, only if we are willing to cast aside certain fundamental tenets of our criminal justice system. If criminal defendants are truly presumed innocent until proven guilty, then blanket policies that delay defendants' access to the government's witness lists and deny access to witness statements until after those witnesses have testified cannot be justified. These policies are premised upon the fear that defendants will commit further crimes in order to clear themselves of the charges for which they are being tried. In sum, the presumption is one of guilt, not innocence. The contention that restrictions on discovery are necessary to offset the government's difficult standard of proof is equally unsound. The imposition of restrictions

3. 18 U.S.C. § 3500 (1988). The Jencks Act states in pertinent part:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

4. Brennan, *supra* note 1, at 294.

5. United States v. Evans, 454 F.2d 813, 820 (8th Cir.), *cert. denied*, 408 U.S. 909 (1972). *But see* Goldstein *supra* note 1, at 1180. Professor Goldstein describes the liberal discovery rule adopted for civil procedure as having "as its object the harnessing of the full creative potential of the adversary process." *Id.*

6. *See* Goldstein, *supra* note 1, at 1173.

7. State v. Tune, 13 N.J. 203, 211-12, 98 A.2d 881, 885 (1953).

> [T]he state is completely at the mercy of the defendant who can produce surprise evidence at the trial, can take the stand or not as he wishes, and generally can introduce any sort of unforeseeable evidence he desires in his own defense. To allow him to discover the prosecutor's whole case against him would be to make the prosecutor's task almost insurmountable.

Id.

8. Fed. R. Crim. P. 16(a) ("Disclosure of Evidence by the Government"); Fed. R. Crim. P. 16(b) ("Disclosure of Evidence by the Defendant").

9. United States v. Robinson, 585 F.2d 274, 280-81 (7th Cir. 1978), *cert. denied*, 441 U.S. 947 (1979).

on defendants to counter the government's standard substantially diminishes that standard, and thus does not constitute a valid justification for their existence. If the function of a criminal trial is really a quest for the truth, to maintain that the adversary system depends on the limitation of defendants' access to information runs contrary to that quest. Civil litigation is no less adversarial because of its unrestricted discovery, and the truth is more likely to be uncovered when information is revealed in time for its meaningful use at trial, than when it is belatedly produced or entirely withheld.

II Current Restrictions and Their Adverse Effects

The existence of any formal provisions for discovery in federal criminal litigation is a relatively recent phenomenon. Prior to the adoption of Rule 16 of the Federal Rules of Criminal Procedure in 1946, no discovery rights existed.[10] Since that time, the rules regarding discovery have been shaped by a number of forces. In addition to Rule 16, which in its initial draft enunciated very limited duties to disclose, discovery rights have gradually reached their present form by way of court rulings and legislation.[11]

The current criminal discovery rules in federal district court are best understood by looking at some actual examples of how the restrictions can affect defendants and their counsel's ability to mount an effective defense. A case tried recently in federal court, in some ways representative of the deluge of drug cases currently swamping the federal dockets,[12] forcefully illustrates the difficulties which often confront such defendants. The following are excerpts from defense counsel's pretrial argument:

> I would like to put it in context for the court very briefly. From what I know about the case, and what I don't know because I think it would help you evaluate our request for a bill of particulars, this is a situation where my client was not arrested in possession of anything, no search [was] conducted of his car which produced any evidence.

10 F Miller R Dawson, G Dix, & R Parker, Criminal Justice Administration 750 (3d ed 1986) [hereinafter F Miller].

11 *Id.*

12 *See, e.g.*, Labaton, *New Tactics in the War on Drugs Tilt Scales of Justice Off Balance*, N.Y. Times, Dec. 29, 1989, at A1, col. 1; *see also*, Greenhouse, *Chief Justice Makes Plea for More Federal Judgeships to Help in Fight Against Drugs*, N.Y. Times, Jan. 1, 1990, at 10, col. 1.

> As far as I know, there is no electronic surveillance or other surveillance. I have been given nothing specific at all. I have a charge that says in or about October of '88, which doesn't limit it to the month of October, he allegedly possessed some methamphetamine with intent to distribute. Not told where or with whom or under what circumstances.[13]

These circumstances, whereby prosecutorial reliance on disclosure restrictions can actually prevent a defendant from even learning the specifics of the charges against him, transform rules that purport to "balance" the flow of information between parties into guidelines so detrimental to the defendant that a scene in a federal courtroom can bear an eerie resemblance to the persecution of Joseph K. in Kafka's *The Trial*.[14]

A. *Bill of Particulars*

The general unavailability of a bill of particulars to criminal defendants in federal court often keeps defendants from ascertaining the specific facts of the charges against them.[15] Even when the charges are clear, by denying counsel information that is essential to the preparation of an effective defense, the defendant is, from the outset, at a disadvantage.

As stated previously, one of the justifications for disallowing criminal defendants this useful discovery tool, one which is routinely available in civil litigation, is the defendant's fifth amendment protection against self-incrimination. Even if a comprehensive bill of particulars was discoverable by the defense, the Constitution would prohibit the government from exacting reciprocal information from the accused, and the defendant would be afforded an unfair advantage. This reasoning is less persuasive, however, when one considers the enormous imbalance of investi-

13 United States v. _____, (D.N.J. April 24, 1989) (Transcript of Proceedings) [hereinafter Transcript]. This case's name and docket number are confidential pending defendant's appeal. Accordingly, this excerpt serves solely illustrative, not authoritative, purposes.

14 F Kafka The Trial (W.E. Muir trans. 1937). "'You can't go out, you are arrested.' 'So it seems,' said K. 'But what for?,' he added. 'We are not authorised to tell you that. Go to your room and wait there. Proceedings have been instituted against you, and you will be informed of everything in due course.'" *Id.* at 5-6.

15 Goldstein, *supra* note 1, at 1180. "The elimination of precise pleading, the general unavailability of particulars, and the increasing elasticity given to indictments all leave a good deal of room for 'surprise' at trial. And not all such 'surprise' is readily curable by granting a continuance." *Id.*

gative resources favoring the prosecution.[16]

Moreover, in cases such as the one from which the excerpt was taken[17] it may be nearly impossible for the defendant to establish an alibi defense, given the imprecision with which the government may charge the accused. There, defense counsel so noted: "If we ask for a bill of particulars and want to know if we can put together a legitimate alibi defense, we need some idea what he is accused of doing, and when he was accused of doing it."[18] Implicit in this policy of nondisclosure is the presumption that the defendant need not be given all relevant information to mount his defense because, after all, if guilty, he knows very well when and where he committed the crimes for which he is charged. The rules ignore the possibility of innocence.

But what if the defendant has been wrongly accused? Given our presumption of innocence, this possibility should at least be considered. Even though a defendant is not required to prove his innocence, he should have the opportunity to do so. An innocent defendant in this scenario would have virtually no way of establishing his innocence until he has heard the specifics of the charges against him. Under the current federal rules, such information could be suppressed until the government presents its case at trial.[19] By that time, many variables could lead to a wrongful conviction. But such possible miscarriages of justice

16. *See, e.g.*, Brennan, *supra* note 1, at 292-93.

> [W]hat of the investigatory paraphernalia important to the preparation of criminal evidence which is, as of course it should be, available to law officers? Laboratories, skilled investigators, experts in all areas are an essential part of the equipment of every agency which would boast of being abreast of the modern techniques for the detection and prevention of crime. All of us are gratified that our agencies are so equipped, and would not want to strip their resources. But I suggest that it overstates the fact to say that we don't need to extend criminal discovery procedures to the accused because the scales are already distorted in his favor by the privilege against self-incrimination and the fact that the state has the burden of proving his guilt beyond a reasonable doubt.

Id.

17. *See supra* note 13 and accompanying text.

18. Transcript, *supra* note 13, at 6.

19. Fed. R. Crim. P. 16 provides in pertinent part:

> (2) *Information Not Subject to Disclosure.* Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective witnesses except as provided in 18 U.S.C. § 3500.

would likely be avoided if procedures allowed defendants to demand a bill of particulars and receive crucial information from the prosecution relating to the specifics of the charges against them.[20] The defendant's counsel in our sample case argued this point well, but, because of the unyielding nature of discovery restrictions, to no avail.

> My client is presumed innocent. The Government shouldn't be saying that the defendant since he must be guilty must know what he is accused of doing. I have no idea what he is accused of doing, and he doesn't know what kind of proofs the Government intends to offer. I think under the circumstances we should be given more.[21]

B. *Witness Lists*

The suppression of government witness lists until just before trial is another restriction that significantly impairs defense preparation. Defendant and counsel may be left guessing until the trial nears commencement. By the time they are given the names of the prosecution's witnesses, the defense may be unable to use the information effectively.

> [T]his is a case where the defendant has no information, and I don't think it's enough for the United States Attorney to tell me they think they have good witnesses. They believe the witnesses will be credible, and I should accept it in evaluating what kind of case I am preparing for. I can't do it.[22]

Without the opportunity to investigate the background and character of government witnesses, the defense, as in this case, may be denied the chance to refute the government's assessment of the credibility of its witnesses. This is an example of how a discovery restriction can curtail the adversarial system rather than preserve it.[23]

20. Goldstein, *supra* note 1, at 1180-81. "Though a motion for discovery of documents before trial is technically available, attempts to invoke it are rarely successful. When they are, they usually enable the defendant to get only materials which are not central to his task of preparing a defense." *Id.* at 1181.

21. Transcript, *supra* note 13, at 7.

22. *Id.*

23. *See supra* note 6 and accompanying text (discussing the effect of discovery rights on the adversarial process); *see also* Williams v. Florida, 399 U.S. 78, 82 (1970) (Court discussed adversary system as consideration secondary to the preservation of due process rights).

As stated earlier, the delay in the turnover of government witness lists is premised primarily on the concern that the defendant, if granted immediate access to the identities of those who will testify against him, will intimidate, bribe, or endanger these people in order to avoid conviction. This rationale is unconvincing since the defense will nevertheless receive the witness list before the witnesses testify, and thus defendants will still retain the opportunity to engage in the conduct the restriction seeks to prevent. Defense counsel in our sample case saw the inherent illogic of this practice: "[T]o say a week before trial [that] we are entitled to know [the government witness list] and that removes the dangers to these people, I don't understand. It just denies us the adequate time to properly prepare our case."[24]

One may be hard pressed to discern the practical result of delaying defendants' access to government witness lists. Other than supposedly allowing defendants somewhat less time to tamper with the prosecution's witnesses, which does little to redress the perceived danger, the practice of delaying disclosure may do no more than injure the defendant and slow down the proceedings. Defense counsel in our example noted this reality, stating that "[t]here is no way that I won't find [out] at some point who is involved in the case, and I suspect it would make more sense from a logistical point of view if we were told sooner than later."[25]

Despite the defendant's inability to receive the prosecution's witness list early in the proceedings, the defense is compelled to provide the government with the list of witnesses it will call in order to support an alibi defense. Rule 12.1 provides that when a defendant wishes to introduce a defense of alibi, he or she must give notice to the government and provide the names and addresses of any witnesses the defense plans to call to establish the alibi.[26] In return, the defense receives only the names of witnesses

The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as "due process" is concerned, for [a rule] which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.

Id.

24 Transcript, *supra* note 13, at 17.

25 *Id.* at 6.

26 Fed. R. Crim. P. 12.1. Notice of Alibi.

(a) Notice by Defendant. Upon written demand of the attorney for the government stating the time, date, and place at which the alleged offense was commit-

the government will call to refute the alibi, not the identities of all witnesses who will testify on behalf of the government.[27]

The notice of alibi rule is still another example of the real ideology at work in federal criminal procedure. The requirement that defendants must provide the government with the names of alibi witnesses has its basis in the assumption that alibis are likely to be fabricated and that alibi witnesses will perjure themselves for the defendant's sake.[28] It is also, however, a refutation of the anti-discovery argument that would characterize open criminal discovery as a one-way street.[29] Clearly, here is a provision that compels disclosure by the defense of vital trial strategy and of the identities of perhaps all of its witnesses.[30] For its part, the prosecution

ted, the defendant shall serve within ten days, or at such different time as the court may direct, upon the attorney for the government a written notice of the defendant's intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi.

Id. See also Wardius v. Oregon, 412 U.S. 470, 472 (1973) (Court held that state's notice-of-alibi rule required reciprocal discovery rights for defendant under the due process clause of the fourteenth amendment). *See also infra* note 28.

27 Fed. R. Crim. P. 12.1. Notice of Alibi.

(b) Disclosure of Information and Witness. Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the attorney for the government shall serve upon the defendant or the defendant's attorney a written notice stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

In Williams v. Florida, 399 U.S. 78, 104 (1970), the Court upheld Florida's notice of alibi rule, emphasizing that its constitutionality might depend on the state rule's provision that the prosecuting attorney shall in turn provide the defendant with a list of the names and addresses of witnesses that the state proposes to offer in rebuttal to discredit the defendant's alibi.

28 *Williams*, 399 U.S. at 81 ("Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate.").

29 *See supra* note 7 and accompanying text.

30 The advantage enjoyed by the government in criminal proceedings, due to its vastly superior investigative resources, is further heightened by Rule 12.1 and its state counterparts. "Reciprocal discovery" in the context of notice-of-alibi is anything but evenhanded; the defendant gives away much more, practically speaking, than he or she receives in return. We are not denouncing all defense disclosure in principle, but such prosecutorial discovery provisions (which are found to be nonviolative of the fifth amendment) must be accompanied by far freer discovery for the defense, if fairness at trial is to be given more than lip service. For an excellent discussion of the emergence of significant prosecutorial discovery rights and the problems resulting therefrom, see Mueller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 Calif. L. Rev. 1567 (1986).

need only disclose a small part of its case; all witnesses who will testify for reasons other than to refute the defendant's alibi remain unannounced to the defendant.

Another related problem confronting the defendant is the apparent inability of the defense to reserve the right to adopt a particular trial strategy. For example, defense counsel may not know at the pretrial stage whether a certain alibi defense will be appropriate or helpful. This is especially so in cases such as our example, where the charges include conspiracy[31] and are vague with respect to the dates and locations of the alleged commission of crimes. The defense must nonetheless furnish the government with all information covered by the notice of alibi rule if it plans to establish an alibi. But there is no corresponding duty for the government ever to disclose its trial strategy other than the obvious strategy to attempt to refute the defendant's alibi. Apparently, the identities of some of the government's witnesses can remain undisclosed indefinitely—for the prosecution is free to claim that their testimony might not be necessary for its case. Defense counsel in our sample case saw that this tactic was subject to abuse and was unfair to his client:

> I tried to negotiate with the United States Attorney to get information, and I have been told, "[W]e have a witness, and we can't tell you who the witness is. Closer to the trial date we may tell you. Accordingly we can't tell you what our relationship is or what kind of arrangements might have been made because we are hoping not to disclose the witness at all."[32]

C. *Witness Statements*

The Jencks Act[33] governs criminal defendants' right to inspect statements made by witnesses in federal prosecutions. Any pretrial statements made by a government witness are to be made available upon motion to the defense only after that witness has testified.[34] Such statements therefore are not subject to defense discovery.

The purpose of the statute has often been officially characterized as simply a means of regulating unwarranted disclosure of

31 *See* Transcript, *supra* note 13, at 5.
32 Transcript, *supra* note 13, at 5-6.
33 18 U.S.C. § 3500 (1988). *See supra* note 3.
34 18 U.S.C. § 3500(b) (1988). *See supra* note 3.

government files to the defense.[35] As with other discovery restrictions, the rule regarding witness statements may in truth be premised on the fear that defendants, if given such information before trial, might commit or suborn perjury by altering defense testimony so as not to conflict with testimony to be given by government witnesses.

These fears, perhaps not without some justification, are the basis for a policy which limits disclosure for all criminal defendants, not just those likely to engage in such misconduct. The effect of the statute on defendants is profound. It provides federal prosecutors with a powerful tool with which to prevent pretrial disclosure of virtually all evidence to be offered by government witnesses.[36] The defense may be surprised at trial with previously unknown evidence and afforded insufficient time to digest newly acquired materials. In order to conduct an effective cross-examination, counsel must be able to investigate the content of the testimony and the background of the witness. Often, this is not possible. The adjudication of criminal cases, arguably the most important task to be undertaken in federal district court, can then become an arcane ritual in which an overly broad public policy supplants the court's truth-seeking function.[37]

It is evident how the current federal discovery restrictions adversely affect the accused, but it is also important to recognize how the restrictions can be detrimental to the prosecution and to the court. With federal criminal prosecutions on the rise and the congestion of court dockets,[38] now more than ever it is practical to facilitate plea agreements and thereby avoid the time and expense of lengthy trials. Limitations on discovery undermine this goal because defendants often cannot ascertain what evidence the government has against them until the trial has commenced. The

35 Palermo v. United States, 360 U.S. 343, 361 (1960); Saunders v. United States, 316 F.2d 346, 349 (D.C. Cir. 1963).
36 Rule 16 of the Federal Rules of Criminal Procedure allows defense discovery of: (A) any statements made by the defendant within the possession of the government, (B) a copy of the defendant's prior criminal record, (C) certain documents and tangible objects, and (D) reports of physical or mental examinations, and of scientific tests or experiments. FED. R. CRIM. P. 16(a)(1). But any statements made by government witnesses, both written and oral, are excluded from pretrial discovery under the Jencks Act. *See* 18 U.S.C. § 3500(e) (1988). Thus, virtually the only "statements" of government witnesses which may be discoverable are expert witness reports under Rule 16(a)(1)(D).
37 *See* Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. Rev. 228, 242 (1964).
38 *See* Greenhouse, *supra* note 12, at 10.

complete and early disclosure of all relevant information to criminal defendants would afford them and their counsel the factual evidence necessary to evaluate the strength of the government's case and aid in a knowledgeable election between trial and guilty plea. Returning to our example, defense counsel saw that, absent such information, the defendant really had no option other than trial: "I said to the United States Attorney, and I say to the Court that the practicality of the situation is my client will be in this case for the duration, unless somebody convinces me that they have a strong case against him, or we ought to reconsider our position."[39]

Indeed, it would make sense even from the government's point of view to reconsider the validity of rules controlling criminal defendants' access to information before trial in federal court. Are the restrictions regarding bills of particulars, government witness lists, and witness statements justified in all cases? Even apart from determining whether the rights of the accused are unduly infringed by these practices, the effect on the orderly administration of justice should be considered.

III. The History of Suppression of Evidence Cases in Federal Court

Excerpts from our example illustrate many of the problems confronting federal criminal defendants. The next step is to consider how discovery restrictions may affect their constitutional rights. Do federal courts recognize discovery to be a right or a privilege in criminal cases? Given the nature of current restrictions, it might be easy to conclude that criminal defendants have virtually no inherent discovery rights, and that the prosecution has only limited disclosure duties.[40] But courts have long recognized the existence of both a criminal defendant's constitutionally-protected right to certain evidence and a significant prosecutorial duty to disclose.[41] The arguments for and against

39 Transcript, *supra* note 13, at 6.

40 *See supra* note 36 for a brief discussion of defense discovery rights under Rule 16 of the Federal Rules of Criminal Procedure, the evolution of the prosecutorial duty to disclose is examined in *infra* text accompanying and notes 41-94.

41 Since the Court first decided, in Mooney v. Holohan, 294 U.S. 103 (1935), that a prosecutor's nondisclosure may violate due process, the constitutional dimensions of a criminal defendant's right to evidence have been gradually set forth in a long line of cases over the last 56 years.

the criminal defendant's right to open discovery may be better considered by analyzing the line of constitutional "access to evidence" cases.

The modern development of the prosecution's duty to disclose began in 1935 with *Mooney v. Holohan*.[42] Mooney, a radical labor organizer, had been convicted of murder as a result of perjured testimony by government witnesses and manufactured physical evidence.[43] Mooney applied for a writ of habeas corpus, maintaining that the prosecution had completely fabricated the case against him.[44] Subsequent investigations found that the district attorney had masterminded the plot to frame Mooney, not only by the use of false evidence but also by intentionally suppressing evidence favorable to the accused.[45] Remarkably, the Supreme Court affirmed the denial of the writ on procedural grounds,[46] but found in dictum that such prosecutorial misconduct constituted a violation of due process.[47] The Court focused on the government's knowing use of perjury, considering this to be the most serious constitutional issue.[48]

In *Pyle v. Kansas*,[49] a case involving similarly egregious prosecutorial misconduct, the Court stressed the issue of the authorities' deliberate suppression of evidence favorable to the accused.[50] Such conduct was held constitutionally impermissible.[51] Later cases gave the Court occasion to consider prosecutors' intentional suppression of evidence independent of a claim of state induced perjury. The Court found there to be a denial of due process where a prosecutor used, but did not suborn, perjured testimony which was relevant only to the punishment of the defendant, not to his guilt.[52] Soon after, the Court further extended prosecutors' duty to disclose, holding that a misrepresentation involving only the credibility of a government witness required the

42 294 U.S. 103 (1935).

43 *Id.* at 110-11.

44 *Id.* at 109.

45 Chafee, The Mooney-Billings Report 242 (1931).

46 *Mooney*, 294 U.S. at 115. The procedural ground cited by the Court was petitioner's failure to exhaust state remedies.

47 *Id.* at 112-13.

48 *Id.*

49 317 U.S. 213 (1942).

50 *Id.* at 215-16.

51 *Id.* at 216.

52 Alcorta v. Texas, 355 U.S. 28, 31 (1957).

reversal of defendant's conviction and demanded a new trial.[53]

During this period, the Court paid special attention to the culpability of the prosecutor in determining whether a due process violation existed. But in *United States ex rel. Thompson v. Dye*,[54] the Third Circuit's decision was a significant departure from the Supreme Court's analysis.[55] The appellate court found that the defendant's due process rights could only be appraised by examining the effect the suppressed evidence had on the ability of the accused to mount his defense; the prosecutor's state of mind was not controlling.[56] The Second Circuit then followed the *Thompson* reasoning in a case involving the negligent suppression of evidence, where it agreed that the absence of willful misconduct by authorities did not necessarily preclude the existence of a due process violation.[57]

A. *The Brady Doctrine*

With its decision in *Brady v. Maryland*,[58] the Supreme Court broke new ground regarding a criminal defendant's constitutional right of access to information within the government's control. The Court held that the suppression of evidence requested by and favorable to the defendant is a violation of due process if the evidence is material to guilt or punishment.[59] Of particular interest was the Court's conclusion that such a violation exists "irrespective of the good faith or bad faith of the prosecution."[60] Aligning with the Third Circuit's approach in *Thompson*, the *Brady* Court focused on the objective value of the evidence in question, rather than the subjective perception of the prosecutor.

Although the *Brady* decision represented a new direction for the Supreme Court's analysis of this area of the law, the holding left many unanswered questions. Who, for example, determines

53 Napue v. Illinois, 360 U.S. 264, 269 (1959).

54 221 F.2d 763 (3d Cir. 1955).

55 The Third Circuit's treatment of suppressed evidence in this case was a harbinger of the Supreme Court's eventual approach. *See infra* text accompanying note 81; *see also* Comment, Brady v. Maryland *and the Prosecutor's Duty to Disclose*, 40 U. Cin. L. Rev. 112, 114 (1971); Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 Yale L.J. 136, 141 (1964).

56 *Thompson*, 221 F.2d at 765.

57 United States v. Consolidated Laundries Corp., 291 F.2d 563 (2d Cir. 1961).

58 373 U.S. 83 (1963).

59 *Id.* at 87.

60 *Id.*

what constitutes *Brady* material?[61] If the defense were to make the determination, it would first need to see the government's file, and the point of limiting disclosure to only material exculpatory evidence would be foiled. Alternatively, should the judge be given this task or should the determination be left to the prosecutor?[62] How important is a request by the defense?[63] If defense counsel fails to make a request, does the defendant lose his right to the information? Is the time of disclosure an important consideration?[64] And, most significantly, what will be the standard for "materiality"?[65]

The standard of materiality is so important in this line of cases because, more than anything else, the manner in which the term is defined will measure the extent of the defendant's right of access. A narrow reading of the term would create only a limited right; a broad reading would make the right expansive, perhaps even to mandate a constitutional right of open discovery.[66] The *Brady* Court offered little guidance.

61 *Cf.* Traynor, *supra* note 37, at 237. Justice Traynor noted that "so long as the availability of pretrial discovery to the defendant depends upon the discretion of his adversary, the prosecutor, there is always the risk of unequal treatment, the more to be questioned because it is needless." *Id. See also infra* text accompanying notes 92-94.

62 In practice, the government either makes a unilateral determination that it need not turn over certain information or evidence, or in the alternative frequently suggests that the court engage in an in-camera inspection in order to make that determination. The offer is meant to verify the government's good faith and confidence in its decision not to disclose. In reality it is an empty gesture.

It is virtually impossible for a court to determine whether information is exculpatory or can be utilized for impeachment purposes. For instance, a witness may claim that he saw the defendant at the scene of the crime in a three-piece blue pin-striped suit. In the abstract, the court would conclude that such information was not exculpatory, and would have no way of knowing whether it could be used to impeach the credibility of the witness. On the other hand, the defendant and defense counsel, knowing that the defendant does not and never has owned a three-piece blue pin-striped suit, might be able to use that information to her advantage. Therefore, the tender of an in-camera inspection rarely will suffice except in the most flagrant and obvious circumstances.

63 *See infra* text accompanying notes 77-79.

64 The Third Circuit has found that material which is arguably exculpatory under *Brady*, yet also arguably nondiscoverable under the Jencks Act, must be disclosed in time for effective use at trial. United States v. Starusko, 729 F.2d 256, 263 (3d Cir. 1984); United States v. Higgs, 713 F.2d 39, 44 (3d Cir. 1983). *But see* United States v. Presser, 844 F.2d 1275 (6th Cir. 1988), *infra* note 91 and accompanying text.

65 Some courts have construed the *Brady* doctrine to encompass evidence that is potentially relevant to the defense even if inculpatory. Other courts, however, have taken a much narrower view. *See Presser*, 844 F.2d at 1278; *infra* note 91 and accompanying text.

66 The notion that *Brady* could lead to constitutional discovery rights was put to rest with *Moore v. Illinois*, 408 U.S. 786 (1971). *See infra* notes 72-76 and accompanying text.

B. *Elaborations on Brady*

In *Giglio v. United States*,[67] the Court further defined the right it had created in *Brady*. In *Giglio*, the government failed to disclose an allegedly unauthorized promise of leniency made by an assistant to a key witness in return for his testimony.[68] The Court held that neither the assistant's lack of authority nor his failure to inform his superiors was controlling.[69] The prosecution's duty to present all material evidence to the jury was violated, constituting a denial of due process and requiring a new trial.[70] *Giglio* made it clear that at least some information that could be used for the purpose of impeaching government witnesses was material under *Brady*.[71] Requests by defendants for so-called *Giglio* material—information concerning any deals or arrangements between the government and its witnesses—grew out of this decision.

The same year, with *Moore v. Illinois*,[72] the Court refined *Brady* by declining to expand it. In a five-to-four decision, the Court concluded that the suppression of arguably exculpatory evidence in this complex murder case was not material to the guilt or punishment of the accused, and thus there was no due process violation.[73] The majority stressed the importance of a specific request for *Brady* material, but did not go so far as to rule it indispensable in all cases.[74]

The majority also clearly indicated, in dictum, that it was not prepared to extend the *Brady* rule to include open discovery as of right: "We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police work on a case."[75]

The minor retrenchment of *Moore* was followed by a more liberal rendering in *United States v. Agurs*.[76] The Court there addressed the issue of prosecutorial nondisclosure of evidence in situations in which the defense has not specifically requested

67 405 U.S. 150 (1972).
68 *Id.* at 152-53.
69 *Id.* at 154.
70 *Id.* at 154-55.
71 *See also, Defendants Have No Right to Pretrial Discovery of "All Impeachment Evidence"*, 43 Crim. L. Rep. (BNA) 2127 (May 18, 1988).
72 408 U.S. 786 (1972).
73 *Id.* at 797.
74 *Id.* at 794-95.
75 *Id.* at 795.
76 427 U.S. 97 (1976).

disclosure.[77] In a ruling consistent with *Brady*, the Court noted that the prosecution must disclose certain evidence that is obviously favorable to the defense, even absent a specific request.[78] Although again clear to point out that the prosecution need not turn over its entire file to the defense, the Court acknowledged that some evidence requires disclosure to comport with fundamental notions of fairness in the trial process.[79] The emphasis was on the nature of the evidence, not the animus of the prosecutor.

C. *The Break from Brady*

The cases leading up to and including *Agurs* depict a Court seeking clearly but cautiously to expand the right first pronounced in *Brady*. In 1985, with *United States v. Bagley*,[80] the Court moved in the opposite direction, choosing to redefine and confine a defendant's right to evidence. The Court collapsed the three different standards of materiality enunciated in *Agurs* for the three types of constitutionally mandated prosecutorial disclosure—where a prosecutor knowingly uses perjured testimony; where the defense makes a specific request; and where the defense makes no request or only a general request for *Brady* material—into one standard: whether the undisclosed evidence creates a "reasonable probability" that the outcome would have been different.[81] Justice Stevens, dissenting, faulted "the Court's unwarranted decision to rewrite the rule" by transforming the concept of "materiality" from merely an evidentiary concept as used in *Brady* and *Agurs* to a result-oriented standard.[82]

77 *Id.* at 110.
78 *Id.* The suppression of evidence in *Agurs* was held to be nonviolative of the defendant's fifth amendment rights under the due process clause because the suppression was deemed harmless error. *Id.* at 114. The dissent urged that the majority deprived the term "material" evidence "of all meaningful content" by so narrowly defining it. *Id.* (Marshall, J., dissenting). *See supra* text accompanying note 66.
79 *Agurs*, 427 U.S. at 110.
80 473 U.S. 667 (1985).
81 *Id.* at 682.
82 *Id.* at 709 (Stevens, J., dissenting). *See also id.* at 702-03 (Marshall, J., dissenting). Justice Marshall wrote:

> I would return to the original theory and promise of *Brady* and reassert the duty of the prosecutor to disclose all evidence in his files that might reasonably be considered favorable to the defendant's case. No prosecutor can know prior to trial whether such evidence *will* be of consequence at trial, the mere fact that it might be, however, suffices to mandate disclosure.

From there, in *Arizona v. Youngblood*,[83] the Court returned to the pre-*Brady* reliance on the good or bad faith of the government official as the dispositive factor in determining due process violations in cases dealing with evidence which is lost or destroyed rather than suppressed.[84] Admittedly, one may see a difference in the nature of the evidence withheld in *Agurs* and *Brady* as opposed to *Youngblood*.[85] In the former cases, the exact significance of the undisclosed evidence may be ascertained, whereas in the latter, the value of the lost evidence can never be divined. Nevertheless, the Court's "bad faith" holding represented a major theoretical shift away from the objective analysis of the evidence and how its unavailability affected the defendant's ability to receive a fair trial.

It is clear that the trend in the current Court is to de-emphasize criminal defendants' constitutional right to evidence. In *United States v. Presser*,[86] the Sixth Circuit followed suit in its decision concerning a case where the *Brady* doctrine and Jencks Act provisions came in direct conflict. The government appealed a district court judge's pretrial order requiring disclosure to the defense of all impeachment evidence which tended to negate guilt. The Sixth Circuit held that evidence that was arguably exempt from pretrial disclosure by the Jencks Act, yet also arguably exculpatory under *Brady*, need only be disclosed to defendants in time for use at trial.[87]

The decision in *Presser* is an indication that federal courts are willing to give as much or more weight to the government's interest in nondisclosure, a statutory consideration, as they are to defendants' constitutional interest in pretrial disclosure of material evidence. The court's holding grapples with the conflicting interests by compromise, neither requiring early pretrial disclosure nor countenancing nondisclosure only after government witnesses have testified. If the delay in disclosing *Brady* material results in

Id. (emphasis in original).

83. 488 U.S. 51 (1988).

84. *Id.* at 57-58.

85. *Id.*

86. 844 F.2d 1275 (6th Cir. 1988).

87. *Id.* at 1283. There is no telling how significant the difference could be between affording defendants disclosure in time for "effective" use at trial, *see supra* note 64, and, as here, merely use at trial. It has been argued that such distinctions may separate substantive justice from formalistic justice. *See generally* Kelman, *Interpretative Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

a defendant's lesser capacity to use the evidence effectively at trial, as indeed it might, is not this delay an infringement of the defendant's due process rights? The court thought not, but this conclusion is not inconsistent with the theory that due process rights must be determined by inquiring whether the undisclosed evidence adversely affected the defendant's ability to receive a fair trial.

The call for a constitutional right of discovery is compatible with the holding in *Brady* but has been seriously undercut by recent Supreme Court and federal circuit court decisions. *Brady* and its progeny expressed the idea that all evidence requested by the defense that is material to guilt or punishment is subject to disclosure by the prosecution. By broadly defining what constitutes "material" evidence, and by retaining the analysis that determinations of due process violations should not be made solely on the basis of a finding of bad faith, the possibility that the Court would recognize a right of open discovery was clearly within sight. Beginning with *Bagley*, that outlook began to change, and now the pro-discovery position appears to have little chance of acceptance in the Court's foreseeable future.

This lack of acceptance by the Court, however, does not necessarily invalidate the constitutional arguments in favor of formal criminal discovery rights. It is not difficult to accept discovery as a logical extension of the *Brady* doctrine if one is willing to concede that virtually all likely defense requests for disclosure may be in some sense material to the issues of guilt or punishment. Furthermore, the fact that many prosecutors choose to open their files to opposing counsel raises the additional issue of equal protection.[88] Cognizant that the practice promotes greater efficiency and is in many cases likely to convince the defendant to enter a guilty plea rather than undergo the rigors of trial when the case against him is strong, some prosecutors endorse the use of defense discovery.[89] But should it be left to the vagaries of prosecutorial discretion to determine which defendants are to be afforded this right and which are not? As Justice Brennan noted, fundamental notions of fairness dictate that the opportunity for discovery should be granted to all criminal defendants, not just those who

88. Brennan, *supra* note 1, at 282; Traynor, *supra* note 37, at 237.

89. The very fact that prosecutors so often assent to pretrial discovery should be a persuasive rebuttal of the argument that such disclosure undermines the adversarial nature of criminal proceedings. *See supra* text accompanying note 5.

receive this benefit by chance.[90]

IV. Specific Recommendations

Regardless of whether federal courts will recognize a constitutional right of criminal discovery, it is evident that if discovery is to be afforded any time soon, it is a task for the legislature. Congress should heed the experience of states, such as New Jersey, that permit open discovery for criminal defendants.[91] The con-

90 Brennan, *supra* note 1, at 282; Traynor, *supra* note 37, at 237. "Even the most fair-minded prosecutor is still an advocate and hence is not ideally suited to determine when a legal process should be made available to a defendant and when not. Such determinations are freighted with risk, even when they rest on most plausible grounds." *Id.*

91. California was among the first of several states to allow broad criminal discovery rights, both by statute and court decisions. Traynor, *supra* note 37, at 243-46. New Jersey has adopted liberal discovery rules of state criminal procedure. States that have adopted such practices have not deemed it necessary to go back to their old, restrictive ways. As Justice Brennan argued more than a quarter-century ago, we should not "be persuaded that the old hobgoblin perjury, invariably raised with every suggested change in procedure to make easier the discovery of the truth, supports the case against criminal discovery." Brennan, *supra* note 1, at 291. State experience has only added strength to that conclusion.

New Jersey Rules Governing Criminal Practice provide:

3:13-3 Discovery and Inspection

(a) Discovery by the Defendant. Upon written request by the defendant, the prosecuting attorney shall permit defendant to inspect and copy or photograph any relevant

(1) books, tangible objects, papers or documents obtained from or belonging to him,

(2) records of statements or confessions, signed or unsigned, by the defendant or copies thereof, and a summary of any admissions or declarations against penal interest made by the defendant that are known to the prosecution but not recorded,

(3) grand jury proceedings recorded pursuant to R. 3:6-6,

(4) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies thereof, which are within the possession, custody or control of the prosecuting attorney;

(5) reports or records of prior convictions of the defendant,

(6) books, papers, documents, or copies thereof, or tangible objects, buildings or places which are within the possession, custody or control of the State,

(7) names and addresses of any persons whom the prosecuting attorney knows to have relevant evidence or information including a designation by the prosecuting attorney as to which of those persons he may call as witnesses,

(8) records of statements, signed or unsigned, by such persons or by codefendants which are within the possession, custody or control of the prosecuting attorney and any relevant record of prior conviction of such persons,

(9) police reports which are within the possession, custody, or control of the prosecuting attorney,

(10) warrants, which have been completely executed, and the papers accompanying them including the affidavits, transcript or summary of any oral testimony, return and inventory,

(11) names and addresses of each person whom the prosecuting attorney expects to call to trial as an expert witness, his qualifications, the subject matter on which the expert is expected to testify, a copy of the report, if any, of such expert witness, or if no report is prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. If this information is requested and not furnished, the expert witness may, upon application by the defendant, be barred from testifying at trial.

Rules Governing the Courts of the State of New Jersey (1991).

New Jersey's broad discovery rules cut both ways. If defendants choose to make use of 3:13-3(a), the State is entitled to much pretrial information under 3:13(b). These provisions, unlike the federal rules, are consistent with principles of fairness, and at least provide defendants with the choice of either discovering and being subject to discovery, or being immune from disclosure but not gaining the benefit of learning the prosecution's case. The corresponding discovery rule provides:

(b) Discovery by the State. A defendant who seeks discovery shall permit the State to inspect and copy or photograph

(1) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies thereof, which are within the possession, custody or control of defense counsel,

(2) any relevant books, papers, documents or tangible objects, buildings or places or copies thereof, which are within the possession, custody or control of defense counsel,

(3) the names and addresses of those persons known to defendant whom he may call as witnesses at trial and their written statements, if any, including memoranda reporting or summarizing their oral statements,

(4) written statements, if any, including any memoranda reporting or summarizing the oral statements, made by any witnesses whom the State may call as a witness at trial,

(5) names and addresses of each person whom the defense expects to call to trial as an expert witness, his qualifications, the subject matter on which the expert is expected to testify, and a copy of the report, if any, of such expert witness, or if no report is prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. If this information is requested and not furnished the expert may, upon application by the prosecutor, be barred from testifying at trial.

cerns that gave rise to the enactment of the Jencks Act on the federal level have not been borne out in the state courts. By studying the positive consequences of such state court discovery provisions, both the federal government and courts can better evaluate the usefulness and validity of the Jencks Act and other restrictions on discovery. We offer the following recommendations:

1. Repeal or modify the Jencks Act

The Jencks Act is a powerful enemy of discovery in federal criminal prosecutions. It reflects an overly broad policy that disadvantages all defendants for the sake of trying to prevent the

potential misconduct of a few. Denying all defendants access to pretrial statements made by government witnesses out of the fear that some will use such information wrongfully can be likened to outlawing the institution of bail on the theory that some of those arrested might commit further crimes.[92] Such fears may indeed be well-founded in specific circumstances, and in such cases, as in rare instances when bail is not granted, judges should have the authority to impose particular restrictions on discovery. Otherwise, open discovery should be the rule, not the exception.

2. Rule 16 of the Federal Rules of Criminal Procedure should be revised

Drafters of federal criminal discovery rules should adopt the approach taken by the American Bar Association's Standards Relating to Discovery and Procedure Before Trial.[93] A great number of states have implemented all or most of the ABA Standards, which advocate broad discovery provisions, through both legislation and court rulings.[94]

3. The federal government must assume the burden to show cause for limiting disclosure

For discovery rules to work fairly and efficiently, the burden must be placed on the prosecution to make a prima facie showing that disclosure should be restricted in specific instances. Absent such a showing, defendants should be granted early and complete disclosure of all relevant information.[95]

V. Conclusion

Discovery is a useful and basic truth-seeking device in civil litigation; it would play a similar role if it were embraced by the federal courts in criminal proceedings. To provide for full disclosure in civil matters but not in criminal cases elevates property

92 Brennan, *supra* note 1, at 287.

93 ABA Standards for Criminal Justice, Discovery and Procedure Before Trial (Supp 1986). *See also* F Miller, *supra* note 10, at 751.

94 F Miller, *supra* note 10, at 751.

95 In advocating broadened discovery rights, we are not suggesting that criminal defendants be afforded all traditional civil discovery procedures, such as the ability to submit interrogatories or to take depositions. Rather, our proposal is simply that criminal defendants be granted access to the materials discussed in this Article.

concerns over liberty interests. A defendant is entitled to be apprised of the evidence against him or her, if a fair trial is to be accorded that defendant. The lack or lateness of disclosure defeats that purpose and renders a trial unfair. This imbalance will be corrected only by reversing the underlying presumptions and thus changing discovery rules to allow criminal defendants sufficient access to evidence. Only then will we fulfill the principle that criminal defendants are presumed innocent until proven guilty.

Rule 32.

Judge Hodges' Proposal to Amend (Memo).

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Additional Materials on Rule 32 Amendments.

DATE: October 2, 1992

Enclosed are additional items which should be added to your agenda books at TAB II-C-6 (Proposal to Amend Rule 32). The first item is a Draft Committee Note for the proposed rule changes. Please note that this draft corresponds to the new subdivision numbers, etc. in Judge Hodges' second draft (Aug. 4, 1992).

The second item is a copy of the Model Local Rule for Guideline Sentencing (1987), which served as the model for several provisions in Judge Hodges' draft. I will bring a copy of the Committee Report, which accompanied that model rule, to the meeting.

There will be no further updated drafts of Rule 32 itself before the meeting; Judge Hodges' second draft, with handwritten notations, will be the working draft at the Seattle meeting.

DRAFT
COMMITTEE NOTE

The amendments to Rule 32 are intended to accomplish three primary objectives. First, the amendments incorporate elements of a "Model Local Rule for Guideline Sentencing" which was proposed by the Judicial Conference Committee on Probation Administration in 1987. That model rule, and the accompanying report, were prepared to assist trial judges in implementing guideline sentencing mandated by the Sentencing Reform Act of 1984. See Committee on the Admin. of the Probation Sys., Judicial Conference of the U.S., Recommended Procedures for Guideline Sentencing and Commentary: Model Local Rule for Guideline Sentencing, Reprinted in T. Hutchinson & D. Yellen, Federal Sentencing Law and Practice, app. 8, at 431 (1989). It was anticipated that sentencing hearings would become more complex due to the new fact finding requirements imposed by guideline sentencing methodology. See U.S.S.G. § 6A1.2. Accordingly, the model rule focused on preparation of the presentencing report as a means of identifying and narrowing the issues to be decided at the sentencing hearing.

Second, the amendments include for the first time a limited provision for victim allocution. The amendments provide for both diclosure of a portion of the presentence report to certain victims and the right of those victims, after giving appropriate notice, to be heard during the sentencing hearing.

Third, in the process of incorporating the two foregoing elements, the rule was reorganized. Over time, numerous amendments to the rule had created a sort of hodge podge; the amendments represent an attempt to reflect an appropriate sequential order in the sentencing procedures.

Subdivision (a) includes several changes. First, instead of the more generalized requirement that the sentence be imposed "without unnecessary delay," the rule now contains a 90-day provision. The purpose of the 90-day time period is to provide a sufficient overall window of time for the probation officer to complete and disclose to the parties the presentence report, for the submission of objections by the parties, and for resolution of those objections, if possible, by the probation officer before the sentencing hearing, and for a report to the court concerning unresolved objections so that the court can prepare for the hearing in an orderly way. Under the rule, however, the sentencing judge may either shorten or extend that time for good cause.

Language in (a)(1) referring to the court's disclosure to the parties of the probation officer's determination of the sentencing classifications and sentencing guideline range was deleted as being redundant to a similiar provision in (c)(3) concerning preparation of the presentence report. Likewise, the reference in (a)(1) to the ability of the parties to comment on the probation officer's determination has been deleted; that matter is covered in (a)(1)(A) and (a)(1)(D).

The amendment to subdivision (a)(1)(A) now includes a specific reference to the process of resolution of disputes which have not been resolved before the sentencing hearing. The process of resolving disputes about the contents of the presentence report are also explicitly addressed in subdivision (c)(4).

The final change to subdivision (a) rests in (a)(1)(E) which now provides certain victims the opportunity to address the court personally.

Subdivision (c), which addresses the presentence investigation, has been modified in several respects. First, subdivision (c)(2) is a new provision which provides that, on request, defense counsel is entitled to be present at any interview of the defendant conducted by the probation officer. Although the courts have not held that presentence interviews are a critical stage of the trial for purposes of the Sixth Amendment right to counsel, the amendment reflects case law which has indicated that requests for counsel to be present should be honored. See, e.g., United States v. Herrera-Figureroa, 918 F.2d 1430, ____ (9th Cir. 1990)(court relied on its supervisory power to hold that probation officers must honor request for counsel's presence); United States v. Tisdale, 952 F.2d 934, ____ (6th Cir. 1992)(court agreed with rule requiring probation officers to honor defendant's request for attorney or request from attorney not to interview defendant in absence of counsel). The Committee believes that permitting counsel to be present during such interviews may avoid unnecessary misunderstandings between the probation officer and the defendant.

Subdivision (c)(4), formerly (c)(3), includes several changes which recognize the key role the presentence report is playing under guideline sentencing. The major thrust of these changes is to address the problem of resolving objections by the parties to the probation officer's presentence report. Subdivision (c)(4)(A) now provides that the probation officer must present the presentence report to

the parties not later than 50 days before the sentencing hearing (rather than 10 days before imposition of the sentence) in order to provide some additional time to the parties and the probation officer to attempt to resolve objections to the report. There has been no change to the practice of deleting from the copy of the report given to the parties certain information specified in (c)4)(A), e.g., the probation officer's final recommendation concerning the sentence, confidential information, or other information which might result in harm to the defendant or other persons.

New subdivisions (c)(4)(C), (D), and (E) now provide explicit deadlines and guidance on resolving disputes about the contents of the presentence report. The amendments are intended to provide early resolution of such disputes by (1) requiring the parties to provide the probation officer with a written list of objections to the report within 20 days of receiving the report; (2) permitting the probation officer to make revisions to the report as deemed appropriate; (3) requiring the probation officer to submit the report to the court and the parties not later than 5 days before the sentencing hearing, noting any unresolved disputes; and (4) permitting the court to treat the report as being accurate, except for the parties' unresolved objetions.

This procedure, which generally mirrors the approach in the Model Local Rule for Guideline Sentencing, supra, is intended to maximize judicial economy by providing for more orderly sentencing hearings while also providing fair opportunity for both parties to review, object to, and comment upon, the probation officer's report in advance of the sentencing hearing. Under the amendment, the parties would still be free to comment on the presentence report, and in the discretion of the court, to introduce evidence concerning their objections to the report.

Subdivision (d) is a new provision which addresses the issue of victim allocution at sentencing. The right is limited, however, to victims of sexual abuse or physical violence. Under the amendment, the the [probation officer][attorney for the government] will (1) notify eligible victims of the time and place of the sentencing hearing, (2) provide a copy of the portions of the presentence report which address the impact of the crime on the victim, and provide a statement concerning the victim's right to testify at the sentencing hearing. The right to appear is not automatic, however. The victim must request an opporunity to be heard at least 10 days before the hearing. The court may place reasonable limitations on the taking of such testimony, such as time limits and scope of

the testimony. The amendment represents a balance between the legitimate interest of the victim in an appropriate sentence and the requirements of determinate sentencing.

MODEL LOCAL RULE
FOR GUIDELINE SENTENCING

(a) Not less than 20 days prior to the date set for sentencing, the probation officer shall disclose the presentence investigation report to the defendant and to counsel for the defendant and the Government. Within 10 days thereafter, counsel shall communicate to the probation officer any objections they may have as to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the report. Such communication may be oral or written, but the probation officer may require that any oral objection be promptly confirmed in writing.

(b) After receiving counsel's objections, the probation officer shall conduct any further investigation and make any revisions to the presentence report that may be necessary. The officer may require counsel for both parties to meet with the officer to discuss unresolved factual and legal issues.

(c) Prior to the date of the sentencing hearing, the probation officer shall submit the presentence report to the sentencing judge. The report shall be accompanied by an addendum setting forth any objections counsel may have made that have not been resolved, together with the officer's comments thereon. The probation officer shall certify that the contents of the report, including any revisions thereof, have been disclosed to the defendant and to counsel for the defendant and the Government, that the content of the addendum has been communicated to counsel, and that the addendum fairly states any remaining objections.

(d) Except with regard to any objection made under subdivision (a) that has not been resolved, the report of the presentence investigation may be accepted by the court as accurate. The court, however, for good cause shown, may allow a new objection to be raised at any time before the imposition of sentence. In resolving disputed issues of fact, the court may consider any reliable information presented by the probation officer, the defendant, or the Government.

(e) The times set forth in this rule may be modified by the court for good cause shown, except that the 10-day period set forth in subsection (a) may be diminished only with the consent of the defendant.

(f) Nothing in this rule requires the disclosure of any portions of the presentence report that are not disclosable under rule 32 of the Federal Rules of Criminal Procedure.

(g) The presentence report shall be deemed to have been disclosed (1) when a copy of the report is physically delivered, (2) one day after the report's availability for inspection is orally communicated, or (3) three days after a copy of the report or notice of its availability is mailed.

MEMO TO: **Advisory Committee on Criminal Rules**

FROM: **Dave Schlueter, Reporter**

RE: **Rule 32, Proposed Amendments**

DATE: **September 3, 1992**

Attached are various materials relating to the proposed amendments to Rule 32 circulated by Judge Hodges:

1. Memo from Judge Hodges to Dave Schlueter, listing suggested issues to be addressed by Committee;

2. Revised "Second Draft" (8-4-92) of Rule 32 with hand written notations and interlineations based on comments from members of Committee;

3. Timetable chart demonstrating possible 60-day and 90-day periods;

4. August 5, 1992 Memo from Judge Hodges to Committee (w/clean copy of Second Draft);

5. Letter from Mr. Ed Marek noting suggested changes ((c)(4)(G)) to Judge Hodges' second draft;

6. Letter from Judge Hodges to Mr. Eldridge (Judicial Center) re study of implementation of model local rule;

7. Letter from Mr. Eldridge to Judge Hodges and Judge Broderick re Judicial Center Study on implementation of model local rule; and

8. Copy of existing Advisory Committee Notes on prior amendments to Rule 32.

Judge Hodges is currently working a draft of the Advisory Committee Note which would accompany the amendments and I am working on incorporating all of the handwritten changes, etc. into a typewritten draft. Finally, the Judicial Center is finishing its report on the implementation of the Model Local Rule. Hopefully, all of these materials can be sent to you well in advance of the meeting, so that they too can be included in your agenda books for the Seattle meeting.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

August 31, 1992

TO: Professor Dave Schlueter

FROM: Wm. Terrell Hodges WTH

RE: Proposed revision of Rule 32, F. R. CR. P.

In accordance with the procedure suggested in my memorandum of August 5, 1992 to the members of the Committee distributing a second draft of a proposed revision of Rule 32, I have received a number of suggestions from several members of the Committee. Each of those suggestions (at least I think I have captured all of them) are reflected by the hand written notations or interlineations on the enclosed copy of the second draft. In addition, I am enclosing (1) a time table which may be helpful to the Committee in deciding whether 60 days (as provided in the second draft) or some larger number of days should be allowed for the completion of the presentence procedures; and (2) substitute language recommended by Ed Marek for subsection (c)(4)(G) - - this is the material at page 11.

Proceeding sequentially through the Rule, the following is a list of the various decisions the Committee will have to make with respect to the modifications that have been proposed.

Decisions for Committee

1. Timetable (60 to 90 days).

3. Presence of counsel at probation officer's presentence interview of defendant.

4. Treatment of sentence recommendation and confidential information.

5. Probation officer's authority to require presence of counsel and defendant at conference.

6. Adding grounds of objections to addendum.

7. Victim notification - - United States Attorney or probation officer?

8. Narrowing of victim class to victims of sex abuse and violent crimes.

9. Restriction of victim allocution to individual victims (i.e., not corporations and not through counsel).

10. Extension of Rule 26.2 to victims who give allocution.

May I suggest that these enclosures, together with this memo, be placed in the agenda book you are presently preparing.

enclosures

HODGES
Second Draft
August 4, 1992

Rule 32. Sentence and Judgment

(a) SENTENCE.

(1) *Imposition of Sentence.* When a presentence investigation and report is ordered pursuant to subdivision (c)(1), sentence shall be imposed ~~without unnecessary delay,~~ at the end of ~~60~~ 90 days from the finding of guilt, but the court may either advance or continue the sentencing hearing for good cause, [or when there is a factor important to the sentencing determination that is not then capable of being resolved, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved.] ~~Prior to the sentencing hearing, the court shall provide the counsel for the defendant and the attorney for the Government with notice of the probation officer's determination, pursuant to the provisions of subdivision (c)(2)(B), of the sentencing classifications and sentencing guideline range believed to be applicable to the case. At the sentencing hearing, the court shall afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence.~~ Before imposing sentence, the court shall ~~also~~--

delete language within the brackets

(A) determine that the defendant and defendant's counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(~~3~~4)(A) or summary thereof made available

pursuant to subdivision (c)(~~3~~ 4 B)(~~F~~); and resolve any remaining disputes pursuant to sub-division (c)(~~3~~ 4 F)(~~E~~);

(B) afford counsel for the defendant an opportunity to speak on behalf of the defendant; ~~and~~

(C) address the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the sentence~~.~~;

(D) Afford the attorney for the Government an equivalent opportunity to speak to the court; and

(E) Afford any ~~individual~~ eligible victim or victims who have made a timely request pursuant to subdivision ~~(c)(4)(B)~~ (d)(2) an opportunity to speak to the court.

Upon a motion that is jointly filed by the defendant and by the attorney for the Government, the court may hear in camera such a statement by the defendant, counsel for the defendant, or the attorney for the Government.

(2) *Notification of Right To Appeal.* After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, including any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except

that the court shall advise the defendant of any right to appeal the sentence. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(b) JUDGMENT.

(1) *In General.* A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(2) *Criminal Forfeiture.* When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

(c) PRESENTENCE INVESTIGATION.

(1) *When Made.* ~~A probation officer shall make a presentence investigation and report to the court before the imposition of sentence u~~Unless the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. 3553, and the court explains this finding on the record~~.~~, the court shall direct the probation officer to make a presentence investigation and report to the court before the imposition of sentence.

(2) Presence of Counsel. Upon request, the defendant's counsel is entitled to be present at any interview of the defendant by the probation officer in the course of the presentence investigation.

Except with the written consent of the defendant, the report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty.

(3) ~~(2)~~ *Report.* The report of the presentence investigation shall contain–

(A) information about the history and characteristics of the defendant, including prior criminal record, if any, financial condition, and any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant;

(B) ~~T~~he classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to section 994(a) of title 28, that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances;

(C) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2);

(D) verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed;

(E) unless the court orders otherwise, information concerning the nature and extent of nonprison programs and resources available for the defendant; and

(F) such other information as may be required by the court.

(4) ~~(3)~~ *Disclosure and Resolution of Disputes*.

(A) ~~At least 10 days before imposing sentence,~~ Not less than ~~25~~ 50 days before the sentencing hearing, unless this minimum period is waived by the defendant, the ~~court~~ probation officer shall provide the defendant, ~~and~~ the defendant's counsel and the attorney for the Government, with a copy of the report of the presentence investigation, including any report and recommendation resulting from a study ordered by the court pursuant to 18 U.S.C. 3552(b). The information required by subdivision (c)(3) and ~~including the information required by subdivision (e)(2) but not including any final recommendation as to sentence, and not to the extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.~~ ~~The court shall afford the defendant and the defendant's counsel an opportunity~~

restore language within the brackets and on page 6, and delete sub (G) on page 8

~~to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.~~

restore language within the brackets and on page 5, and delete sub (G) on page 8

[~~(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant and the defendant's counsel an opportunity to comment thereon. The statement may be made to the parties in camera.~~]

(C) ~~(B)~~ Within ~~10~~ 20 days ~~thereafter~~ after receiving the report of the presentence investigation, the parties shall communicate in writing to the probation officer and to each other any objections either may have as to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the report of the presentence investigation. After receiving any such objections the probation officer may conduct any further investigation and make any revisions to the presentence report that the probation officer deems appropriate, [and may require the defendant, the defendant's counsel and the attorney for the Government to meet with the probation officer to discuss unresolved factual and legal issues.]

delete language within the brackets

~~(C) Any material which may be disclosed to the defendant and the defendant's counsel shall be disclosed to the attorney for the government.~~

(D) ~~(C)~~ Not later than 5 days before the sentencing hearing the probation officer shall submit the presentence report to the court together with an addendum setting forth any unresolved objections, the grounds for such objections and the probation officer's comments concerning such objections. Any revisions made to the presentence report, and the addendum, shall be furnished by the probation officer at the same time to the defendant, the defendant's counsel and the attorney for the Government.

(E) ~~(D)~~ Except for any objection made under subdivision (c)(3)(B) that has not been resolved, the report of the presentence investigation may be accepted by the court as accurate. For good cause shown, the court may allow a new objection to be raised at any time before the imposition of sentence.

(F) ~~(E)~~ ~~(D) If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof,~~ At the sentencing hearing the court shall afford counsel for the defendant and the attorney for the government an opportunity to comment on the probation officer's determination and on other matters relating to the appropriate sentence; shall determine the unresolved objections to the presentence report, if any, and may, in the discretion of the court, permit the parties to introduce testimony or

other evidence concerning such objections. [T]he court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons.

[(G) ~~(F)~~ The court may by local rule or in individual cases direct the probation officer, in making disclosure of the presentence report pursuant to subdivision (c)(4)(A), to withhold (i) the probation officer's recommendation, if any, as to sentence; (ii) sources of information obtained upon a promise of confidentiality; (iii) diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or (iv) any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. Any factual information so withheld, and upon which the court intends to rely in determining sentence, shall be summarized for the parties orally or in writing before the determination of any objections to the presentence report pursuant to subdivision (c)(4)(F). The summary may be made to the parties in camera.]

~~(E) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3552(b) shall~~

delete language within brackets after restoration of language on pages 5 & 6

or

See substitute attached at end as page 11

~~be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.~~

(d) ~~(A)~~ *Individual Victims.*

(1) ~~(A)~~ At the time a copy of the report of the presentence investigation is provided to the parties pursuant to subdivision (c)~~(3)~~(4)(A), [the attorney for the probation officer government] unless excused by the court for good cause, shall also provide notice to any individual against whom the offense has been committed. The notice shall contain (i) a copy of that part of the report of the presentence investigation prepared pursuant to subdivision (c)(2)(D); (ii) the time and place of the sentencing hearing; and (iii) a statement describing the right of such individual to speak at the sentencing hearing if a request to do so is made pursuant to subdivision ~~(c)(4)(B)~~ (d)(2).

(2) ~~(B)~~ Subject to reasonable limitations established by the court, an eligible individual victim or victims receiving notice from the attorney for the government pursuant to subdivision ~~(c)(4)(A)~~ (d)(1) may appear and be heard personally at the sentencing hearing pursuant to subdivision (a)(1)~~(D)~~(E) if such individual, at least 10 days before the sentencing hearing, makes a written request to do so. The request shall be submitted to the attorney for the government who shall provide copies to the defendant, the defendant's counsel and the probation officer. Such request shall contain a summary of the victim's intended allocution and shall be included

if the offense involves an act of sexual abuse prohibited by Chapter 109A of Title 18 or a crime of violence as defined by 18 USC 16.

in the addendum to the presentence report submitted to the court pursuant to subdivision (c)(3)(C).

(e) ~~(d)~~ PLEA WITHDRAWAL. If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

~~(e) PROBATION. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation if permitted by law.~~

~~[(f) REVOCATION OF PROBATION.] (Abrogated Apr. 30, 1979, eff. Dec. 1, 1980)~~

(f) PRODUCTION OF STATEMENTS AT SENTENCING HEARING.

(1) In General. Rule 26.2 (a) - (d), (f) applies at a sentencing hearing under this rule. An eligible individual victim who is heard under subdivision (d)(2) shall be deemed to be a witness for purposes of this rule and Rule 26.2.

new material

(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, at sentencing the court may not consider the affidavit or testimony of witness whose statement is withheld.

(G) (F) The court may, by local rule or by order in an individual case direct the probation officer, in disclosing the presentence report in accordance with subdivision (c)(4)(A), to withhold the probation officer's recommendation as to sentence. The court may, only by order in an individual case, direct the probation officer, in disclosing the presentence report in accordance with subdivision (c)(4)(A), to withhold (i) sources of information obtained upon a promise of confidentiality; (ii) diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation or (iii) any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or another person. If the court intends to rely upon any factual information so withheld in determining sentence, the court shall summarize it for the parties orally or in writing before the court determines objections to the presentence report in accordance with subdivision (c)(4)(F). The summary may be made to the parties in camera.

Timetable (in Days) for Accomplishment of Presentence Tasks Between Plea or Finding of Guilt and Imposition of Sentence

	60	70	80	90
PSR Completed and delivered to parties	35	40	45	50
Period for objections	10	10	15	20
Period for resolving objections	10	15	15	15
Delivery of PSR and Addendum to Court (i.e., number of days before sentencing)	5	5	5	5
	60	70	80	90

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

August 5, 1992

TO: ALL MEMBERS OF THE CRIMINAL RULES ADVISORY COMMITTEE

RE: PROPOSED REVISION OF RULE 32, F. R. CR. P.

FROM: WM. TERRELL HODGES

At our April meeting in Washington we discussed a proposed revision of Rule 32. The revision was designed to accomplish two prime objectives, and while those objectives necessitated a significant rewriting and reorganization of the Rule, no substantial changes were effected except for those principal purposes which were:

1. Incorporation of the essential elements of the Model Local Rule disseminated in 1987 by the Probation and Criminal Law Committee providing for a 60 day period between the finding of guilt and the imposition of sentence during which the probation officer prepares and discloses the presentence report, the parties file objections, if any, and the probation officer resolves those objections. The probation officer then prepares an addendum to the presentence report enumerating the unresolved objections that the Court must determine at the sentencing hearing, i.e., the addendum becomes an agenda for the hearing.

2. Provision for victim allocution, a subject being considered by Congress in several bills filed during recent years.

At the conclusion of our discussion of this proposal at our April meeting, it was resolved that I would prepare a second draft addressing the principal comments or criticisms voiced during the discussion, and then circulate that draft for further consideration at our meeting in Seattle this October. Attached is that second draft. As before, it is presented in two formats: A legislative version with new material underlined and deleted material lined through, and a "clean" version representing the way the rule would read if all of the proposed revisions were adopted. This second draft makes the following changes in relation to the first draft considered last April:

1. The provisions of present Rule 32(a)(1)(A) are restored as had been suggested by Ed Marek. (The language was deleted from the first draft because it seemed redundant to the new material in subsection (c)(3)(E).

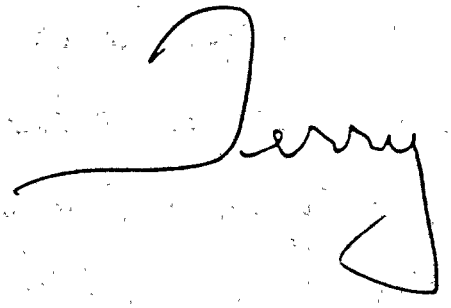
2. Language was added to subsection (c)(3)(E) reinforcing the obligation of the Court under subsections (a)(1)(A),(B) and (C) to permit the defendant and his counsel to comment on the presentence report.

3. Language was added to subsection (c)(3)(F) making it clear that the Court by local rule or on a case-by-case basis may withhold disclosure of the probation officer's recommendation concerning the sentence.

4. Subsections (c)(4)(A) and (B) were changed so as to place the burden upon the prosecutor, rather than the probation officer, to notify victims concerning their possible right to allocution. Language was also added requiring notice from the victim of his/her intent to appear and make allocution. A requirement was also added that any such notice from a victim must contain a summary of the intended allocution (in order to permit advance assessment by the parties and the Court concerning the possible Guidelines impact of such allocution.)

Given the somewhat extensive nature of this material, I suggest that we proceed as follows. Please let me have your comments or suggestions - - any proposed changes, additions or deletions - - not later than the close of business on Friday, August 28. I will then collate your individual responses and reflect them by interlineation or marginal notation on copies of the enclosed drafts which will then be included in your agenda books and distributed in September well in advance of the Seattle meeting. This should give everyone a double opportunity to review the proposal, including the suggestions of other members prior to the meeting thereby enhancing the prospects of a vote on a final draft in October.

I will look forward to seeing all of you in Seattle.



enclosures
c: Honorable Robert E. Keeton
Mr. William R. Wilson
Professor David A. Schlueter
Mr. David N. Adair, Jr.

HODGES
Second Draft
August 4, 1992

Rule 32. Sentence and Judgment

(a) SENTENCE.

(1) *Imposition of Sentence.* When a presentence investigation and report is ordered pursuant to subdivision (c)(1), sentence shall be imposed ~~without unnecessary delay,~~ at the end of 60 days from the finding of guilt, but the court may advance the sentencing hearing for good cause, or when there is a factor important to the sentencing determination that is not then capable of being resolved, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved. ~~Prior to the sentencing hearing, the court shall provide the counsel for the defendant and the attorney for the Government with notice of the probation officer's determination, pursuant to the provisions of subdivision (c)(2)(B), of the sentencing classifications and sentencing guideline range believed to be applicable to the case. At the sentencing hearing, the court shall afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence.~~ Before imposing sentence, the court shall ~~also~~—

(A) determine that the defendant and defendant's counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available

pursuant to subdivision (c)(3)(F); and resolve any remaining disputes pursuant to sub-division (c)(3)(E);

(B) afford counsel for the defendant an opportunity to speak on behalf of the defendant; ~~and~~

(C) address the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the sentence;

(D) Afford the attorney for the Government an equivalent opportunity to speak to the court; and

(E) Afford any individual victim or victims who have made a timely request pursuant to subdivision (c)(4)(B) an opportunity to speak to the court.

Upon a motion that is jointly filed by the defendant and by the attorney for the Government, the court may hear in camera such a statement by the defendant, counsel for the defendant, or the attorney for the Government.

(2) *Notification of Right To Appeal.* After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, including any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except

that the court shall advise the defendant of any right to appeal the sentence. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(b) JUDGMENT.

(1) *In General.* A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(2) *Criminal Forfeiture.* When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

(c) PRESENTENCE INVESTIGATION.

(1) *When Made.* ~~A probation officer shall make a presentence investigation and report to the court before the imposition of sentence u~~Unless the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. 3553, and the court explains this finding on the record~~.~~, the court shall direct the probation officer to make a presentence investigation and report to the court before the imposition of sentence.

Except with the written consent of the defendant, the report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty.

(2) *Report.* The report of the presentence investigation shall contain–

(A) information about the history and characteristics of the defendant, including prior criminal record, if any, financial condition, and any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant;

(B) The classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to section 994(a) of title 28, that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances;

(C) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2);

(D) verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed;

(E) unless the court orders otherwise, information concerning the nature and extent of nonprison programs and resources available for the defendant; and

(F) such other information as may be required by the court.

(3) *Disclosure and Resolution of Disputes*.

(A) ~~At least 10 days before imposing sentence,~~ Not less than 25 days before the sentencing hearing, unless this minimum period is waived by the defendant, the ~~court~~ probation officer shall provide the defendant, ~~and~~ the defendant's counsel and the attorney for the Government, with a copy of the report of the presentence investigation, including any report and recommendation resulting from a study ordered by the court pursuant to 18 U.S.C. 3552(b). ~~; including the information required by subdivision (c)(2) but not including any final recommendation as to sentence, and not to the extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. The court shall afford the defendant and the defendant's counsel an opportunity~~

~~to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.~~

~~(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant and the defendant's counsel an opportunity to comment thereon. The statement may be made to the parties in camera.~~

(B) Within 10 days thereafter, the parties shall communicate in writing to the probation officer and to each other any objections either may have as to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the report of the presentence investigation. After receiving any such objections the probation officer may conduct any further investigation and make any revisions to the presentence report that the probation officer deems appropriate, and may require the defendant, the defendant's counsel and the attorney for the Government to meet with the probation officer to discuss unresolved factual and legal issues.

~~(C) Any material which may be disclosed to the defendant and the defendant's counsel shall be disclosed to the attorney for the government.~~

(C) Not later than 5 days before the sentencing hearing the probation officer shall submit the presentence report to the court together with an addendum setting forth any unresolved objections and the probation officer's comments concerning such objections. Any revisions made to the presentence report, and the addendum, shall be furnished by the probation officer at the same time to the defendant, the defendant's counsel and the attorney for the Government.

(D) Except for any objection made under subdivision (c)(3)(B) that has not been resolved, the report of the presentence investigation may be accepted by the court as accurate. For good cause shown, the court may allow a new objection to be raised at any time before the imposition of sentence.

(E) ~~(D) If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof,~~ At the sentencing hearing the court shall afford counsel for the defendant and the attorney for the government an opportunity to comment on the probation officer's determination and on other matters relating to the appropriate sentence; shall determine the unresolved objections to the presentence report, if any, and may, in the discretion of the court, permit the parties to introduce testimony or

other evidence concerning such objections. [T]he court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons.

(F) The court may by local rule or in individual cases direct the probation officer, in making disclosure of the presentence report pursuant to subdivision (c)(3)(A), to withhold (i) the probation officer's recommendation, if any, as to sentence; (ii) sources of information obtained upon a promise of confidentiality; (iii) diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or (iv) any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. Any factual information so withheld, and upon which the court intends to rely in determining sentence, shall be summarized for the parties orally or in writing before the determination of any objections to the presentence report pursuant to subdivision (c)(3)(E). The summary may be made to the parties in camera.

~~(E) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3552(b) shall~~

~~be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.~~

(4) *Individual Victims.*

(A) At the time a copy of the report of the presentence investigation is provided to the parties pursuant to subdivision (c)(3)(A), the attorney for the government, unless excused by the court for good cause, shall also provide notice to any individual against whom the offense has been committed. The notice shall contain (i) a copy of that part of the report of the presentence investigation prepared pursuant to subdivision (c)(2)(D); (ii) the time and place of the sentencing hearing; and (iii) a statement describing the right of such individual to speak at the sentencing hearing if a request to do so is made pursuant to subdivision (c)(4)(B).

(B) Subject to reasonable limitations established by the court, an individual victim or victims receiving notice from the attorney for the government pursuant to subdivision (c)(4)(A) may appear and be heard at the sentencing hearing pursuant to subdivision (a)(1)(D) if such individual, at least 10 days before the sentencing hearing, makes a written request to do so. The request shall be submitted to the attorney for the government who shall provide copies to the defendant, the defendant's counsel and the probation officer. Such request shall contain a summary of the victim's intended allocution and shall be included

in the addendum to the presentence report submitted to the court pursuant to subdivision (c)(3)(C).

(d) PLEA WITHDRAWAL. If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

~~(e) PROBATION. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation if permitted by law.~~

~~[(f) REVOCATION OF PROBATION.] (Abrogated Apr. 30, 1979, eff. Dec. 1, 1980)~~

Office of the
FEDERAL PUBLIC DEFENDER
for the
Northern District of Ohio

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EDWARD F. MAREK
FEDERAL PUBLIC DEFENDER

August 28, 1992

VIA FACSIMILE

Honorable William Terrell Hodges
Judge, United States District Court
United States Courthouse, Suite 108
611 North Florida Avenue
Tampa, Florida 33602

Re: Rule 32

Dear Judge Hodges:

Pursuant to your memorandum of August 5, 1992 regarding Rule 32, I have the following suggested changes to your second draft (August 4, 1992).

(1) Time limit on sentencing process.

My feeling is that 60 days is too short a period of time in which to get a convicted defendant sentenced. It seems unrealistic to impose a rigid rule that ignores local circumstances. As I read the 60 day time frame in the rule, the probation officer would have 35 days in which to complete the presentence report. (c)(3)(A) This might be expanded to six weeks instead of five. Thereafter, the attorneys have 10 days to make objections. (c)(3)(B) This could be expanded to 14 days. (The victim has 15 days to request an appearance at sentencing (c)(4)(B).) After receiving the objections, the probation officer has only 10 days to revise the report. (c)(3)(C) This also could be expanded to 14 days. As an alternative to your (a)(1) we could retain the "without unnecessary delay" language now in (a)(1) or we could expand the 60 days to, for example, 75 days along the lines indicated above.

(2) Add a new (c)(2) Presence of Counsel. A new (c)(2) would provide:

> (c)(2) Presence of Counsel. Upon request, defendant's counsel is entitled to be present at any interview of the defendant done by a probation officer in the course of a presentence investigation.

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While the courts have not held that the interview between a probation officer and the defendant is a critical stage of the proceeding for Sixth Amendment purposes, they have said that a request from the defendant or his attorney to be present during all interviews regarding preparation or revision of the presentence report should be honored, including a request from the attorney that the client not be interviewed without the attorney being present. In United States v. Herrera-Figueroa, 918 F.2d 1430 (9th Cir. 1990), the Ninth Circuit held under its supervisory power that probation officers must honor a request from a defendant's attorney to accompany the client to the presentence interview. Furthermore, in United States v. Tisdale, 952 F.2d 934 (6th Cir. 1992) the court agreed with a rule which requires probation officers to honor a defendant's request for his attorney to be present or a request from the attorney that the client not be interviewed without the presence of the attorney.

The presence of an attorney can avoid many problems at sentencing which arise because of simple misunderstandings between the defendant and a probation officer. In addition, the November 1, 1992 amendments to U.S.S.G. § 3E1.1 permit a defendant to earn the two point acceptance of responsibility reduction by making a statement only as to the offense of conviction while remaining silent as to other relevant conduct. Where the offense of conviction is part of a course of criminal conduct, a defendant may not understand the difference and he needs the guiding hand of counsel in this complicated area. I understand that the United States District Court for the Southern and Eastern Districts of New York have a similar local rule. Although I believe this provision should be included in Rule 32 based on its merits alone, it is particularly necessary if the committee adopts the proposal in (c)(3)(B) to give a probation officer the power to compel the defendant to meet and "discuss unresolved factual and legal issues." A defendant's attorney should be present at such a delicate stage. (I would renumber the remaining subdivisions of (c) if a Presence of Counsel provision is placed as (c)(2).)

(3) (c)(3)(B). I would omit the right of a probation officer to require the attorneys and the defendant to meet with him/her. Any information required from the attorneys can be provided in writing. However, if a new subdivision (c)(2) Presence of Counsel is added I am less concerned about this language.

(4) (c)(3)(C). On the third line after "unresolved objections" I would add "together with the grounds for such objections." It is important that the parties' unresolved objections be fully presented to the district court. Probation

officers sometime either just state the fact of objections or briefly restate the grounds. This additional language will require a more careful and comprehensive presentation of the unresolved objections.

(5) (c)(3)(F). I would require that the decision to withhold any of the information mentioned in (c)(3)(F) be made in the context of an individual case. To accomplish this we could simply omit the language "by local rule or in individual cases" in the first line of (c)(3)(F).

As a secondary position, I would allow only the recommendation of sentence to be withheld through a local rule. As to the other information in (c)(3)(F) I would require that the court make the decision whether to withhold it based on the facts and circumstances of the individual case. The current language of (c)(3)(A) seems to suggest this approach as well. I am afraid that allowing a court to withhold such information by local rule would run afoul of cases such as United States v. Giltner, 889 F.2d 1004 (11th Cir. 1989) which speak of a defendant's due process right to refute any inaccurate information contained in a presentence report. While a court retains discretion to determine the form and type of rebuttal information, the decision to withhold any information used in sentencing should be made in the context of an individual case. As a substitute for your (c)(3)(F), I would suggest the following:

> (F) The court may, by local rule or by order in an individual case direct the probation officer, in disclosing the presentence report in accordance with subdivision (c)(3)(A), to withhold the probation officer's recommendation as to sentence. The court may, only by order in an individual case, direct the probation officer, in disclosing the presentence report in accordance with subdivision (c)(3)(A), to withhold (i) sources of information obtained upon a promise of confidentiality; (ii) diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or (iii) any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or another person. If the court intends to rely upon any factual information so withheld in determining sentence, the court shall summarize it for the parties orally or in writing before the court determines objections to the presentence report in accordance with subdivision (c)(3)(E). The summary may be made to the parties in camera.

(6) Victim Allocution. First, this subject might justify a separate subdivision (d) since it is in a sense unrelated to (c) Presentence Investigation. We would have to renumber current (d). I still believe that existing law adequately serves the victim's interest. See Fed. R. Crim. P. 32(c)(2)(D); Pub. L. 97-291, § 6(a)(5)(Oct. 12, 1982) (Attorney General to consider guidelines requiring attorney for the Government to consult with victims regarding, among other things, disposition of the case). However, the will of the committee appears to be otherwise.

I would make it clear in (c)(4)(B) that the victim speak personally and not through counsel i.e., "may appear and personally speak." I would also add a provision which would allow the defendant to obtain the relevant prior statements of the victim, if any, in possession of the attorney for the government or probation officer. This would be in addition to the summary of the victim's intended allocution required by the proposed rule. Our new Rule 32(f) probably will not cover prior statements of a victim who speaks at sentencing since it covers only the testimony of a person offered at a sentencing hearing. However, production of a victim's prior statements would follow the spirit of 32(f).[1]

I appreciate the substantial effort you have made regarding Rule 32 and I look forward to seeing you in Seattle.

Very truly yours,

Edward F. Marek

EFM:laj
hodges.efm
cc: Professor David A. Schlueter

[1] It is only with great restraint that I do not propose again a clear and convincing standard of proof for (c)(3)(E)(i). However, the rule as written will allow courts to fashion such a standard, if deemed necessary, such as in cases like United Stats v. Kikumura, 918 F.2d 1084 (1990). Besides, a rule change along these lines would invoke that old controversy whether a standard of proof is a substantive or procedural change.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

August 7, 1992

Mr. William B. Eldridge
Director of Research
The Federal Judicial Center
Dolley Madison House
1520 H Street, NW
Washington, DC 20005

Dear Bill:

Thank you very much for your letter of July 30, 1992 concerning the study you have undertaken with regard to the operation of the Model Local Rule governing the preparation of presentence reports and the conduct of sentencing proceedings in Guidelines sentencing cases.

I anticipate that the proposed revision of Rule 32 will be on the agenda of the Advisory Committee at its meeting in Seattle in October; and, if the Committee so decides, we may well elect to move forward with a recommendation that the proposed rule be published for comment and consider the final result of your study along with comments received. In other words, given the protracted length of time required by the Rules Enabling Act process, the Advisory Committee may wish to proceed now rather than prolong the process by awaiting your final study, especially since we would only be sending the proposed rule forward for publication and comment, not approval and adoption.

Nevertheless, it would be very helpful to have whatever you can produce by the time of the October meeting in order to aid the Committee in making these decisions.

Warm personal regards.

Cordially,

Wm. Terrell Hodges

c: Honorable Vincent L. Broderick
Professor David A. Schlueter
Mr. Donald L. Chamlee

THE FEDERAL JUDICIAL CENTER
DOLLEY MADISON HOUSE
1520 H STREET, N.W.
WASHINGTON, D.C. 20005

William B. Eldridge
Director of Research

Writer's Direct Dial Number:
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30 July 1992

The Honorable Vincent L. Broderick
101 East Post Road
White Plains, New York 10601

The Honorable William Terrell Hodges
U.S. Courthouse, Suite 108
Tampa, Florida 33602-4511

Dear Judge Broderick and Judge Hodges :

In both your committees, discussions about revising Rule 32 of Criminal Procedure to comport with the procedures in the model local rule raised some questions about how widely the model rule has been adopted and how it is actually operating. It was in that context that I offered to find out more about actual practices and report to your committees. The work is underway. Pamela Lawrence, an attorney on the Research Division staff, will be conducting the study.

To obtain useful and reliable information, Ms. Lawrence is first collecting and analyzing the rules and orders in effect in all the courts. She will also survey probation offices to identify the salient features of actual practice in the districts--whether or not they conform to the stated procedures. This work will be closely coordinated with other activities in the Judicial Center and the Administrative Office bearing on the work of your committees. We will keep Don Chamlee, Chief of Probation Division, and Dave Schlueter, Reporter to the Criminal Rules Committee in touch with the work so that we can modify or expand the inquiry to reach related questions they may suggest.

We will have a preliminary report for the next meeting of the Advisory Committee on Criminal Rules and a complete report as soon as possible thereafter. I hope both of you as well as Mr. Chamlee and Professor Schlueter will call us to raise any question about this activity or to suggest other issues. Ms. Lawrence can be reached at (202) 786-6281.

Sincerely,

cc: Mr. Chamlee
Professor Schlueter
Ms. Lawrence

tencing discretion and explains this finding on the record. The Committee believes that presentence reports are important aids to sentencing and should not be dispensed with easily.

The Committee added language to subdivision (c)(3)(A) that permits a defendant to offer testimony or information to rebut alleged factual inaccuracies in the presentence report. Since the presentence report is to be used by the court in imposing sentence and since the consequence of any significant inaccuracy can be very serious to the defendant, the Committee believes that it is essential that the presentence report be completely accurate in every material respect. The Committee's addition to subdivision (c)(3)(A) will help insure the accuracy of the presentence report.

The Committee added language to subdivision (c)(3)(D) that gives the court the discretion to permit either the prosecutor or the defense counsel to retain a copy of the presentence report. There may be situations when it would be appropriate for either or both of the parties to retain the presentence report. The Committee believes that the rule should give the court the discretion in such situations to permit the parties to retain their copies.

Notes of Advisory Committee on Rules

Note to Subdivision (a). This rule is substantially a restatement of existing procedure. Rule I of the Criminal Appeals Rules of 1933, 292 U.S. 661 [18 U.S.C. formerly following § 688]. See Rule 43 relating to the presence of the defendant.

Note to Subdivision (b). This rule is substantially a restatement of existing procedure. Rule I of the Criminal Appeals Rules of 1933, 292 U.S. 661 [18 U.S.C. formerly following § 688].

Note to Subdivision (c). The purpose of this provision is to encourage and broaden the use of presentence investigations, which are nor being utilized to good advantage in many cases. See, "The Presentence Investigation" published by Administrative Office of the United States Courts, Division of Probation.

Note to Subdivision (d). This rule modifies existing practice by abrogating the ten-day limitation on a motion for leave to withdraw a plea of guilty. See rule II(4) of the Criminal Appeals Rules of 1933, 292 U.S. 661 [18 U.S.C. formerly following § 688].

Note to Subdivision (e). See 18 U.S.C. former § 724 et seq. [now § 3651 et seq.].

1966 Amendment

Subdivision (a)(1).—The amendment writes into the rule the holding of the Supreme Court that the court before imposing sentence must afford an opportunity to the defendant personally to speak in his own behalf. See Green v. United States, 365 U.S. 301 (1961); Hill v. United States, 368 U.S. 424 (1962). The amendment also provides an opportunity for counsel to speak on behalf of the defendant.

Subdivision (a)(2).—This amendment is a substantial revision and a relocation of the provision originally found in Rule 37(a)(2): "When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant." The court is required to advise the defendant of his right to appeal in all cases which have gone to trial after plea of not guilty because situations arise in which a defendant represented by counsel at the trial is not adequately advised by such counsel of his right to appeal. Trial counsel may not regard his responsibility as extending beyond the time of imposition of sentence. The defendant may be removed from the courtroom immediately upon sentence and held in custody under circumstances which make it difficult for counsel to advise him. See, e. g., Hodges v. United States, 368 U.S. 139 (1961). Because indigent defendants are most likely to be without effective assistance of counsel at this point in the proceedings, it is also provided that defendants be notified of the right of a person without funds to apply for leave to appeal in forma pauperis. The provision is added here because this rule seems the most appropriate place to set forth a procedure to be followed by the court at the time of sentencing.

Subdivision (c)(2).—It is not a denial of due process of law for a court in sentencing to rely on a report of a presentence investigation without disclosing such report to the defendant or giving him an opportunity to rebut it. Williams v. New York, 337 U.S. 241 (1949); Williams v. Oklahoma, 358 U.S. 576 (1959). However, the question whether as a matter of policy the defendant should be accorded some opportunity to see and refute allegations made in such reports has been the subject of heated controversy. For arguments favoring disclosure,

see Tappan, Crime, Justice, and Correction, 558 (1960); Model Penal Code, 54-55 (Tent. Draft No. 2, 1954); Thomsen, Confidentiality of the Presentence Report: A Middle Position, 28 Fed.Prob., March 1964, p. 8; Wyzanski, A Trial Judge's Freedom and Responsibility, 65 Harv.L.Rev. 1281, 1291-2 (1952); Note, Employment of Social Investigation Reports in Criminal and Juvenile Proceedings, 58 Colum.L.Rev. 702 (1958); cf. Kadish, The Advocate and the Expert: Counsel in the Peno-Correctional Process, 45 Minn.L.Rev. 803, 806 (1961). For arguments opposing disclosure, see Barnett and Gronewold, Confidentiality of the Presentence Report, 26 Fed.Prob., March 1962, p. 26; Judicial Conference Committee on Administration of the Probation System, Judicial Opinion on Proposed Change in Rule 32(c) of the Federal Rules of Criminal Procedure—a Survey (1964); Keve, The Probation Officer Investigates, 6-15 (1960); Parsons, The Presentence Investigation Report Must be Preserved as a Confidential Document, 28 Fed.Prob., March 1964, p. 3; Sharp, The Confidential Nature of Presentence Reports, 5 Cath.U.L.Rev. 127 (1955); Wilson, A New Arena is Emerging to Test the Confidentiality of Presentence Reports, 25 Fed.Prob., Dec. 1961, p. 6; Federal Judge's Views on Probation Practices, 24 Fed.Prob., March 1960, p. 10.

In a few jurisdictions the defendant is given a right of access to the presentence report. In England and California a copy of the report is given to the defendant in every case. English Criminal Justice Act of 1948, 11 & 12 Geo. 6, c. 58, § 43; Cal.Pen.C. § 1203. In Alabama the defendant has a right to inspect the report. Ala.Code, Title 42, § 23. In Ohio and Virginia the probation officer reports in open court and the defendant is given the right to examine him on his report. Ohio Rev. Code, § 2947.06; Va.Code, § 53-278.1. The Minnesota Criminal Code of 1963, § 609.115(4), provides that any presentence report "shall be open for inspection by the prosecuting attorney and the defendant's attorney prior to sentence and on the request of either of them a summary hearing in chambers shall be held on any matter brought in issue, but confidential sources of information shall not be disclosed unless the court otherwise directs." Cf. Model Penal Code § 7.07(5) (P.O.D. 1962): "Before imposing sentence, the Court shall advise the defendant or his counsel of the factual contents and the conclusions of any presentence investigation or psychiatric examination and afford fair opportunity, if the defendant so requests, to controvert them. The sources of confidential information need not, however, be disclosed."

Practice in the federal courts is mixed, with a substantial minority of judges permitting disclosure while most deny it. See the recent survey prepared for the Judicial Conference of the District of Columbia by the Junior Bar Section of the Bar Association of the District of Columbia, reported in Conference Papers on Discovery in Federal Criminal Cases, 33 F.R.D. 101, 125-127 (1963). See also Gronewold, Presentence Investigation Practices in the Federal Probation System, Fed.Prob. Sept.1958, pp. 27, 31. For divergent judicial opinions see Smith v. United States, 223 F.2d 750, 754 (5th Cir.1955) (supporting disclosure); United States v. Durham, 181 F.Supp. 503 (D.D.C.1960) (supporting secrecy).

Substantial objections to compelling disclosure in every case have been advanced by federal judges, including many who in practice often disclose all or parts of presentence reports. See Judicial Conference Committee on the Administration of the Probation System, Judicial Opinion on Proposed Change in Rule 32(c) of the Federal Rules of Criminal Procedure—A Survey (1964). Hence, the amendment goes no further than to make it clear that courts may disclose all or part of the presentence report to the defendant or to his counsel. It is hoped that courts will make increasing use of their discretion to disclose so that defendants generally may be given full opportunity to rebut or explain facts in presentence reports which will be material factors in determining sentences. For a description of such a practice in one district, see Thomsen, Confidentiality of the Presentence Report: A Middle Position, 28 Fed.Prob., March 1964, p. 8.

It is also provided that any material disclosed to the defendant or his counsel shall be disclosed to the attorney for the government. Such disclosure will permit the government to participate in the resolution of any factual questions raised by the defendant.

Subdivision (f).—This new subdivision writes into the rule the procedure which the cases have derived from the provision in 18 U.S.C. § 3653 that a person arrested for violation of probation "shall be taken before the court" and that thereupon the court may revoke the probation. See Escoe v. Zerbst, 295 U.S. 490 (1935); Brown

v. United States, 236 F.2d 253 (9th Cir. 1956) certiorari denied 356 U.S. 922 (1958) Compare Model Penal Code § 301.4 (P.O. D.1962); Hink, The Application of Constitutional Standards of Protection to Probation, 29 U.Chi.L.Rev. 483 (1962).

1972 Amendment

Subdivision (b)(2) is new. It is intended to provide procedural implementation of the recently enacted criminal forfeiture provisions of the Organized Crime Control Act of 1970, Title IX, § 1963, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II, § 408(a)(2).

18 U.S.C. § 1963(c) provides for property seizure and disposition. In part it states:

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper.

Although not specifically provided for in the Comprehensive Drug Abuse Prevention and Control Act of 1970, the provision of Title II, § 408(a)(2) forfeiting "profits" or "interest" will need to be implemented procedurally, and therefore new rule 32(b)(2) will be applicable also to that legislation.

For a brief discussion of the procedural implications of a criminal forfeiture, see Advisory Committee Note to rule 7(c)(2).

1974 Amendment

Subdivision (a)(1) is amended by deleting the reference to commitment or release pending sentencing. This issue is dealt with explicitly in the proposed revision of rule 46(c).

Subdivision (a)(2) is amended to make clear that there is no duty on the court to advise the defendant of the right to appeal after sentence is imposed following a plea of guilty or nolo contendere.

To require the court to advise the defendant of a right to appeal after a plea of guilty, accepted pursuant to the increasingly stringent requirements of rule 11, is likely to be confusing to the defendant. See American Bar Association, Standards Relating to Criminal Appeals § 2.1(b) (Approved Draft, 1970), limiting the court's duty to advise to "contested cases."

The Advisory Committee is of the opinion that such advice, following a sentence imposed after a plea of guilty, will merely tend to build false hopes and encourage frivolous appeals, with the attendant expense to the defendant or the taxpayers. Former rule 32(a)(2) imposes a duty only upon conviction after "trial on a plea of not guilty." The few federal cases dealing with the question have interpreted rule 32(a)(2) to say that the court has no duty to advise defendant of his right to appeal after conviction following a guilty plea. Burton v. United States, 307 F.Supp. 448, 450 (D.Ariz.1970); Alaway v. United States, 280 F.Supp. 326, 336 (C.D.Calif.1968); Crow v. United States, 397 F.2d 284, 285 (10th Cir. 1968).

Prior to the 1966 amendment of rule 32, the court's duty was even more limited. At that time [rule 37(a)(2)] the court's duty to advise was limited to those situations in which sentence was imposed after trial upon a not guilty plea of a defendant not represented by counsel. 8A J. Moore, Federal Practice ¶ 32.01[3] (2d ed. Cipes 1969); C. Wright, Federal Practice and Procedure: Criminal § 525 (1969); 5 L. Orfield, Criminal Procedure Under the Federal Rules § 32:11 (1967).

With respect to appeals in forma pauperis, see appellate rule 24.

Subdivision (c)(1) makes clear that a presentence report is required except when the court otherwise directs for reasons stated of record. The requirement of reasons on the record for not having a presentence report is intended to make clear that such a report ought to be routinely required except in cases where there is a reason for not doing so. The presentence report is of great value for correctional purposes and will serve as a valuable aid in reviewing sentences to the extent that sentence review may be authorized by future rule change. For an analysis of the current rule as it relates to the situation in which a presentence investigation is required, see C. Wright, Federal Practice and Procedure: Criminal § 522 (1969); 8A J. Moore, Federal Practice ¶ 32.03[1] (2d ed. Cipes 1969).

Subdivision (c)(1) is also changed to permit the judge, after obtaining defendant's consent, to see the presentence report in order to decide whether to accept a plea agreement, and also to expedite the imposition of sentence in a case in which the defendant has indicated that he may plead guilty or nolo contendere.

Former subdivision (c)(1) provides that "The report shall not be submitted to the court * * * unless the defendant has pleaded guilty * * *." This precludes a judge from seeing a presentence report prior to the acceptance of the plea of

guilty. L. Orfield, Criminal Procedure Under the Federal Rules § 32:35 (1967); 8A J. Moore, Federal Practice ¶ 32.03[2], p. 32-22 (2d ed. Cipes 1969); C. Wright, Federal Practice and Procedure: Criminal § 523, p. 392 (1969); Gregg v. United States, 394 U.S. 489, 89 S.Ct. 1134, 22 L.Ed.2d 442 (1969).

Because many plea agreements will deal with the sentence to be imposed, it will be important, under rule 11, for the judge to have access to sentencing information as a basis for deciding whether the plea agreement is an appropriate one.

It has been suggested that the problem be dealt with by allowing the judge to indicate approval of the plea agreement subject to the condition that the information in the presentence report is consistent with what he has been told about the case by counsel. See American Bar Association, Standards Relating to Pleas of Guilty § 3.3 (Approved Draft, 1968); President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 136 (1967).

Allowing the judge to see the presentence report prior to his decision as to whether to accept the plea agreement is, in the view of the Advisory Committee, preferable to a conditional acceptance of the plea. See Enker, Perspectives on Plea Bargaining, Appendix A of President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts at 117 (1967). It enables the judge to have all of the information available to him at the time he is called upon to decide whether or not to accept the plea of guilty and thus avoids the necessity of a subsequent appearance whenever the information is such that the judge decides to reject the plea agreement.

There is presently authority to have a presentence report *prepared* prior to the acceptance of the plea of guilty. In Gregg v. United States, 394 U.S. 489, 491, 89 S.Ct. 1134, 22 L.Ed.2d 442 (1969), the court said that the "language [of rule 32] clearly permits the preparation of a presentence report before guilty plea or conviction [3] * * *." In footnote 3 the court said:

> The history of the rule confirms this interpretation. The first Preliminary Draft of the rule would have required the consent of the defendant or his attorney to commence the investigation before the determination of guilt. Advisory Committee on Rules of Criminal Procedure, Fed.Rules Crim.Proc., Preliminary Draft 130, 133 (1943). The Second Preliminary Draft omitted this requirement and imposed no limitation on the time when the report could be made and submitted to the court. Advisory Committee on Rules of Criminal Procedure, Fed.Rules Crim.Proc., Second Preliminary Draft 126-128 (1944). The third and final draft, which was adopted as Rule 32, was evidently a compromise between those who opposed any time limitation, and those who preferred that the entire investigation be conducted after determination of guilt. See 5 L. Orfield, Criminal Procedure Under the Federal Rules § 32.2 (1967).

Where the judge rejects the plea agreement after seeing the presentence report, he should be free to recuse himself from later presiding over the trial of the case. This is left to the discretion of the judge. There are instances involving prior convictions where a judge may have seen a presentence report, yet can properly try a case on a plea of not guilty. Webster v. United States, 330 F. Supp. 1050 (E.D.Va.1971). Unlike the situation in *Gregg v. United States*, subdivision (c)(3) provides for disclosure of the presentence report to the defendant, and this will enable counsel to know whether the information thus made available to the judge is likely to be prejudicial. Presently trial judges who decide pretrial motions to suppress illegally obtained evidence are not, for that reason alone, precluded from presiding at a later trial.

Subdivision (c)(3)(A) requires disclosure of presentence information to the defense, exclusive of any recommendation of sentence. The court is required to disclose the report to defendant or his counsel unless the court is of the opinion that disclosure would seriously interfere with rehabilitation, compromise confidentiality, or create risk of harm to the defendant or others.

Any recommendation as to sentence should not be disclosed as it may impair the effectiveness of the probation officer if the defendant is under supervision on probation or parole.

The issue of disclosure of presentence information to the defense has been the subject of recommendations from the Advisory Committee in 1944, 1962, 1964, and 1966. The history is dealt with in considerable detail in C. Wright, Federal Practice and Procedure: Criminal § 524 (1969), and 8A J. Moore, Federal Practice ¶ 32.03[4] (2d ed. Cipes 1969).

In recent years, three prestigious organizations have recommended that the re-

port be disclosed to the defense. See American Bar Association, Standards Relating to Sentencing Alternatives and Procedures § 4.4 (Approved Draft, 1968); American Law Institute, Model Penal Code § 7.07(5) (P.O.D.1962); National Council on Crime and Delinquency, Model Sentencing Act § 4 (1963). This is also the recommendation of the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967) at p. 145:

In the absence of compelling reasons for nondisclosure of special information, the defendant and his counsel should be permitted to examine the entire presentence report.

The arguments for and against disclosure are well known and are effectively set forth in American Bar Association Standards Relating to Sentencing Alternatives and Procedures, § 4.4 Commentary at pp. 214-225 (Approved Draft, 1968). See also Lenrich, The Use and Disclosure of Presentence Reports in the United States, 47 F.R.D. 225 (1969).

A careful account of existing practices in Detroit, Michigan and Milwaukee, Wisconsin is found in R. Dawson, Sentencing (1969).

Most members of the federal judiciary have, in the past, opposed compulsory disclosure. See the view of District Judge Edwin M. Stanley, American Bar Association Standards Relating to Sentencing Alternatives and Procedures, Appendix A. (Appendix A also contains the results of a survey of all federal judges showing that the clear majority opposed disclosure.)

The Advisory Committee is of the view that accuracy of sentencing information is important not only to the defendant but also to effective correctional treatment of a convicted offender. The best way of insuring accuracy is disclosure with an opportunity for the defendant and counsel to point out to the court information thought by the defense to be inaccurate, incomplete, or otherwise misleading. Experience in jurisdictions which require disclosure does not lend support to the argument that disclosure will result in less complete presentence reports or the argument that sentencing procedures will become unnecessarily protracted. It is not intended that the probation officer would be subjected to any rigorous examination by defense counsel, or that he will even be sworn to testify. The proceedings may be very informal in nature unless the court orders a full hearing.

Subdivision (c)(3)(B) provides for situations in which the sentencing judge believes that disclosure should not be made under the criteria set forth in subdivision (c)(3)(A). He may disclose only a summary of that factual information "to be relied on in determining sentence." This is similar to the proposal of the American Bar Association Standards Relating to Sentencing Alternatives and Procedures, § 4.4(b) and Commentary at pp. 210–224.

Subdivision (c)(3)(D) provides for the return of disclosed presentence reports to insure that they do not become available to unauthorized persons. See National Council on Crime and Delinquency, Model Sentencing Act § 4 (1963): "Such reports shall be part of the record but shall be sealed and opened only on order of the court."

Subdivision (c)(3)(E) makes clear that diagnostic studies under 18 U.S.C. §§ 4208(b), 5010(c), or 5034 are covered by this rule and also that 18 U.S.C. § 4252 is included within the disclosure provisions of subdivision (c). Section 4252 provides for the presentence examination of an "eligible offender" who is believed to be an addict to determine whether "he is an addict and is likely to be rehabilitated through treatment."

Both the Organized Crime Control Act of 1970 [§ 3575(b)] and the Comprehensive Drug Abuse Prevention and Control Act of 1970 [§ 409(b)] have special provisions for presentence investigation in the implementation of the dangerous special offender provision. It is, however, unnecessary to incorporate them by reference in rule 32 because each contains a specific provision requiring disclosure of the presentence report. The judge does have authority to withhold some information "in extraordinary cases" provided notice is given the parties and the court's reasons for withholding information are made part of the record.

Subdivision (e) is amended to clarify the meaning.

Legislative History

For legislative history and purpose of Pub L. 97–291, see 1902 U.S. Code Cong. and Adm. News, p. 2515. See, also, Pub L. 98–473, 1984 U.S. Code Cong. and Adm. News, p. 3182; Pub L. 99–646, 1986 U.S. Code Cong. and Adm. News, p. 6139.

ADVISORY COMMITTEE NOTES

1979 Amendment

Rule 32 (c) (3) (E). The amendment to rule 32(c) (3) (E) is necessary in light of recent changes in the applicable statutes.

Rule 32 (f). This subdivision is abrogated. The subject matter is now dealt with in greater detail in proposed new rule 32.1.

1983 Amendment

Rule 32(a)(1). Subdivision (a)(1) has been amended so as to impose upon the sentencing court the additional obligation of determining that the defendant and his counsel have had an opportunity to read the presentence investigation report or summary thereof. This change is consistent with the amendment of subdivision (c)(3), discussed below, providing for disclosure of the report (or, in the circumstances indicated, a summary thereof) to both defendant and his counsel without request. This amendment is also consistent with the findings of a recent empirical study that under present rule 32 meaningful disclosure is often lacking and "that some form of judicial prodding is necessary to achieve full disclosure." Fennell & Hall, Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts, 93 Harv. L.Rev. 1613, 1651 (1980):

> The defendant's interest in an accurate and reliable presentence report does not cease with the imposition of sentence. Rather, these interests are implicated at later stages in the correctional process by the continued use of the presentence report as a basic source of information in the handling of the defendant. If the defendant is incarcerated, the presentence report accompanies him to the correctional institution and provides background information for the Bureau of Prisons' classification summary, which, in turn, determines the defendant's classification within the facility, his ability to obtain furloughs, and the choice of treatment programs. The presentence report also plays a crucial role during parole determination. Section 4207 of the Parole Commission and Reorganization Act directs the parole hearing examiner to consider, if available, the presentence report as well as other records concerning the prisoner. In addition to its general use as background at the parole hearing, the presentence report serves as the primary source of information for calculating the inmate's parole guideline score.

Though it is thus important that the defendant be aware now of all these potential uses, the Advisory Committee has considered but not adopted a requirement that the trial judge specifically advise the defendant of these matters. The Committee believes that this additional burden should not be placed upon the trial judge, and that the problem is best dealt with by a form attached to the presentence report, to be signed by the defendant, advising of these potential uses of the report. This suggestion has been forwarded to the Probation Committee of the Judicial Conference.

Rule 32(c)(3)(A), (B) & (C). Three important changes are made in subdivision (c)(3): disclosure of the presentence report is no longer limited to those situations in which a request is made; disclosure is now provided to both defendant and his counsel; and disclosure is now required a reasonable time before sentencing. These changes have been prompted by findings in a recent empirical study that the extent and nature of disclosure of the presentence investigation report in federal courts under current rule 32 is insufficient to ensure accuracy of sentencing information. In 14 districts, disclosure is made only on request, and such requests are received in fewer than 50% of the cases. Forty-two of 92 probation offices do not provide automatic notice to defendant or counsel of the availability of the report, in 18 districts, a majority of the judges do not provide any notice of the availability of the report, and in 20 districts such notice is given only on the day of sentencing. In 28 districts, the report itself is not disclosed until the day of sentencing in a majority of cases. Thirty-one courts generally disclose the report only to counsel and not to the defendant, unless the defendant makes a specific request. Only 13 districts disclose the presentence report to both defendant and counsel prior to the day of sentencing in 90% or more of the cases. Fennell & Hall, supra, at 1640–49.

These findings make it clear that rule 32 in its present form is failing to fulfill its purpose. Unless disclosure is made sufficiently in advance of sentencing to permit the assertion and resolution of claims of inaccuracy prior to the sentencing hearing, the submission of additional information by the defendant when appropriate, and informed comment on the presentence report, the purpose of promoting accuracy by permitting the defendant to contest erroneous information is defeated. Similarly, if the report is not made available to the defendant and his counsel in a timely fashion, and if disclosure is only made on request, their opportunity to review the report may be inadequate. Finally, the failure to disclose the report to the defendant, or to require counsel to review the report with the defendant, significantly reduces the likelihood that false statements will be discovered, as much of the content of the presentence report will ordinarily be outside the knowledge of counsel.

The additional change to subdivision (c)(3)(C) is intended to make it clear that the government's right to disclosure does not depend upon whether the defendant elects to exercise his right to disclosure.

Rule 32(c)(3)(D). Subdivision (c)(3)(D) is entirely new. It requires the sentencing court, as to each matter controverted, either to make a finding as to the accuracy of the challenged factual proposition or to determine that no reliance will be placed on that proposition at the time of sentencing. This new provision also requires that a record of this action accompany any copy of the report later made available to the Bureau of Prisons or Parole Commission.

As noted above, the Bureau of Prisons and the Parole Commission make substantial use of the presentence investigation report. Under current practice, this can result in reliance upon assertions of fact in the report in the making of critical determinations relating to custody or parole. For example, it is possible that the Bureau or Commission, in the course of reaching a decision on such matters as institution assignment, eligibility for programs, or computation of salient factors, will place great reliance upon factual assertions in the report which are in fact untrue and which remained unchallenged at the time of sentencing because defendant or his counsel deemed the error unimportant in the sentencing context (e.g., where the sentence was expected to conform to an earlier plea agreement, or where the judge said he would disregard certain controverted matter in setting the sentence).

The first sentence of new subdivision (3)(c)(D) is intended to ensure that a record is made as to exactly what resolution occurred as to controverted matter. The second sentence is intended to ensure that this record comes to the attention of the Bureau or Commission when these agencies utilize the presentence investigation report. In current practice, "less than one-fourth of the district courts (twenty of ninety-two) communicate to the correctional agencies the defendant's challenges to information in the presentence report and the resolution of these challenges." Fennell & Hall, supra, at 1680.

New subdivision (c)(3)(D) does not impose an onerous burden. It does not even require the preparation of a transcript. As is now the practice in some courts, these findings and determinations can be simply entered onto a form which is then appended to the report.

Rule 32(c)(3)(E) & (F). Former subdivisions (c)(3)(D) and (E) have been renumbered as (c)(3)(E) and (F). The only change in the former, necessitated because disclosure is now to defendant and his counsel.

The issue of access to the presentence report at the institution was discussed by the Advisory Committee, but no action was taken on that matter because it was believed to be beyond the scope of the rule-making power. Rule 32 in its present form does not speak to this issue, and thus the Bureau of Prisons and the Parole Commission are free to make provision for disclosure to inmates and their counsel.

Rule 32(d). The amendment to Rule 32(d) is intended to clarify (i) the standard applicable to plea withdrawal under this rule, and (ii) the circumstances under which the appropriate avenue of relief is other than a withdrawal motion under this rule. Both of these matters have been the source of considerable confusion under the present rule. In its present form, the rule declares that a motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed, but then states the standard for permitting withdrawal after sentence. In fact, "there is no limitation upon the time within which relief thereunder may, after sentencing, be sought." United States v. Watson, 548 F.2d 1058 (D.C.Cir. 1977). It has been critically stated that "the Rule offers little guidance as to the applicable standard for a pre-sentence withdrawal of plea." United States v. Michaelson, 552 F.2d 472 (2d Cir.1977), and that as a result "the contours of [the presentence] standard are not easily defined." Bruce v. United States, 379 F.2d 113 (D.C.Cir.1967).

By replacing the "manifest injustice" standard with a requirement that, in cases to which it applied, the defendant must (unless taking a direct appeal) proceed under 28 U.S.C. § 2255, the amendment avoids language which has been a cause of unnecessary confusion. Under the amendment, a defendant who proceeds too late to come under the more generous "fair and just reason" standard must seek relief under § 2255, meaning the applicable 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 authority is to be found to the effect that the rule 32(d) "manifest injustice" standard is indistinguishable from the § 2255 standard. In United States v. Hamilton, 553 F.2d 63 (10th Cir.1977), for example, the court, after first concluding defendant was not entitled to relief under the § 2255 "miscarriage of justice" test, then held that "[n]othing is to be gained by the invocation of Rule 32(d)" and its "manifest injustice" standard. Some courts, however, have indicated that the rule 32(d) standard provides a somewhat broader basis for relief than § 2255. United States v. Daboub-Diaz, 599 F.2d 96 (5th Cir. 1979); United States v. Watson, 548 F.2d 1058 (D.C.Cir.1977); Meyer v. United States, 424 F.2d 1181 (8th Cir.1970); United States v. Kent, 397 F.2d 446 (7th Cir.1968). It is noteworthy, however, that in Daboub-Diaz, Meyer and Kent the defendant did not prevail under either § 2255 or Rule 32(d), and that in Watson, though the § 2255 case was remanded for consideration as a 32(d) motion, defendant's complaint (that he was not advised of the special parole term, though the sentence he received did not exceed that he was warned about by the court) was one as to which relief had been denied even upon direct appeal from the conviction. United States v. Peters, No. 77-1700 (4th Cir. Dec. 22, 1978).

Indeed, it may more generally be said that the results in § 2255 and 32(d) guilty plea cases have been for the most part the same. Relief has often been granted or recognized as available via either of these routes for essentially the same reasons: that there exists a complete constitutional bar to conviction on the offense charged, Brooks v. United States, 424 F.2d 425 (5th Cir.1970) (§ 2255), United States v. Bluso, 519 F.2d 473 (4th Cir. 1975) (Rule 32); that the defendant was incompetent at the time of his plea, United States v. Masthers, 539 F.2d 721 (D.C.Cir.1976) (§ 2255), Klenlen v. United States, 379 F.2d 20 (10th Cir. 1967) (Rule 32); and that the bargain the prosecutor made with defendant was not kept, Walters v. Harris, 460 F.2d 988 (4th Cir.1972) (§ 2255), United States v. Hawthorne, 502 F.2d 1183 (3rd Cir.1974) (Rule 32). Perhaps even more significant is the fact that relief has often been denied under like circumstances whichever of the two procedures was used: a mere technical violation of Rule 11, United States v. Timmreck, 441 U.S. 780 (1979) (§ 2255), United States v. Saft, 558 F.2d 1073 (2d Cir.1977) (Rule 32); the mere fact defendants expected a lower sentence, United States v. White, 572 F.2d 1007 (4th Cir.1978)

(§ 2255), Masciola v. United States, 469 F.2d 1057 (3rd Cir.1972) (Rule 32), or mere familial coercion, Wojtowicz v. United States, 550 F.2d 786 (2d Cir 1977) (§ 2255), United States v. Bartoli, 572 F.2d 188 (8th Cir 1978) (Rule 32)

The one clear instance in which a Rule 32(d) attack might prevail when a § 2255 challenge would not is present in those circuits which have reached the questionable result that post-sentence relief under 32(d) is available not merely upon a showing of a "manifest injustice" but also for any deviation from literal compliance with Rule 11. United States v. Cantor, 469 F.2d 435 (3d Cir. 1972) See Advisory Committee Note to Rule 11(h), noting the unsoundness of that position.

The change in Rule 32(d), therefore, is at best a minor one in terms of how post-sentence motions to withdraw pleas will be decided It avoids the confusion which now obtains as to whether a § 2255 petition must be assumed to also be a 32(d) motion and, if so, whether this bears significantly upon how the matter should be decided See, e.g., United States v. Watson, supra. It also avoids the present undesirable situation in which the mere selection of one of two highly similar avenues of relief, rule 32(d) or § 2255, may have significant procedural consequences, such as whether the government can take an appeal from the district court's adverse ruling (possible under § 2255 only). Moreover, because § 2255 and Rule 32(d) are properly characterized as the "two principal procedures for collateral attack of a federal plea conviction," Borman, The Hidden Right to Direct Appeal From a Federal Conviction, 64 Cornell L.Rev. 319, 327 (1979), this amendment is also in keeping with the proposition underlying the Supreme Court's decision in United States v. Timmreck, supra, namely, that "the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas." The amendment is likewise consistent with ALI Code of Pre-Arraignment Procedure § 350.9 (1975) ("Allegations of noncompliance with the procedures provided in Article 350 shall not be a basis for review of a conviction after the appeal period for such conviction has expired, unless such review is required by the Constitution of the United States or of this State or otherwise by the law of this State other than Article 350"); ABA Standards Relating to the Administration of Criminal Justice § 14–2.1 (2d ed. 1978) (using "manifest injustice" standard, but listing six specific illustrations each of which would be basis for relief under § 2255); Unif.R.Crim.P. 444(e) (Approved Draft, 1974) (using "interest of justice" test, but listing five specific illustrations each of which would be basis for relief under § 2255).

The first sentence of the amended rule incorporates the "fair and just" standard which the federal courts, relying upon dictum in Kercheval v. United States, 274 U.S. 220 (1927), have consistently applied to presentence motions. See, e.g., United States v. Strauss, 563 F.2d 127 (4th Cir. 1977); United States v. Bradin, 535 F.2d 1039 (8th Cir.1976); United States v. Barker, 514 F.2d 208 (D.C.Cir.1975). Under the rule as amended, it is made clear that the defendant has the burden of showing a "fair and just" reason for withdrawal of the plea. This is consistent with the prevailing view, which is that "the defendant has the burden of satisfying the trial judge that there are valid grounds for withdrawal," see United States v. Michaelson, supra, and cases cited therein (Illustrative of a reason which would meet this test but would likely fall short of the § 2255 test is where the defendant now wants to pursue a certain defense which he for good reason did not put forward earlier, United States v. Barker, supra.)

Although "the terms 'fair and just' lack any pretense of scientific exactness," United States v. Barker, supra, guidelines have emerged in the appellate cases for applying this standard. Whether the movant has asserted his legal innocence is an important factor to be weighed, United States v. Joslin, 434 F.2d 526 (D.C.Cir.1970), as is the reason why the defenses were not put forward at the time of original pleading. United States v. Needles, 472 F.2d 652 (2d Cir.1973). The amount of time which has passed between the plea and the motion must also be taken into account.

> A swift change of heart is itself strong indication that the plea was entered in haste and confusion * * *. By contrast, if the defendant has long delayed his withdrawal motion, and has had the full benefit of competent counsel at all times, the reasons given to support withdrawal must have considerably more force.

United States v. Barker, supra.

If the defendant establishes such a reason, it is then appropriate to consider whether the government would be prejudiced by withdrawal of the plea. Substantial prejudice may be present for a variety of reasons. See United States v. Jerry, 487 F.2d 600 (3d Cir.1973) (physical evidence had been discarded); United States v. Vasquez-Velasco, 471 F.2d 294 (9th Cir.1973) (death of chief government witness); United States v. Lombardozzi, 436 F.2d 878 (2d Cir.1971) (other defendants with whom defendant had been joined for trial had already been tried in a lengthy trial); Farnsworth v. Sanford, 115 F.2d 375 (5th Cir. 1940) (prosecution had dismissed 52 witnesses who had come from all over the country and from overseas bases).

There is currently some disparity in the manner in which presentence motions to withdraw a guilty plea are dealt with. Some courts proceed as if any desire to withdraw the plea before sentence is "fair and just" so long as the government fails to establish that it would be prejudiced by the withdrawal. Illustrative is United States v. Savage, 561 F.2d 554 (4th Cir.1977), where the defendant pleaded guilty pursuant to a plea agreement that the government would recommend a sentence of 5 years. At the sentencing hearing, the trial judge indicated his unwillingness to follow the government's recommendation, so the defendant moved to withdraw his plea. That motion was denied. On appeal, the court held that there had been no violation of Rule 11, in that refusal to accept the government's recommendation does not constitute a rejection of the plea agreement. But the court then proceeded to hold that absent any showing of prejudice by the government, "the defendant should be allowed to withdraw his plea"; only upon such a showing by the government must the court "weigh the defendant's reasons for seeking to withdraw his plea against the prejudice which the government will suffer." The other view is that there is no occasion to inquire into the matter of prejudice unless the defendant first shows a

good reason for being allowed to withdraw his plea. As stated in United States v. Saft, 558 F.2d 1073 (2d Cir.1977): "The Government is not required to show prejudice when a defendant has shown no sufficient grounds for permitting withdrawal of a guilty plea, although such prejudice may be considered by the district court in exercising its discretion." The second sentence of the amended rule, by requiring that the defendant show a "fair and just" reason, adopts the Saft position and rejects that taken in Savage.

The Savage position, as later articulated in United States v. Strauss, supra, is that the "sounder view, supported by both the language of the rule and by the reasons for it, would be to allow withdrawal of the plea prior to sentencing unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea." (Quoting 2 C. Wright, Federal Practice and Procedure § 538, at 474–75 (1969).) Although that position may once have been sound, this is no longer the case in light of the recent revisions of Rule 11. Rule 11 now provides for the placing of plea agreements on the record, for full inquiry into the voluntariness of the plea, for detailed advice to the defendant concerning his rights and the consequences of his plea and a determination that the defendant understands these matters, and for a determination of the accuracy of the plea. Given the great care with which pleas are taken under this revised Rule 11, there is no reason to view pleas so taken as merely "tentative," subject to withdrawal before sentence whenever the government cannot establish prejudice.

> Were withdrawal automatic in every case where the defendant decided to alter his tactics and present his theory of the case to the jury, the guilty plea would become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim. In fact, however, a guilty plea is no such trifle, but "a grave and solemn act," which is "accepted only with care and discernment."

United States v. Barker, supra, quoting from Brady v. United States, 397 U.S. 742 (1970).

The facts of the Savage case reflect the wisdom of this position. In Savage, the defendant had entered into a plea agreement whereby he agreed to plead guilty in exchange for the government's promise to recommend a sentence of 5 years, which the defendant knew was not binding on the court. Yet, under the approach taken in Savage, the defendant remains free to renege on his plea bargain, notwithstanding full compliance therewith by the attorney for the government, if it later appears to him from the presentence report or the comments of the trial judge or any other source that the court will not follow the government's recommendation. Having bargained for a recommendation pursuant to Rule 11(e)(1)(B), the defendant should not be entitled, in effect, to unilaterally convert the plea agreement into a Rule 11(e)(1)(C) type of agreement (i.e., one with a guarantee of a specific sentence which, if not given, permits withdrawal of the plea).

The first sentence of subdivision (d) provides that the motion, to be judged under the more liberal "fair and just reason" test, must have been made before sentence is imposed, imposition of sentence is suspended, or disposition is had under 18 U.S.C. § 4205(c). The latter of these has been added to the rule to make it clear that the lesser standard also governs prior to the second stage of sentencing when the judge, pursuant to that statute, has committed the defendant to the custody of the Attorney General for study pending final disposition. Several circuits have left this issue open, e.g., United States v. McCoy, 477 F.2d 550 (5th Cir.1973); Callaway v. United States, 367 F.2d 140 (10th Cir.1966); while some have held that a withdrawal motion filed between tentative and final sentencing should be judged against the presentence standard, United States v. Barker, 514 F.2d 208 (D.C.Cir 1975); United States v. Thomas, 415 F.2d 1216 (9th Cir.1969).

Inclusion of the § 4205(c) situation under the presentence standard is appropriate. As explained in Barker:

> Two reasons of policy have been advanced to explain the near-presumption which Rule 32(d) erects against post-sentence withdrawal motions. The first is that post-sentence withdrawal subverts the "stability" of "final judgments." • • • The second reason is that the post-sentence withdrawal motion often constitutes a veiled attack on the judge's sentencing decision; to grant such motions in lenient fashion might undermine respect for the courts and fritter away the time and painstaking effort devoted to the sentence process.
> • • • Concern for the "stability of final judgments" has little application to withdrawal motions filed between tentative and final sentencing under Section 4208(b) [now 4205(c).] The point at which a defendant's judgment of conviction becomes "final" for purposes of appeal—whether at tentative or at final sentencing—is wholly within the defendant's discretion. • • • Concern for the integrity of the sentencing process is, however, another matter. The major point, in our view, is that tentative sentencing under Section 4208(b) [now 4205(c)] leaves the defendant ignorant of his final sentence. He will therefore be unlikely to use a withdrawal motion as an oblique attack on the judge's sentencing policy. The relative leniency of the "fair and just" standard is consequently not out of place.

1987 Amendment

The amendments are technical. No substantive change is intended.

1989 Amendment

The amendment to subdivision (a)(1) is intended to clarify that the court is expected to proceed without unnecessary delay, and that it may be necessary to delay sentencing when an applicable sentencing factor cannot be resolved at the time set for sentencing. Often, the factor will relate to a defendant's agreement to cooperate with the government. But other factors may be capable of resolution if the court delays sentencing while additional information is generated. As currently written, the rule might imply that a delay requested by one party or suggested by the Court *sua sponte* might be unreasonable. The amendment rids the rule of any such implication and provides the sentencing court with desirable discretion to assure that relevant factors are considered and

accurately resolved. In exercising this discretion, the court retains under the amendment the authority to refuse to delay sentencing when a delay is inappropriate under the circumstances.

In amending subdivision (c)(1), the Committee conformed the rule to the current practice in some courts: i.e., to permit the defendant and the prosecutor to see a presentence report prior to a plea of guilty if the court, with the written consent of the defendant, receives the report at that time. The amendment permits, but does not require, disclosure of the report with the written consent of the defendant.

The amendment to change the "reasonable time" language in subdivision (c)(3)(A) to at least 10 days prior to sentencing, unless the defendant waives the minimum period, conforms the rule to 18 U.S.C. 3552(d). Nothing in the statue or the rule prohibits a court from requiring disclosure at an earlier time before sentencing. The inclusion of a specific waiver provision is intended to conform the rule to the statute and is not intended to suggest that waiver of other rights is precluded when no specific waiver provision is set forth in a rule or portion thereof.

The language requiring the court to provide the defendant and defense counsel with a copy of the presentence report complements the abrogation of subdivision (E), which had required the defense to return the probation report. Because a defendant or the government may seek to appeal a sentence, an option that is permitted under some circumstances, there will be cases in which the defendant has a need for the presentence report during the preparation of, or the response to, an appeal. This is one reason why the Committee decided that the defendant should not be required to return the nonconfidential portions of the presentence report that have been disclosed. Another reason is that district courts may find it desirable to adopt portions of the presentence report when making findings of fact under the guidelines. They would be inhibited unnecessarily from relying on careful, accurate presentence reports if such reports could not be retained by defendants. A third reason why defendant should be able to retain the reports disclosed to them is that the Supreme Court's decision in *United States Department of Justice v. Julian*, 48___ U.S. ___ (1988), 108 S.Ct. 1606 (1988), suggests that defendants will routinely be able to secure their reports through Freedom of Information Act suits. No public interest is served by continuing to require the return of reports, and unnecessary FOIA litigation should be avoided as a result of the amendment to Rule 32.

The amended rule does not direct whether the defendant or the defendant's lawyer should retain the presentence report. In exceptional cases where retention of a report in a local detention facility might pose a danger to persons housed there, the district judge may direct that the defendant not personally retain a copy of the report until the defendant has been transferred to the facility where the sentence will be served.

Because the parties need not return the presentence report to the probation officer, the Solicitor General should be able to review the report in deciding whether to permit the United States to appeal a sentence under the Sentencing Reform Act of 1984, 18. U.S.C. § 3551 et seq.

Although the Committee was concerned about the potential unfairness of having confidential or diagnostic material included in presentence reports but not disclosed to a defendant who might be adversely affected by such material, it decided not to recommend at this time a change in the rule which would require complete disclosure. Some diagnostic material might be particularly useful when a court imposes probation, and might well be harmful to the defendant if disclosed. Moreover, some of this material might assist correctional officials in prescribing treatment programs for an incarcerated defendant. Information provided by confidential sources and information posing a possible threat of harm to third parties was particularly troubling to the Committee, since this information is often extremely negative and thus potentially harmful to a defendant. The Committee concluded, however, that it was preferable to permit the probation officer to include this information in a report so that the sentencing court may determine whether is ought to be disclosed to the defendant. If the court determines that it should not be disclosed, it will have to decide whether to summarize the contents of the information or to hold that no finding as to the undisclosed information will be made because such information will not be taken into account in sentencing. Substantial due process problems may arise if a court attempts to summarize information in a presentence report, the defendant challenges the information, and the court attempts to make a finding as to the accuracy of the information without disclosing to the defendant the source of the information or the details placed before the court. In deciding not to require disclosure of everything in a presentence report, the Committee made no judgment that findings could validly be made based upon nondisclosed information.

Finally, portions of the rule were gender-neutralized.

1991 Amendment

The amendments are technical. No substantive changes are intended.

FEDERAL PRACTICE AND PROCEDURE

Circumstances under which plea of guilty may be withdrawn, see Wright: Criminal 2d § 175.

Disclosure of presentence reports, see Wright & Miller: Civil § 2019.

Discussion of this rule, see Wright & Graham: Evidence § 5438.

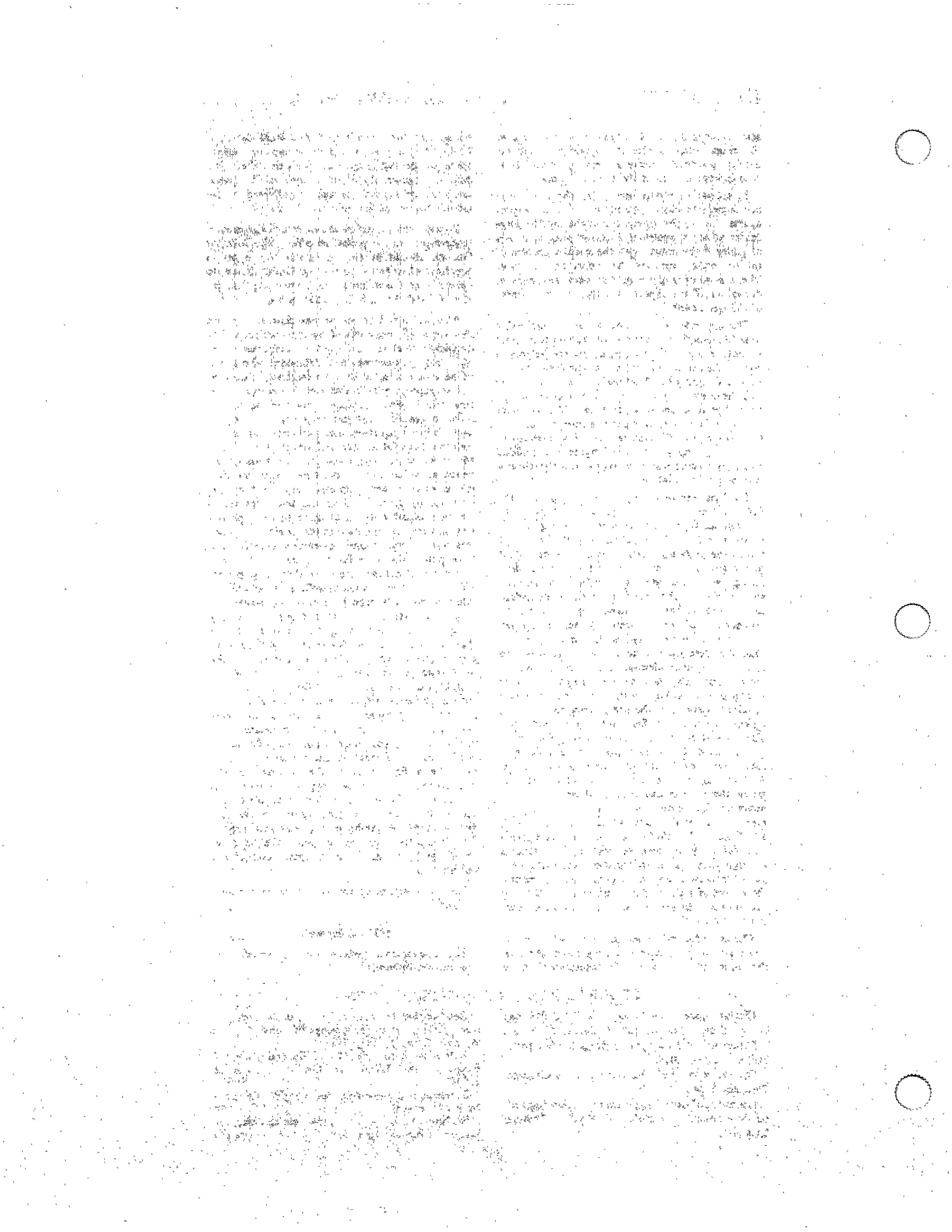
Necessity of expediting criminal proceedings after determination of guilt, see Wright: Criminal 2d § 632.

Relationship between judgment on verdict and rule pertaining to rendering of verdicts, see Wright: Criminal 2d § 511.

Relationship to rule 410 of Federal Rules of Evidence, see Wright & Graham: Evidence § 5349.

Sentence and judgment, see Wright: Criminal 2d § 521 et seq.

Withdrawal of plea of nolo contendere, see Wright: Criminal 2d § 177.



nal Release of Probationer, etc.

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Rule 40(d); Proposed Amendment to Explicitly Authorizing Magistrate Judge to Set Terms of Release of Probationer or Supervised Releasee.

DATE: September 2, 1992

Magistrate Judge Robert Collins has recommended that the Committee consider an amendment to Rule 40(d) which would explicitly address the issue of whether a magistrate judge acting under that rule may set term of release of a probationer or supervised releasee. His interest in this issue arose out of a case before him. His lengthy and careful analysis of the issue is included in the attached Memorandum and Order. He ultimately concluded that Rule 40(d)(2) and 32.1(a)(1) authorize a magistrate judge to set conditions in certain cases.

This matter will be on the agenda for the Seattle meeting in October.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

August 17, 1992

Honorable Robert B. Collings
United States Magistrate Judge
918 John W. McCormack Post Office
and Courthouse
Boston, Massachusetts 02109-4565

Dear Judge Collings:

Thank you very much for your letter of August 11, 1992 suggesting an amendment to Rule 40(d), F. R. Cr. P., permitting a Magistrate Judge to consider conditional release of a probationer or supervised releasee when arrested in a district other than the district having jurisdiction of the person.

By copy of this letter to our Reporter, I will ask that your suggestion be placed upon the Advisory Committee's agenda for consideration at its upcoming meeting in October. You will, of course, be informed concerning the result of the Committee's deliberations.

Thank you again for your suggestion.

Very truly yours,

WTH

Wm. Terrell Hodges

c: Honorable Robert E. Keeton
Professor David A. Schlueter ✓

Dave: Please add this to the agenda for the meeting in Seattle.

WTH.

United States District Court
District of Massachusetts
918 John W. McCormack Post Office & Courthouse
Boston, Massachusetts 02109-4363

Robert B. Collings
United States Magistrate Judge

August 11, 1992

The Honorable William Terrell Hodges
Chairman, Advisory Committee on
Criminal Rules
Chief Judge, U.S. District Court
Suite 108, United States Courthouse
611 North Florida Avenue
Tampa, Florida 33602

Dear Judge Hodges:

I am writing to suggest that the Advisory Committee on Criminal Rules consider an amendment to Rule 40(d), Fed.R.Crim., to make explicit whether or not a magistrate judge is empowered to set conditions of release on a probation violator who is arrested on a probation violation warrant in a district other than the district in which probation was imposed. For some time now, the U.S. Attorneys in this district have been taking the position that if an alleged probation violator is arrested in a district which was not the district in which probation was imposed and probation jurisdiction has not been transferred to the district of arrest, the magistrate judge in the district of arrest is not empowered to set conditions of release pending removal but must detain the alleged violator.

The issue came to a head in a case before me, and I have labored to find out the answer. To my dismay, the analysis required a lot more work than anticipated, and although I reached a result, the answer is far from clear. I enclose a copy of the Memorandum and Order I wrote on the subject in the case of United States v. Weddleton.

May I suggest that if the committee is of the view that magistrate judges should be permitted to set bail in all cases in which a probation violator is arrested in a district other than the one which imposed the probation, the committee amend Rule 40(d) so that language which I have underlined is added:

(d) **Arrest if Probationer or Supervised Releasee.** If a person is arrested for a violation of probation or supervised release in a district other than the district having jurisdiction, such person shall be taken without unnecessary delay before the nearest available federal magistrate [judge]. The person may be released pursuant to Rule 46(c). The federal magistrate [judge] shall...

On the other hand, if the committee is of the view that conditions of release should not be able to be set in the situations governed by Rule 40(d)(2) and/or 40(d)(3), Fed.R.Crim.P., may I suggest that amendments be fashioned to those sections of Rule 40(d) to make them explicit on the issue.

Very truly yours,

ROBERT B. COLLINGS
United States Magistrate Judge

Attachment (1)

Copy to (w/ attachment):
Honorable Robert E. Keeton, Chairman
Standing Committee on Rules
of Practice and Procedure
United States District Judge
306 John W. McCormack Post office
and Courthouse
Boston, Massachusetts 02109

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,

V.

MAGISTRATE JUDGE DOCKET NO. 92-0869RC (D. Mass.)

91-0110 CR-KING (S.D. Fla.)

MARK WEDDLETON.

MEMORANDUM AND ORDER RE:
SETTING CONDITIONS OF RELEASE

COLLINGS, U.S.M.J.

INTRODUCTION

Mark Weddleton was arrested in the District of Massachusetts on a warrant issued by the United States District Court for the Southern District of Florida. The warrant was based on a Petition filed by the U.S. Probation Officer for the Southern District of Florida on March 4, 1992 alleging that the defendant violated the terms and conditions of his probation which had been imposed in that Court on September 30, 1991. Although jurisdiction over the probationer has not been transferred to Massachusetts, the defendant was being supervised by the Probation Office in Massachusetts and the acts which formed the basis of the allegation that defendant violated his probation occurred in Massachusetts.

The Government contends that on these facts, the undersigned has no discretion to set conditions of release for the defendant and must hold the defendant in custody under the applicable law and

rules; counsel for the defendant contends otherwise. The issue requires a close analysis of the history and wording of the applicable statutes as well as the interplay between Rules 32.1 and 40(d) of the Federal Rules of Criminal Procedure.

STATUTES - PAST AND PRESENT

I first turn to the statutes, both past and present, which have governed the arrest of probation violators to determine whether any speak to the question of whether, after a probationer's arrest, a judicial officer has the power to release the violator on bail or conditions after initial appearance pending further hearings on the violation. However, before commencing the analysis of the statutes, one further fact must be mentioned. According to the indictment which was filed in the Southern District of Florida upon which the defendant was convicted and sentenced to probation, the offenses of which the defendant was convicted occurred between December 11, 1990 and January 6, 1991. This is important because the applicable statutes are different for persons convicted of offenses occurring before November 1, 1987 and offenses committed after that date. In the instant case, the defendant committed the offenses for which he was convicted after November 1, 1987.

Statutes Applicable To Convictions For
Offenses Committed Before November 1, 1987

If the offenses for which the defendant was convicted had occurred before November 1, 1987, the procedures to be followed after his arrest in Massachusetts would have been governed by 18 U.S.C. § 3653, which provides, in pertinent part:

> If the probationer shall be arrested in any district other than that in which he was last supervised, he shall be returned to the

> district in which the warrant was issued, unless jurisdiction over him has been transferred as above provided to the district in which he is found, and in that case he shall be detained pending further proceedings in that district.

June 25, 1948, c. 646, 62 Stat. 842; May 24, 1949, c. 139, § 56, 63 Stat. 96.

A close reading of this statute reveals that if jurisdiction is not transferred to the district of arrest, the defendant "shall be **returned** to the district in which the warrant issued." If jurisdiction is transferred to the district of arrest, the defendant "shall be **detained** pending further proceedings in that district." It is clear that the last independent clause, i.e., "and in that case he shall be detained pending further proceedings in that district," refers to the clause immediately preceding, i.e., "unless jurisdiction over him has been transferred as above provided to the district in which he is found." Thus, the statute requires that a person be "returned" when probation supervision has been not been transferred and "detained" when the jurisdiction has been transferred. The meaning of the word "detained" seems clear enough. But does the word "returned" include detention, i.e., does the word "returned" mean "returned in custody?" It would seem odd to require detention when jurisdiction is transferred but allow conditions of release to be set when a defendant is to be returned to the district in which the warrant issued.

Title 18 U.S.C. § 3653 was originally enacted on June 25, 1948 as part of a comprehensive revision of the criminal code. When enacted, the last two sentences read as follows:

> The warrant [for the probationer's arrest] may be executed either by the probation officer or the United States marshal for either the district in which the probationer was placed upon probation or for any district in which he is found. If the probationer is arrested in a district other than that in which he was placed upon probation, the officer making the arrest may return him to the district in which the warrant was issued.

The wording of this statute would seem to imply that the probationer would be "returned" to the district in which the warrant was issued in the custody of the officer who made the arrest.

It so happens that on the same date as Congress passed the comprehensive revision of the criminal code, i.e., June 25, 1948, Congress also passed an amendment to § 3653 by amending the 1925 Act which had established a probation system in the United States Courts. This statute read, in pertinent part:

> If the probationer shall be so arrested in a district other than that in which he is being supervised, he shall be returned to the district out of which such warrant shall have been issued, unless jurisdiction over him is transferred as above provided to the district in which he is found, and in that case he shall be detained pending further proceedings in that district.

H.R. Rep. No. 2766, 80th Cong., 2d Sess, (1948), reprinted in 1948 U.S. Code Congressional Service, p. 703-4.

In 1949, to reconcile two separate and overlapping amendments made on June 25, 1948 to the same statute, Congress again amended § 3653 so that it reads as it now does for offenses occurring before November 1, 1987. See § 3653, page 2, supra.

Thus, it can be seen that the provision regarding a

probationer being "detained" first appeared in the amendments to the act providing for a probation system; the revision of the criminal code passed the same day provided that the officer making the arrest could "return" the probationer to the district from which the warrant issued. In reconciling the two, Congress, in essence, followed the amendment to the act providing for the establishment of a probation system whereby a defendant is "returned" if jurisdiction is not transferred and "detained" if jurisdiction is transferred.

The legislative history of the amendments to the probation act is brief and provides no clue as to what was meant by the use of the word "detained." The primary thrust of the amendment was to allow for transfer of jurisdiction which did not exist prior to the enactment. Prior practice had permitted transfer of supervision, but if there was a violation, the probationer "...must be returned to the court which granted probation," a "procedure sometimes involv[ing] considerable time and expense." S. Rep. No. 1544, 80th Cong., 2d Sess. (1948), reprinted in 1948 U.S. Code Congressional Service, pp. 2061-2. The amendment enacted on June 25, 1948 provided for a transfer of jurisdiction after arrest if both districts consented. However, it is unclear why the word "returned" is used if jurisdiction is not transferred and why "detained" is used if jurisdiction is transferred.

Statutes Applicable To Convictions For Offenses Committed After November 1, 1987

Be that as it may, the statutory provisions governing cases in

which the underlying offenses occurred after November 1, 1987 (18 U.S.C. § 3565) was enacted on October 12, 1984 and has no similar provision. That section provides, in pertinent part:

> (a) **Continuation or revocation.** - If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in section 3553(a) to the extent they are applicable -
>
> (1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or
>
> (2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.

Pub.L. 98-473, Title II, § 212(a)(2), October 12, 1984, 98 Stat. 1995, amended Pub.L. 100-690, Title VI, § 6214, Title VII, § 7303(a)(2), Nov. 18. 1988, 102 Stat. 4361, 4464; Pub.L. 101-647, Title XXXV, § 3585, Nov. 29, 1990, 104 Stat. 4930.

As can be seen, there is no mention whatever in this statute of the procedures to follow when a probationer is arrested in a district other than the district which imposed the probation and from which the warrant issued. Congress did not incorporate into § 3565 the provisions of § 3653 requiring that probationers arrested in other districts be either "returned" or "detained." However, whether by omitting the language of § 3653 in the new statute, Congress intended to allow for the setting of bail or conditions of release in such situations is unclear.

A review of the legislative history of the repeal of 18 U.S.C. § 3653 and the enactment of 18 U.S.C. § 3565 for offenses committed

after November 1, 1987 does not reveal any discussion as to why the provisions of § 3653 governing the situation in which a probationer is arrested in a district other than the one in which the warrant was issued were not included in § 3565. There is the following statement in the legislative history to § 3565:

> Provisions governing the arrest of a probationer are contained in proposed 18 U.S.C. § 3606; provisions governing the hearing to be accorded the probationer are contained in Rule 32.1 [FN 230: See Gagnon v. Scarpelli, 411 U.S. 778 (1873); see also Morrisey v. Brewer, 408 U.S. 472 (1972).] The Committee felt it appropriate to leave procedural provisions concerning probation revocation rights in Rule 32.1 where they will remain subject to periodic revision by the Judicial Conference of the United States if necessary.

S. Rep. No. 225, 98th Cong., 2d Sess. (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3185.

It could perhaps be argued that when the Committee referred to "leav[ing] procedural provisions concerning the probation revocation rights in Rule 32.1 where they will remain subject to periodic revision by the Judicial Conference," it meant to leave the question of whether conditions of release may be set to the rule also. However, the citation to the Gagnon and Morrisey cases makes it clear that the "procedural provisions" referred to are those governing the hearing as contained in Rule 32.1(a)(1)(A) through (D) rather than to any issue of whether conditions of release may be set.

It is noted that the pertinent provision of the 1949 version of § 3653 under discussion is contained in the third paragraph of that statute dealing with situation in which "...the

probationer...[is] arrested in any district other than that in which he was last supervised."[1] The only mention of arrest of a probationer in the legislative history of § 3565 is the statement that "...[p]rovisions governing the arrest of the probationer are contained in proposed 18 U.S.C. § 3606." Section 3606 provides that:

> If there is probable cause to believe that a probationer on supervised release has violated a condition of his probation or release, he may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. A probation officer may make such an arrest wherever the probationer or releasee is found, and may make the arrest without a warrant. The court having supervision of the probationer or releasee, or, if there is no such court, the court having last supervision of the probationer or releasee, may issue a warrant for the probationer or releasee for violation of a condition of release, and a probation officer or United States marshal may execute the warrant in the district in which the warrant was issued or in any district in which the probationer or releasee is found.

The legislative history of § 3606 reads, in pertinent part:

> Proposed 18 U.S.C. 3606 continues the provisions of 18 U.S.C. 3653 which authorize the arrest and return of a probationer to the court having jurisdiction over him when there has been a violation of a condition of probation, and expands the provision to refer

---

[1] If the probationer shall be arrested in any district other than that in which he was last supervised, he shall be returned to the district in which the warrant was issued, unless jurisdiction over him has been transferred as above provided to the district in which he is found, and in that case he shall be detained pending further proceedings in that district.

> to persons on supervised release pursuant to section 3583. The Committee intends that any probationer arrested for violation of a condition of probation be **returned** to the district in which he is being supervised even if the arrest is made in a different district.

S. Rep. No. 225, 98th Cong., 2d Sess. (1984) reprinted in 1984 U.S.C.C.A.N. p. 3182, 3316.

The use of the word "return" in the legislative history is of interest. Does the word mean "returned in custody" as the word "return" did in the 1948 and 1949 enactments to 18 U.S.C. § 3653? There is no explicit answer given.

Lastly, a review of the provisions of the various bail statutes in effect from 1948 to the present reveals no mention of whether a probation violator has a right to be released on bail pending probation revocation proceedings or whether indeed the Court has the power to release a probation violator on bail pending either a preliminary hearing or a revocation hearing. See Section 3141, Act June 25, 1948, c. 645, 62 Stat. 683, amended Pub.L. 89-465, § 5(b), June 22, 1966, 80 Stat. 214, repealed Pub.L. 98-473, Title II, c. 1, § 203(a), Oct. 12, 1984, 98 Stat. 1976.

RULES 32.1 AND 40(d), FEDERAL RULES OF CRIMINAL PROCEDURE

Since a review of the applicable statutes and legislative histories has failed to answer the question of whether a judicial officer has the authority to set conditions of release when a probationer is arrested for violation of probation in a district other than the district which imposed the probation, an examination of the applicable rule and advisory committee notes is necessary.

Rule 40(d), Fed.R.Crim.P., provides:

> (d) **Arrest of Probationer or Supervised Releasee.** If a person is arrested for a violation of probation or supervised release in a district other than the district having jurisdiction, such person shall be taken without unnecessary delay before the nearest available federal magistrate. The federal magistrate shall:
>
> (1) Proceed under Rule 32.1 if jurisdiction over the person is transferred to that district;
>
> (2) Hold a prompt preliminary hearing if the alleged violation occurred in that district, and either (i) hold the person to answer in the district court of the district having jurisdiction or (ii) dismiss the proceedings and so notify that court; or
>
> (3) otherwise order the person held to answer in the district court having jurisdiction, upon production of certified copies of the judgment, the warrant, and the application for the warrant, and upon the finding that the person before the magistrate is the person named in the warrant, the federal magistrate shall hold the person to answer in the district in which the warrant was issued.

The instant case is clearly governed by Rule 40(d)(2), Fed.R.Crim.P. The violation is alleged to have occurred in Massachusetts and jurisdiction has not been transferred. However, the rule is silent as to whether a federal magistrate judge can set conditions of release pending the preliminary hearing in the district of arrest and/or the final revocation hearing in the district from which the warrant issued. Rule 40(d)(1), Fed.R.Crim.P., as amended in 1982, contains a reference to Rule 32.1, Fed.R.Crim.P.; Rule 40(d)(2) does not. However, the conduct

of a preliminary hearing is governed by Rule 32.1(a)(1), Fed.R.Crim.P., which provides:

> (1) **Preliminary Hearing.** Whenever a person is held in custody on the grounds that the person has violated a condition of probation or supervised release, the person shall be afforded a prompt hearing before any judge or a United States magistrate who has been given authority pursuant to 28 U.S.C. § 636 to conduct such hearings, in order to determine whether there is probable cause to hold the person for a revocation hearing. The person shall be given
>
> > (A) notice of the preliminary hearing and its purpose and of the alleged violation;
> >
> > (B) an opportunity to appear at the hearing and present evidence in the person's own behalf;
> >
> > (C) upon request, the opportunity to question witnesses against the person unless, for good cause, the federal magistrate decides that justice does not require the appearance of the witness; and
> >
> > (D) notice of the person's right to be represented by counsel.
>
> The proceedings shall be recorded stenographically or by an electronic recording device. If probable cause is found to exist, the person shall be held for a revocation hearing. The person may be released pursuant to Rule 46(c) pending the revocation hearing. If probable cause is not found to exist, the proceeding shall be dismissed.

Thus, Rules 32.1 and 40(d)(1), Fed.R.Crim.P.,[2] provide for the

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[2] Revisions have been proposed to both Rule 32.1 and 40, Fed.R.Crim.P. See 137 F.R.D. 500-502. However, no changes have been proposed to the subsections applicable to the instant case, i.e., Rule 32.1(a)(1) and 40(d).

setting of conditions of release pending a revocation hearing[3] at least as to probationers who have been arrested in either the district in which the probation was imposed or the district to which jurisdiction has been transferred. The question is, does the provision of Rule 32.1, Fed.R.Crim.P., providing for bail pending a final revocation hearing, apply to the situation set forth in Rule 40(d)(2), Fed.R.Crim.P., which applies to this case where the probationer is arrested in a district to which jurisdiction has not been transferred but in which the alleged violation occurred? Although not raised on the facts of the instant case, a further question is whether conditions of release may be set in a case governed by Rule 40(d)(3), Fed.R.Crim.P., in which a probationer is arrested in one district, no transfer of jurisdiction has been accomplished, and the acts which form the basis of the violation did not occur in the district of arrest.

It is to be noted that the use of the words "shall be held"

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[3] Upon first reading, it is noted that Rule 32.1(a)(1) (eff. 12/1/91) does not provide for release from the time of the initial appearance upon arrest to the time of the preliminary hearing. This is because, by its terms, Rule 32.1(a)(1) only applies to "a person held in custody on the grounds that the person has violated a condition of probation." Persons who are not held in custody on a probation violation charge are not entitled to a preliminary hearing. Thus, the rule presumes that a probationer may be arrested, brought before a magistrate judge for an initial appearance, and not held in custody pending the revocation hearing, presumably because conditions of release were set at the initial appearance. If a probationer is detained at the initial appearance, he is " held in custody" and is entitled to a preliminary hearing pursuant to Rule 32.1(a)(1). That rule explicitly allows a magistrate judge to release a probationer after a preliminary hearing if the probationer had not been released upon his initial appearance but rather held in custody pending the preliminary hearing. See Rule 32.1, Fed.R.Crim.P., Notes of Advisory Committee to 1979 Addition.

or "shall hold" as used in Rules 32.1(a), 40(d)(2) and 40(d)(3), Fed.R.Crim.P., do not mean "shall be detained." Rather, the words have the same meaning in these rules as they do in Rule 5.1, Fed.R.Crim.P., which provides that if probable cause is found after a preliminary examination, "...the federal magistrate [judge] shall hold the defendant to answer in the district court." No one would contend that the words as used in Rule 5.1, Fed.R.Crim.P., mean that any time a magistrate judge finds probable cause after a preliminary hearing, the magistrate judge must detain the defendant. Rather, the word "hold" means that the case will proceed and the defendant will be subject either to conditions of release or detention as opposed to being "discharged" as per Rule 5.1(b), Fed.R.Crim.P. Similarly, in Rule 32.1(a), Fed.R.Crim.P., if probable cause is found, the probationer "shall be held for a revocation hearing" but if probable cause is not found, the proceedings shall be "dismissed." The same is true of Rule 40(d)(2), Fed.R.Crim.P. After a preliminary hearing, the magistrate judge is commanded to either "hold" the person to answer or "dismiss the proceedings." This point is made explicit in the Notes of the Advisory Committee to the 1979 Addition to Rule 32.1, Fed.R.Crim.P., which state:

> The federal magistrate [judge]...if he finds probable cause of a violation [is to] hold the probationer for a revocation hearing. The probationer may be released pending the revocation hearing.

Emphasis added.

DISCUSSION

Returning to the framework of Rule 40(d), Fed.R.Crim.P., it is to be recalled that rule covers three scenarios which may be applicable when a probationer is arrested in a district other than the district which imposed the probation. These three are: (1) jurisdiction is transferred to the district of arrest (Rule 40(d)(1), Fed.R.Crim.P.); (2) jurisdiction has not been transferred but the acts which form the basis of the alleged violation occurred in the district of arrest (Rule 40(d)(2), Fed.R.Crim.P.); and (3) jurisdiction has not been transferred and the acts which form the basis of the alleged violation did not occur in the district of arrest. (Rule 40(d)(3), Fed.R.Crim.P.)

The result in the first scenario, i.e., the situation described in Rule 40(d)(1), Fed.R.Crim.P., is clear; the rule explicitly commands the magistrate judge to "[p]roceed under Rule 32.1." Put another way, the magistrate judge should proceed in the same manner he would proceed if the probation had been imposed in the district in which the magistrate judge sits. Since Rule 32.1 applies only when a person is held in custody, it would seem that the only inference which can be drawn from the rules is that upon initial appearance after arrest, the magistrate judge is empowered to set conditions of release. As noted in footnote 3, supra, Rule 32.1, Fed.R. Crim.P., specifically provides for the setting of conditions of release after a preliminary hearing pending the revocation hearing. It would be illogical to infer that the framers of the rule intended that an arrested probationer, upon initial

appearance before a magistrate judge, must be held in custody pending the preliminary hearing but could be released after the preliminary hearing pending the revocation hearing.

Thus, I conclude that in the situation governed by Rule 40(d)(1), Fed.R.Crim.P., a magistrate judge may set conditions of release upon initial appearance; the setting of the conditions is governed by Rule 46(c), Fed.R.Crim.P., which incorporates the standard of 18 U.S.C. § 3143 in which the standard for release pending sentencing or appeal is promulgated.

I turn next to the third scenario, i.e., the situation governed by Rule 40(d)(3), Fed.R.Crim.P. My analysis of the past and present statutes and rules leads to the conclusion that if a probationer is arrested in a district other than the one in which the probation was imposed and the acts which form the basis of the alleged violation did not occur in the district of arrest, and jurisdiction has not been transferred, there is no basis on which conditions of release may be set. No statute, either past or present, has any provisions explicitly permitting the setting of conditions of release in such a situation. Until its repeal in 1984, 18 U.S.C. § 3653 had always provided for the "return" of alleged probation violators to the district of origin in the situation set forth in Rule 40(d)(3), Fed.R.Crim.P., and so far as I can discern, "returned" meant "returned in custody." In these circumstances and in the absence of any explicit indication to the contrary, I interpret the word "returned" as used in the

legislative history to the 1984 enactment, 18 U.S.C. § 3606,[4] as it has historically been used in the prior statutes. In doing so, I rely heavily on the fact that the legislative history recites that "[p]roposed 18 U.S.C. 3606 **continues the provisions of 18 U.S.C. 3653 which authorizes the arrest and return of a probationer to court having jurisdiction over him...**" (emphasis supplied)[5]

That leaves the second scenario, governed by Rule 40(d)(2), Fed.R.Crim.P., which applies to the instant defendant. At first blush, it would appear that the same reasoning as applied to the situation governed by Rule 40(d)(3) should govern this situation. The wrinkle is the command contained in Rule 40(d)(2), Fed.R.Crim.P., that the magistrate judge shall "[h]old a prompt preliminary hearing." Although Rule 40(d)(2), Fed.R.Crim.P., contains no explicit reference to Rule 32.1, Fed.R.Crim.P., it is clear that the preliminary hearing which is to be conducted is the same preliminary hearing as is described in Rule 32.1(a)(1), Fed.R.Crim.P., and the conduct of the hearing is to be in accordance with the procedural requirements set forth in that rule, particularly the procedures set forth in the subsections denoted (A) through (D).

It is to be recalled that, in subsections (A) through (D), the rule contains four sentences[6] which provide:

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[4] See page 8, supra.

[5] S. Rep. No. 225, 98th Cong., 2d Sess. (1984) reprinted in 1984 U.S.C.C.A.N. p. 3182, 3316.

[6] I have inserted the bracketed numbers in order to segregate each of the four sentences for discussion purposes.

> [1] The proceedings shall be recorded stenographically or by an electronic recording device. [2] If probable cause is found to exist, the person shall be held for a revocation hearing. [3] The person may be released pursuant to Rule 46(c) pending the revocation hearing. [4] If probable cause is not found to exist, the proceeding shall be dismissed.

Rule 32.1(a), Fed.R.Crim.P.

There can be no doubt that the requirement of the first sentence would apply to a preliminary hearing held in accordance with the command of Rule 40(d)(2), Fed.R.Crim.P. The second and fourth sentences parallel the clauses denoted (i) and (ii) of Rule 40(d)(2), Fed.R.Crim.P., but are modified to deal with the specific situation which Rule 40(d)(2), Fed.R.Crim.P., was meant to govern.[7] Conceding the result far from free of doubt, I conclude that when the drafters of Rule 40(d)(2), Fed.R.Crim.P., commanded the magistrate judge to hold a "preliminary hearing," the command was meant to incorporate into the proceedings all of the provisions of Rule 32.1(a), Fed.R.Crim.P., which do not require modification to conform to the specific situation with which Rule 40(d)(2), Fed.R.Crim.P., was meant to govern. This would include the third sentence permitting "release" pending the revocation hearing.

For the same reasons I discussed in connection with Rule 40(d)(1), Fed.R.Crim.P., I am of the opinion that the power is not limited to setting conditions of release after the preliminary

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[7] After a preliminary hearing, Rule 40(d)(2), Fed.R.Crim.P. commands the magistrate judge "...either (i) hold the person to answer in the district court or (ii) dismiss the proceedings and so notify that court...".

hearing "pending the revocation hearing" but also includes the power to set conditions at the initial appearance pending the preliminary hearing. See discussion at pp. 13-14, supra.

CONCLUSION

Accordingly, I rule that Rules 40(d)(2) and 32.1(a)(1), Fed.R.Crim.P., empower a magistrate judge to set conditions of release in any case, such as that of the defendant, in which (1) an alleged probation violator is arrested in a district other than the district in which the probation was imposed, (2) jurisdiction has not been transferred to the district of arrest, and (3) the acts which form the basis of the allegation that the probation has been violated occurred in the district of arrest.

I further conclude that the same rule power exists when jurisdiction has been transferred to the district of arrest. Rule 40(d)(1), Fed.R.Crim.P.

The result is different if jurisdiction has not been transferred and the acts forming the allegation of probation violation did not occur in the district of arrest. Thus, if a probation violator falls within the purview of Rule 40(d)(3), Fed.R.Crim.P., there is no provision which empowers a judicial officer to set conditions of release.

ROBERT B. COLLINGS
United States Magistrate Judge

August 11, 1992.

Rule 43(b).

Proposal from DOJ

Re: Sentencing of Absent Defendant (Memo).

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ROBERT E. KEETON
CHAIRMAN

JOSEPH F. SPANIOL, JR.
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
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APPELLATE RULES
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CIVIL RULES
WILLIAM TERRELL HODGES
CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

August 4, 1992

Honorable Robert S. Mueller, III
Assistant Attorney General
Criminal Division, Room 2107
U. S. Department of Justice
Washington, DC 20530

Dear Mr. Mueller:

Thank you for your letter of July 31, 1992, proposing an amendment to Rule 43(b) of the Criminal Rules permitting imposition of sentence in absentia.

By copy of this response to our Reporter, Professor Schlueter, I will ask that your proposal be added to the Committee's agenda for consideration at our next meeting this Fall.

Sincerely,

Wm. Terrell Hodges

Wm. Terrell Hodges

c: Mr. Roger Pauley
Professor David A. Schlueter

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Rule 43(b), DOJ Proposal to Permit Court to Sentence Absent Defendant

DATE: September 3, 1992

Attached is a letter from Mr. Robert S. Mueller, III, which requests that the Committee consider amending Rule 43(b) to provide for in absentia sentencing. The letter sets out reasons for the amendment along with suggested language.

Mr. Mueller draws an anology between forfeiting the right to be present at sentencing with the "disentitlement" doctrine which permits an appellate court to dismiss an appeal of a fugitive-appellant. As noted in footnote 1 of the letter, however, there is apparently a split in the circuits on that doctrine and the Supreme Court has decided to address the issue.

This matter will be on the agenda for the Committee's October meeting in Seattle.

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

July 31, 1992

Honorable William Terrell Hodges
Chairman
Advisory Committee on Criminal Rules
P.O. Box 1620
Jacksonville, Florida 32201-1620

Dear Judge Hodges:

I am writing on behalf of the Department of Justice to request that the Advisory Committee place on the agenda for its next meeting a proposal to amend Rule 43(b), F.R.Crim. P, to permit a court to sentence in absentia a defendant who has fled during the trial or after verdict.

Currently, as you know, Rule 43(b) allows the court to continue the trial of a defendant, who voluntarily absents himself after the trial has begun, through the return of a verdict. Rule 43(b), however, does not provide for the waiver of the right to be present at sentencing of such a defendant, and thus does not permit the timely imposition of sentence on a fugitive defendant. The 1944 Advisory Committee Note, which accompanies the Rule, gives no reason for the Rule's lack of waiver of the right to be present at sentencing, other than to observe that this aspect of the Rule is "a restatement of existing law."

We believe the Rule should be changed to give the trial court discretion to sentence a fugitive defendant. The change is a fair response to the defendant's choice voluntarily to absent himself from the trial, and is necessary in some situations to avoid prejudice to the government. A defendant may elude capture for many months or even years. See, e.g., United States v. Parrish, 887 F.2d 1107 (D.C. Cir. 1989) (defendant escaped during trial and was at large for 14 years; the court held that defendant had forfeited the right to challenge his conviction on appeal); see also, to the same effect, United States v. London, 723 F.2d 1538 (11th Cir.), cert. denied, 467 U.S. 1228 (1984); United States v. Persico, 853 F.2d 134 (2d Cir. 1988);

United States v. DeValle, 894 F.2d 133 (5th Cir. 1990). [1] Given the existence of the comparatively new sentencing guidelines system, under which sentences often depend on proof of aggravating factors on which the government bears the burden of persuasion, a lengthy delay in sentencing may prejudice the government by impairing its ability to establish certain facts at the sentencing proceeding.[2] In this regard, we are advised that under the current system, where sentencing is postponed until a fugitive defendant's recapture, the Probation Office does not begin to prepare a presentence report until the defendant is captured.[3]

Unfortunately, the incidence of defendants who flee, after trial has begun and prior to sentencing, is both substantial and increasing. According to statistics furnished by the Administrative Office of the United States Courts, the number of defendants who were fugitives after trial (but before sentencing) rose from 737 as of June 30, 1989, to 853 as of June 30, 1991 -- an increase of more than 15%. In Estelle v. Dorrough, 420 U.S. 534 (1975), the Supreme Court sustained a State court decision dismissing the appeal of a defendant, who had escaped after appealing and was apprehended two days later, noting that the statute requiring such disposition served the end of "discourag-[ing] the felony of escape and encourag[ing] voluntary surrenders." Id. at 537. So too, allowing a court to impose sentence on a fugitive defendant, who thereby would be deprived of the potential benefits of personal participation in the preparation of the presentence report and of exercising the right to allocution, may contribute to discouraging the felony of escape and encouraging voluntary surrender.

We emphasize that, under the amendment we urge, a court would not be required to sentence a fugitive defendant, just as, under Rule 43(b) today, the court is not required to complete the

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[1] A conflict among the circuits exists on this issue, compare Katz v. United States, 920 F.2d 610 (9th Cir. 1990), which the Supreme Court will evidently resolve next Term. See Ortega-Rodriguez v. United States, No. 91-7749, cert. granted June 15, 1992.

[2] In Persico, supra, the court cited as one of the reasons for denying a recaptured fugitive the right to appeal his conviction the fact that the "delay occasioned by the period of a defendant's flight can prejudice the prosecution should a new trial be ordered after a successful appeal." 853 F.2d at 137.

[3] Telephone conversation of Roger Pauley, Criminal Division, with Donald Chamlee, Chief, Probation and Pretrial Services Division, Administrative Office of the United States Courts, June 16, 1992.

trial of such a defendant. Rather, the matter is left to the trial court's discretion, using guideposts developed by the courts of appeals. See, e.g., United States v. Benavides, 596 F.2d 137 (5th Cir. 1979). However, the present Rule should be changed to vest the courts with the ability to sentence a defendant who has, by his voluntary decision to flee, eschewed the judicial process and disentitled himself to the right to be present at various stages of the trial. Specifically, we recommend that Rule 43(b) be amended to read as follows:

> The further progress of the trial to and including the return of the verdict (and, in a non-capital case involving the circumstances in paragraph (1), the imposition of sentence) shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present, etc. (proposed new matter underscored).

Your and the other Committee members' consideration of this issue is greatly appreciated.

Sincerely,

Robert S. Mueller, III
Assistant Attorney General

cc: Professor David Schlueter

Other Rules

Agenda Item II.D
10/1992
Criminal

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Proposed Amendment to Rule 57

DATE: September 3, 1992

At is January 1992 meeting, the Standing Committee directed the reporters of the Advisory Committees to consider uniform amendments regarding the authority to promulgate local rules. At its Spring 1992 meeting, the Advisory Committee considered such amendments to Rule 57. The Committee's proposal, along with similar proposals to the Civil, Appellate, and Bankruptcy Rules, were considered by the Standing Committee at its June 1992 meeting in Washington. After extended discussion, the matter was tabled pending additional coordination by the Reporter for the Standing Committee. Apparently, the subject will be revisited at the Standing Committee's December meeting.

The attached draft reflects changes suggested by the Standing Committee. If the Advisory Committee has any views, or additional suggestions, about the draft it would be appropriate to briefly address them at the upcoming Seattle meeting.

RULES OF CRIMINAL PROCEDURE

Rule 57. Rules by District Courts

(a) IN GENERAL. Each district court by action of a majority of the district judges ~~thereof~~ may from time to time, after giving appropriate notice and an opportunity to comment, make and amend rules governing its practice that are ~~not inconsistent~~ consistent with, but not duplicative of, ~~these rules~~ the rules adopted under 28 U.S.C. § 2072 and § 2075. Any local rule must be numbered or identified in conformity with any uniform system prescribed by the Judicial Conference of the United States. In all cases not provided for by rule, the district judges and magistrate judges may regulate their practice in any manner consistent with the rules adopted under 28 U.S.C. § 2072 and § 2075 and those of the district in which they act.

(b) EFFECTIVE DATE AND NOTICE. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district court is located. Copies of the rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts

RULES OF CRIMINAL PROCEDURE

and shall be made available to the public. ~~In all cases not provided by rule, the district judges and magistrate judges may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.~~

COMMITTEE NOTE

Rule 57 provides flexibility to district courts to promulgate local rules of practice and procedure. But experience has demonstrated several problems. The amendments are intended to address those problems. First, as originally written, Rule 57 only prohibited rules which were inconsistent with the rules of criminal procedure. No mention was made of local rules which might attempt to paraphrase or merely duplicate an existing rule of criminal procedure. Such duplication can confuse practitoners where it is not entirely clear whether the national or local rule should prevail. Duplication can also obscure any local variations or special requirements. The amendment now specifically prohibits such. The prohibition would also apply to local rules which merely attempt to paraphrase a rule of criminal procedure.

Second, the absence of any uniform numbering of local rules can become an unnecessary trap for unwary counsel who may be unaware of applicable local provisions. To remedy that problem, the amendments require that local rules conform in numbering with any uniform system of numbering devised by the Judicial Conference of the United States.

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Rule 59: Authorization for Judicial Conference to Make Technical Amendments to Rules

DATE: September 3, 1992

At its January 1992 meeting, the Standing Committee considered a report from its Subcommittee on Style on the problem of making technical, nonsubstantive, amendments to the Rules. The subcommittee recommended that amendments to the various Federal Rules of Procedure could remove the necessity of seeking Supreme Court and Congressional approval of the so-called technical amendments. With regard to the Criminal Rules, it was suggested that an amendment to Rule 59 would be appropriate which would authorize the Judicial Conference to make the necessary changes.

At its Spring 1992 meeting, the Committee considered a draft amendment to Rule 59. Thereafter, I corresponded with the reporters of the other committees to determine if any consensus existed on amending language. At its Summer 1992 meeting, the Standing Committee considered the draft, along with similar drafts to the other rules, and decided to table the issue until its next meeting. As I understand, the Standing Committee's Reporter is to coordinate the amending language in all of the pertinent rules.

If the Advisory Committee has any additional thoughts on this proposal, it might be appropriate to state them at the upcoming Seattle meeting.

The draft amendment to Rule 59 is attached.

Advisory Committee on Criminal Rules
Rule 59
Spring 1992

RULES OF CRIMINAL PROCEDURE

Rule 59. Effective Date; Technical Amendments

(a) These rules take effect on the day which is 3 months subsequent to the adjournment of the first regular session of the 79th Congress, but if that day is prior to September 1, 1945, then they take effect on September 1, 1945. They govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.

(b) The Judicial Conference of the United States may amend these rules or explanatory notes to conform to statutory changes, to correct errors in grammar, spelling, cross-references, or typography and to make other similar technical changes of form or style.

COMMITTEE NOTE

The amendment is intended to streamline the process of correcting clerical or other technical matters which appear from time to time in the Rules. For example, recent technical amendments were required in Rule 54 to reflect superseding statutes which affected the prosecution of cases in Guam and the Virgin Islands by indictment or information. Currently such changes are formally reviewed by the Supreme Court and Congress pursuant to the Rules Enabling Act.

Agenda Item III B
Criminal 10/1992

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Submitted To

THE JUDICIAL CONFERENCE

OF

THE UNITED STATES

By

Standing Committee

On

Rules of Practice and Procedure

TABLE OF CONTENTS

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 101. Scope

These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States ~~magistrates~~ judges, to the extent and with the exceptions stated in rule 1101.

COMMITTEE NOTES

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without ~~prior disclosure of~~ first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

COMMITTEE NOTES

This rule, which relates to the manner of presenting testimony at trial, is revised to avoid an arguable conflict with revised Rules 26(a)(2)(B) and 26(e)(1) of the Federal Rules of Civil Procedure or

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1. New matter is underlined; matter to be omitted is lined through.

with revised Rule 16 of the Federal Rules of Criminal Procedure, which require disclosure in advance of trial of the basis and reasons for an expert's opinions.

If a serious question is raised under Rule 702 or 703 as to the admissibility of expert testimony, disclosure of the underlying facts or data on which opinions are based may, of course, be needed by the court before deciding whether, and to what extent, the person should be allowed to testify. This rule does not preclude such an inquiry.

Rule 1101. Applicability of Rules

(a) **Courts and ~~magistrates~~ judges.** These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to United States bankruptcy judges and United States ~~magistrates~~ judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States bankruptcy judges and United States ~~magistrates~~ judges.

* * * *

(e) **Rules applicable in part.** In the following proceedings these rules apply to the extent that matters of evidence are not provided

for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of ~~minor~~ misdemeanors and other petty offenses ~~by~~ before United States magistrates judges; * * * *

COMMITTEE NOTES

This revision is made to conform the rule to changes in terminology made by Rule 58 of the Federal Rules of Criminal Procedure and to the changes in the title of United States magistrates made by the Judicial Improvements Act of 1990.

Agenda Item III.C.
Criminal 10/1992

MEMO TO: **Advisory Committee on Criminal Rules**

FROM: **Dave Schlueter, Reporter**

RE: **Fed. R. Evid. 804, Definition of "Unavailability."**

DATE: **September 7, 1992**

At its Spring 1992 meeting, the Advisory Committee agreed upon an amendment to Federal Rule of Evidence 804(a) which would permit the trial court to rule that a person of "tender years" was unavailable for stated reasons. After discussing the Committee's proposal, the Standing Committee decide to refer the amendment back to the Committee for further consideration.

It should be noted that the proposed amendment was discussed following an extensive discussion and vote on the issue of whether a new evidence Advisory Committee should be created. Because the Judicial Conference will be addressing that point before the Committee's Seattle meeting, any discussion on Rule 804 may be mooted. Nontheless, I am attaching a marked copy of Rule 804 showing suggested changes by members of the Standing Committee during the debate on the amendment.

The Standing Committee was concerned with several points. First, Judge Ellis questioned whether the new ground for unavailability would raise confrontation clause problems. Second, there was some concern expressed about the term "tender years" and whether that was substantially equivalent to age. Third, one member questioned whether the Rule should be extended to persons other than children, and whether it should extend to non-victims. And fourth, one member questioned whether 804(b)(5)(the "catch-all" exception) would be the proper receptacle for child victim hearsay statements.

My sense is that some of the members of the Committee confused the "unavailability" requirement in Rule 804(a) with specific hearsay exceptions in Rule 804(b). That is, several of them apparently viewed the amendment as a new hearsay exception for child abuse victims, although the first sentence in the second paragraph of the Committee Note specifically states that the amendment does not add a new exception.

If the Committee decides to pursue this proposal, then some consideration should be given to the concerns raised by the Standing Committee.

FEDERAL RULES OF EVIDENCE

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant --

• • • • •

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity, or there is a substantial likelihood that testifying would result in serious physical, psychological, or emotional ~~trauma~~ to a declarant who is of tender years. or whose mental or emotional condition is comparable to a child of tender years.

injury

COMMITTEE NOTE

The amendment to Rule 804 is intended to fill a perceived gap in Federal Evidence. Although a majority of the States have adopted some variation of a child hearsay exception, either in their Rules of Evidence or in statutory form, no such exception exists in the Federal Rules of Evidence. The effect of the State adoptions has been that hearsay statements by child victims or witnesses may be admitted if certain procedural prerequisites are met.

The amendment does not adopt a specific exception for child hearsay statements. But it recognizes that calling a person of tender years to testify may present substantial dangers to the declarant. Thus, Rule 804(a)(4) has been amended to reflect that a declarant of tender years may be "unavailable" for purposes of the exceptions in the Rule due to a substantial likelihood of physical, psychological or emotional trauma. If the court finds the declarant

unavailable under those circumstances, the hearsay statement may be admissible under any of the exceptions in Rule 804(b), including the residual hearsay exception in Rule 804(b)(5). The Committee envisions that most litigation arising from this amendment will involve the residual exception.

The "declarant of tender years" provision has been included in Rule 804 to avoid confrontation clause problems, especially in criminal cases. See Idaho v. Wright, ____ U.S. ____, 110 S.Ct. 3139, 3147 (1990).

Unlike Uniform Rule 807 (Child Victims or Witnesses), and many similar State child-hearsay provisions, the amendment to Rule 804 does not include detailed procedural requirements. Instead, the Rule leaves to the trial court the task of considering the surrounding circumstances of the making of the statement in determining whether the hearsay statement of a declarant of tender years is trustworthy. As noted by the Court in Idaho v. Wright, supra, the Constitution does not impose a "fixed set of procedural prerequisites to the admission of such statements at trial" and in some cases procedural requirements as conditions precedent might be inappropriate or unnecessary. 110 S.Ct. at 3148.

The Committee considered, but rejected, setting a particular age for child declarants under the Rule. Instead, it chose to use the broader term "tender years" to recognize that the provision could extend to older declarants whose mental and emotional age were comparable to that of a child. Regardless of the age of the declarant, unavailability requires a showing of a risk of serious harm to the declarant.

The amendment is not intended to preclude use of any other hearsay exception which might be available, such as excited utterances under Rule 803(2) or statements made for the purpose of medical diagnosis or treatment under Rule 803(4).

Agenda Item III-D.
Criminal 10/1992

MEMO TO: **Advisory Committee on Criminal Rules**

FROM: **Dave Schlueter, Reporter**

RE: **Fed. R. Evid. 1102, Authority to Make Technical Amendments**

DATE: **September 7, 1992**

The Standing Committee is currently considering the possibility of amending the various rules of procedure and the evidence rules to provide authority to the Judicial Conference to make "technical" amendments. Attached is a draft of a proposed amendment to Federal Rule of Evidence 1102 which currently parallels similar language in Criminal Rule 59.

Although the Standing Committee briefly considered this draft at is June 1992, meeting, the matter has been tabled until the December 1992 meeting; the Reporter for the Standing Committee is supposed to coordinate conforming language in the Criminal, Civil, Appellate, Bankruptcy, and Evidence rules.

Unless the Committee has additional suggestions or comments, no additional action is needed at this point.

FEDERAL RULES OF EVIDENCE

Rule 1102. Amendments

Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code. The Judicial Conference of the United States may amend these rules or explanatory notes to conform to statutory changes, to correct errors in grammar, spelling, cross-references, or typography and to make other similar technical changes of form or style.

COMMITTEE NOTE

The amendment streamlines the process of correcting or changing clerical or technical matters which appear from time to time in the Rules. For example, a purely technical change was made recently to the statutory reference in Rule 1102 to reflect statutory changes in the statutes governing the procedure for promulgating rules of procedure and evidence. Currently such technical changes are formally reviewed by the Supreme Court and Congress pursuant to 28 U.S.C. § 2071, et. seq..

Agenda Item III E
Criminal 10/1992

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

July 8, 1992

MEMORANDUM TO KAREN KREMER, COUNSEL, LEGISLATIVE AND PUBLIC AFFAIRS OFFICE

SUBJECT: Status Report on Advisory Criminal Rule Committee's Action on Rule 412 of the Federal Rules of Evidence

I am writing to provide you with a status report on the actions of the Advisory Committee on Criminal Rules involving changes to the rules of evidence that are now under consideration by the Congress.

Rule 412 of the Federal Rules of Evidence

Subtitle E of S. 15, the Violence Against Women Act of 1991, would add two rules to the Federal Rules of Evidence similar to existing Rule 412 (commonly referred to as the rape-shield law). Rule 412 excludes the admission of evidence of a victim's past sexual behavior in a criminal case for sexual abuse offenses prosecuted under chapter 109A of title 18, United States Code. The proposed rules would expand the applicability of this exclusionary rule to other types of cases, including civil cases involving sexual misconduct and in criminal cases involving offenses not included under chapter 109A of title 18.

The Advisory Committee on Criminal Rules appointed a special subcommittee to review the legislative proposals at its May 1991 meeting. In October 1991 the committee considered a report of the subcommittee which raised several problems with the legislative proposal. The subcommittee was instructed to draft alternative language, which was reviewed by the advisory committee at its April 1992 meeting. The committee agreed in principle with the subcommittee's suggested draft and instructed it to continue refining the language in light of the comments and suggestions made at the meeting.

Problems with Existing Rule 412

The rule revisions proposed in S. 15 are patterned on the existing Rule 412, which applies only to sexual abuse criminal cases. Rule 412 was based on state models and has been criticized as confusing and overly-complex.

In cases other than those covered specifically by Rule 412, the admissibility of evidence of character is determined under Rule 404 and depends on whether the case is criminal or civil, and whether character is an essential element of a charge, claim, or defense. If evidence of character is admissible, Rule 405 specifies two methods of proving it: (1) reputation or opinion evidence; and (2) specific instances of conduct. Both, either, or neither method of proving character is allowed depending upon the type of case and a determination that evidence of character is admissible under Rule 404.

Rule 412 is particularly complicated, because it establishes a set of evidence standards in criminal sexual abuse cases different from the rules governing admission of character or reputation evidence that apply in all other cases. Understanding the appropriate standards under all the potential permutations created by the interplay of the different types of cases, the variety of claims and defenses, and the methods of proving character poses challenges both to laymen and attorneys.

In addition to the complexity caused by multiple standards, the language of Rule 412 has raised many interpretational problems. A thorough examination of Rule 412 is set forth in the Wright & Graham treatise on the Federal Rules of Evidence.[1] They have severely criticized several provisions of Rule 412 and supported their conclusions by copious caselaw citations.

For example, the authors note that the scope of the opening line of Rule 412, "Notwithstanding any other provision of law," is unclear. The authors have cited numerous cases in which the courts have wrestled with its meaning in determining whether it applies to other rules of evidence or to provisions of substantive law.[2] Another example pertains to the uncertainty created by the reference in Rule 412 to past sexual behavior. Courts have considered, for instance, whether a victim's

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[1]23 C. Wright & K. Graham, Federal Practice and Procedure §§ 5381-5393 (1980).

[2]Id. at § 5383.

"disposition" or inclination towards sexual behavior falls under the definition of past sexual behavior.[3]

Other questions concern the Rule's reference to reputation and whether it is meant to cover general reputation or only reputation limited to past sexual conduct.[4] Rule 412 also contains a caveat for constitutional exceptions that has been troublesome in some cases.[5] The authors contend that the constitutional caveat has given the judges more, rather than less, discretion to admit sexual history under particular circumstances.

In sum, the existing language of Rule 412 is defective, and its ambiguities have caused significant litigation. It should not serve as a model for new rules.

Subcommittee's Proposal

The subcommittee of the advisory committee concluded that the evidence excluded in Rule 412 should be excluded in all civil and criminal cases. In lieu of a proposal to create an additional two new rules that could create needless confusion and uncertainty, the committee recommended that Rule 412 be clarified, simplified, and expanded to cover the admissibility of a victim's past sexual behavior in all civil and criminal cases.

The committee considered the subcommittee's proposal at its April 1992 meeting. Although the committee believed that the proposal was a definite improvement over the existing language and other proposals that were patterned on Rule 412, several questions and concerns were raised which needed further clarification and examination.

The subcommittee's proposed Rule 412, which was considered by the committee at its April meeting, is set forth below:

Rule 412. Victim's Past Sexual Behavior or Predisposition

(a) Evidence of a victim's past sexual behavior or predisposition is not admissible in any civil or criminal proceeding except as provided in subdivision (b).

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[3]Id. at § 5385.

[4]Id.

[5]Id. at § 5387.

(b) Evidence of a victim's past sexual behavior or predisposition may be admitted under the following circumstances:

(1) evidence of specific instances of sexual behavior with persons other than the person whose sexual misconduct is alleged if offered to prove that another person was the source of semen or injury;

(2) evidence of specific instances of sexual behavior with the person whose sexual misconduct is alleged if offered to prove consent;

(3) evidence of specific instances of sexual behavior if offered under circumstances in which exclusion would deny the person whose sexual misconduct is alleged a fair trial;

(4) evidence of reputation or opinion evidence when character is an element of a claim or defense.

(c) No evidence covered by this rule shall be admitted unless the party offering it files a motion under seal, not less than 15 days prior to trial or at such other time as the court may direct, seeking leave to offer the evidence at trial. The motion must describe with particularity the evidence and the purposes for which it is offered. The court shall permit any other party as well as the victim to be heard in camera on the motion and shall determine whether the evidence will be admitted, the conditions of admissibility and the form in which the evidence may be admitted. The court may permit a motion to be made under seal during trial if a party claims good cause for not making a pretrial motion, and the court may consider the motion if it finds good cause shown. The motion and the record of any in camera proceeding shall remain under seal during the course of all further proceedings both in the trial and appellate courts.

The subcommittee's proposal has several advantages over other proposals that are patterned on the existing language of Rule 412.

First, the subcommittee's proposal simplifies the rules and establishes one set of standards governing the admission of evidence of a victim's past sexual behavior. It also expands its applicability to all cases. It would not create separate standards of admissibility for civil cases and criminal cases which were not covered under Rule 412. Nor would it limit application in civil cases to only those in which a defendant is accused of sexual misconduct.

Second, the subcommittee's proposal rectifies many of the defects in Rule 412, which were described in the Wright & Graham

treatise. It would not perpetuate these problems. (The "notwithstanding any other provision of law" language is deleted, all evidence of a victim's past sexual behavior is excluded rather than reputation evidence, a fair trial requirement has been substituted for the constitutional caveat, a victim's past sexual behavior has been expanded to cover predisposition, and safeguards have been added requiring that a motion to determine relevancy be filed under seal and any proceeding on the motion be held in camera.)

Third, the subcommittee's proposal recognizes that in cases where character is an element of a crime, claim, or defense, evidence of reputation or opinion evidence may be admissible, e.g., proving character as part of defense in a libel action. In such cases, the evidence is clearly relevant as stated in the 1972 advisory committee notes to Rule 404. Proposals based on the existing language of Rule 412 fail to account for this possibility and would assuredly cause future litigation.

Fourth, the subcommittee's proposal would permit admission of evidence of specific instances of a victim's sexual behavior under only three very limited circumstances. Proposals based on Rule 412 appear to be less restrictive and would permit admission of this evidence in cases where the probative value outweighs the danger of unfair prejudice. This standard is similar to, but more limited, than the general standard of admissibility in Rule 403, which excludes the admission of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice...."

Conclusions

Generally, the committee disfavors the proliferation of evidence rules, which have been kept to a minimum and have worked reasonably well. The committee recognizes, however, that the undertaking to revise and expand the rape-shield rule is worthwhile. Nonetheless, accomplishing the task poses very challenging and difficult draftsmanship problems. Patterning any new rule or rules on the language of the existing rule would be a mistake. It would increase, rather than clarify, the confusion in this area.

The committee believes that adherence to the rule-making process is very important. Under the formal rule-making process, any proposed amendment to the rules receives intensive and widespread scrutiny. Initial drafts are frequently revised and significantly improved after the committee has reviewed the comments and suggestions submitted by the bench, bar, and public. Although the process is time-consuming, it imposes a quality control that ensures a superior work-product.

Abiding by the established procedures is critical in this case because of the complexity of the problem and the potential mischief that may be caused by prematurely promulgating a rule of evidence that has not been subjected to the appropriate degree of scrutiny. Promulgating a flawed rule would be particularly unfortunate, since the Federal Rules of Evidence serve as models for state evidence codes.

John K. Rabiej

cc: Honorable Robert E. Keeton, Chairman, Committee on Rules of Practice and Procedure
Honorable William Terrell Hodges, Chairman, Advisory Committee on Criminal Rules
Professor David A. Schlueter, Reporter, Advisory Committee on Criminal Rules

Agenda Item V
Mtng Adds. 10/1992

Memorandum for the Criminal Rules Advisory Committee

Re: Possible Amendment to Rule 53
of the Federal Rules of Criminal Procedure

This memorandum is submitted at the suggestion of Professor Steven Salzburg. It requests that the Committee consider a non-substantive amendment to Rule 53 of the Federal Rules of Criminal Procedure at its next meeting in Washington, D.C. in May 1993.

As the Committee is aware, the Judicial Conference in September 1990 authorized a three-year experiment with cameras in the federal courts. The experiment began on July 1, 1991, in two courts of appeals and six district courts. It will conclude on July 1, 1994.

Unlike most state experiments, the federal experiment is limited to civil cases because of the prohibition in Rule 53 against "[t]he taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room." In recommending the federal experiment, Judge Peckham's Committee noted that "Rule 53 . . . specifically prohibits the broadcasting of criminal proceedings." Report of the Judicial Conference Ad Hoc Committee on Cameras in the Courtroom (September 1990) at 6 n.3.

The coalition of news organizations that originally sought the federal experiment (see attached) wishes to propose a non-substantive amendment to delete the cameras prohibition from Rule 53. The coalition does not seek an amendment to Rule 53 that would authorize cameras in criminal proceedings. Rather, we are seeking an amendment that would simply transfer jurisdiction over the issue of cameras in federal criminal proceedings from the Rules of Criminal Procedure to the Judicial Conference, which already exercises jurisdiction over the issue of cameras in civil proceedings. That matter is currently within the jurisdiction of the Committee on Court Administration.

We note that the Judicial Conference determined to delete the cameras prohibition from the Code of Judicial Conduct on a similar theory -- that the prohibition was a matter for the Judicial Conference to decide rather than a matter of judicial ethics. Report of the Judicial Conference Ad Hoc Committee on Cameras in the Courtroom at 2.

We request that this item be added to the Committee's agenda for its May 1993 meeting and, if appropriate, that a subcommittee be appointed to consider the matter in the interim. We would submit more extensive materials within the next 30-60 days for the Committee's consideration and, of course, provide copies of these materials to the Committee on Court Administration.

Timothy B. Dyk
Barbara McDowell
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-7600

ATTACHMENT

The coalition of news organizations that sought the federal experiment includes the American Society of Newspaper Editors, Associated Press, Cable News Network, Inc., Capital Cities/ABC, Inc., CBS INC., C-SPAN, Gannett Company, Inc., National Association of Broadcasters, National Press Photographers Association, National Public Radio, Inc., The New York Times Company, Post-Newsweek Stations, Inc., Public Broadcasting Service, Radio-Television News Directors Association, the Reporters Committee for Freedom of the Press, Society of Professional Journalists and The Washington Post.

U.S. Department of Justice

Federal Bureau of Prisons

Office of the Director *Washington, DC 20534*

Honorable William Terrell Hodges
Chairman, Advisory Committee on Criminal Rules
P.O. Box 1620
Jacksonville, Florida 32201-1620

Dear Judge Hodges:

As we have discussed previously, I strongly support the initiative to modify the Federal Rules of Criminal Procedure to allow for the use of video technology in pre-trial court functions, such as arraignment. I greatly appreciated the opportunity to come before the Committee on Criminal Rules at its April meeting to underscore the importance of this issue to the Department of Justice and look forward to your additional consideration of this topic at the October meeting of the Committee in Seattle.

Following the decision in Valenzuela-Gonzalez v. United States District Court for the District of Arizona, 915 F.2d 1276 (9th Cir. 1990), some doubt was cast on the use of video technology in pre-trial proceedings. In that case, the Court held that arraignment by closed circuit television would violate the Federal Rules of Criminal Procedure because the defendant was not physically present in court at the arraignment. At present, Rule 10 mandates that arraignment be conducted in "open court" with the defendant being called on to plead. In addition, Rule 43 states that the "defendant shall be present at the arraignment..." Attached are proposed amendments to Rules 10 and 43 that would allow for the use of video technology in connection with pre-trial court proceedings.

It is important to note that the Valenzuela decision did not find that the use of video arraignment was prohibited by the Constitution, but rather by Rules 10 and 43. The Court stated that the "protection of these rules is broader than the Constitution provides." Id. at 1280. It may also be useful to note that Judge Beezer, who wrote the opinion in Valenzuela, subsequently wrote to Chief Judge Goodwin of the Ninth Circuit supporting an amendment to the Rules of Criminal Procedure that would allow for video arraignment programs such as had been carried out in Arizona.

Judges around the country have been extremely supportive of efforts to utilize video technology for pre-trial proceedings. In

the attached surveys given to 9th and 11th Circuit Judges on this issue, the overwhelming response was in favor of considering the use of video technology. In addition, the Bureau of Prisons has received favorable reactions from Judges in the 1st, 2nd and 11th Circuits regarding the possible use of this technology for court to institution linkages in their respective Circuits. A broad coalition of law enforcement officials also supports the use of such technology. Data further suggests that defendants may prefer the use of video proceedings to the time consuming and uncomfortable procedures necessary for an in person court appearance (see attached survey).

The cumbersome process of bringing individuals to court for pre-trial proceedings is not only taxing on defendants, but on the entire criminal justice system as well. Video technology provides an efficient alternative for our courts, whose resources are severely stretched by a rapidly increasing number of cases. The attached statistics obtained from the Administrative Office of the United States Courts shows that there is an opportunity to use this technology in many thousands of cases, thereby decreasing the burdens faced by courts. The United States Marshals Service also would benefit and thereby be able to focus more of it's efforts on court security and other high priority projects.

The benefits to be obtained by the use of this technology would also flow in several ways to society at large. There would be an immediate benefit to overall public safety. Thousands of defendants would not have to be transported to and from courts. The risks attendant with such transportation are evident to anyone who follows the news headlines. These benefits would also extend to law enforcement and judicial personnel, who come into direct contact with defendants. Security and safety benefits would also affect the Bureau of Prisons, as an opportunity for large amounts of contraband materials to enter Bureau institutions would be averted. The public would also receive a benefit due to the significant costs savings that jurisdictions using video technology have reported. In this period of financial uncertainty, this would be a welcome corollary benefit of using video technology.

Amending the Federal Rules of Criminal Procedure would not make the use of video technology mandatory for any jurisdiction. Rather, this amendment would merely give Judges the discretion to use this technology if they deemed it appropriate for their courts. This is the same decision that has been made affirmatively by numerous state and local courts around the nation (see attached list). The Bureau of Prisons would be able to provide assistance in technologically facilitating the application of these procedures at the federal level. Video linkages between courts and institutions would include telephone and facsimile capabilities. Attorneys would be able to effectively have confidential communications with their clients through the use of privacy switches on phone lines. Due to these safeguards, defendants would in no way be harmed by lack of access to their attorneys during pre-trial proceedings.

The use of video technology for pre-trial proceedings preserves the rights and dignity of defendants while allowing the criminal justice system and society to benefit. I and others throughout the criminal justice community feel certain that this technology can be used to significantly increase the safety and efficiency related to managing the burgeoning pre-trial detention population.

With your approval, I would very much like to be present during the discussion of this issue at your Committee's meeting and contribute in any manner that you feel appropriate. I am certainly willing to offer a statement or presentation of our position supporting the use of video technology for pre-trial proceedings. I have attached a packet of materials relating to this matter that may be helpful to members of your committee. I would ask your approval to forward these materials to members of the Advisory Committee for their review.

Thank you for your assistance on this issue. I look forward to any response you may have to these matters and to speaking with you again in the near future.

Sincerely,

Thomas R. Kane for

J. Michael Quinlan
Director

Enclosure

VIDEO CONFERENCING FOR SOME PRE-TRIAL PROCEEDINGS

The increasing sophistication of video conferencing technology offers a unique and compelling opportunity for all post-arrest components of the criminal justice system. Currently in use in over 50 state and local systems (Attachment A), use of this technology to conduct some non-trial court functions provides for increased efficiency, savings of tax dollars, and increased public safety while enhancing respect for human dignity and protecting important rights of the defendant. Further, surveys conducted with the courts, attorneys, defendants and detention and transporting officials indicate wide acceptance of the use of video conferencing for pre-trial court functions.

ENHANCED EFFICIENCY

Efficiency is enhanced through improved and more precise court docketing procedures and more timely proceedings. When video conferencing is available for pre-trial proceedings, court staff can more effectively determine which defendants are available for proceedings and schedule them for hearings on much shorter notice, as transportation from the point of detention to the court room is not required.

For the detaining agency, processing the defendant out of the facility, along with all other individuals scheduled for appearances that day, and then processing him back in at the completion of all hearings is eliminated. The defendant simply moves from one part of the facility to the video court room within the facility shortly before his scheduled appearance. In addition, if the court orders release, that release can be effected much more quickly, as the defendant does not have to wait for the appearances of all others scheduled that day, return to the detaining facility, and then be processed out.

For the transporting agency, the number of individuals to be transported is substantially reduced, requiring fewer vehicles and staff escorts. To give some sense of scope, according to the Administrative

Offices for the U.S. Courts, during the twelve month period prior to June 30, 1991, U.S. Magistrate Judges disposed of 51,745 initial appearances, 35,699 arraignments, and 8,246 bail reviews (Attachment B).

With the burgeoning court caseloads and the increasing number of individuals detained in pre-trial status, efficiency in providing for initial appearances, detention hearings, and arraignments is essential to the criminal justice system. With projections for substantial increases in this population, greater efficiency in providing for these pre-trial functions without compromise of the rights of the defendant is essential to prevent gridlock of the entire federal criminal justice system.

SAVINGS OF TAX DOLLARS

With substantial reductions in the number of individuals who must be physically transported to court, transporting agencies, particularly the U.S. Marshal Service, can expect to conserve valuable staff and fiscal resources. Similarly, detention agencies should realize some savings resulting from the reduced number of individuals who must be processed into and out of the facility each day. As indicated in a 1991 report by the Chairman of the County Wide Criminal Justice Coordination Committee in Los Angeles, that jurisdiction saved over $1 million per year on transportation costs alone using video conferencing for some pre-trial court functions. In a much smaller jurisdiction, Ada, Iowa, over $75,000 were saved through the use of video conferencing for pre-trial proceedings. This conservation of tax dollars represents good public stewardship.

ENHANCED PUBLIC SAFETY

The most compelling reason for implementation of video conferencing for pre-trial court functions at the federal level is the resulting increase in safety to the escorting officials, officers of the court, and the general

public. Each time an individual is physically removed from the secure perimeter of a detention facility, the risks of escape and assault are dramatically increased. The risks involved in transporting individuals in pre-trial status are even greater, in that the detention facility and the transporting officials typically have little background information about the individual with which to assess potential threats. As a result, the level of security afforded during transportation may not be adequate, because of some factor unknown to the transporting agency that could dramatically increase the potential threat to transporting officials, court officials, or the general public. In addition, institution security is enhanced when video conferencing is used, as one potential source for the introduction of contraband into the facility is effectively eliminated. One of the tasks of the criminal justice system is to protect the public, and this mission can be greatly enhanced by maintaining offenders in a secure setting rather than transporting them.

ACCEPTANCE BY COURTS AND DEFENDANTS

Surveys conducted with state and local inmates regarding the use of video conferencing for pre-trial functions indicates that the vast majority of those who appeared in court electronically rather than in person felt that the electronic appearance was just as effective as would have been an in person appearance (Attachment C). When given the option of appearing electronically or in person, the majority chose to use video conferencing rather than endure the grueling process of processing out of the facility along with a number of others scheduled for appearances, appearing in front of family and friends in handcuffs, and spending the entire day waiting while others completed their appearances. Defendants like to appear in court using video conferencing, as this procedure entails far less discomfort, affords all of the rights and attention of the court that in person appearances receive, and does not require them to appear in public under the security that in person appearances mandate.

Similar surveys with the courts (Attachments D and E) show clear

support for the use of video conferencing for pre-trial court functions. At the federal level, when asked "In order to preclude the necessity of moving an inmate to court from prison, would you consider the use of interactive video technologies useful for the conduct of some pre-trial court functions," the vast majority of judges surveyed indicated support. At a Sentencing Workshop for the 9th Circuit, 77% of the District Judges and 71% of the Circuit Judges indicated support of such a proposal. At a Sentencing Institute for the 11th Circuit, 73% of the District Judges and 100% of the Circuit Judges indicated support.

PROPOSED MODIFICATIONS TO RULES

Video conferencing for pre-trial court functions was briefly piloted at the federal level in three cities. However, in Valenzuela-Gonzalez v. United States District Court of Arizona, 915 F.2d 1276 (9th Cir. 1990) the Court ruled that the use of video conferencing for pre-trial appearances violated rules ten and forty-three of the Federal Rules of Criminal Procedure. Indicating that there are no clear Constitutional issues, the court did find that until the rules of criminal procedure requiring appearance in open court of the defendant were modified to allow for appearance through video conferencing, such procedures could not be effected in that circuit. The proposed changes to rules 10 and 43 (Attachment F) simply add language indicating that for the purposes of these rules, the use of video teleconferencing technology is consistent with the presence requirement.

SUMMARY

With approval of the proposed modifications to rules 10 and 43, the courts will have options available that can be exercised in a variety of ways. Procedures for the use of video conferencing can be established as the court desires, allowing those judges who wish to use the technology to do so without requiring its use by those judges who elect not to use the technology. Further, the changes will allow a judge to mandate the use of video conferencing when a clear and

compelling threat to the safety of the defendant, the court, or the general public exists.

In summary, we believe that the proposed changes in rules 10 and 43 provide the flexibility to the courts, the transporting and detaining agencies, and the defendants that is essential if the federal criminal justice system is to continue to operate in the face of rapidly increasing demands. Experience at the state and local levels indicates that this technology can be implemented with advantages to all involved and result in substantial savings of tax dollars. Further, the use of video conferencing for pre-trial court functions can be implemented in such a manner as to enhance the personal dignity of the defendant and preserve all of the rights required for these proceedings.

VIDEO TECHNOLOGY APPLICATIONS IN THE COURTS

18th Judicial District, Kansas
Colorado Springs, Municipal Court, Colorado
Prince George Circuit, Maryland
Jackson Circuit Court, Florida
12th Judicial Circuit, Florida
Pima County Superior Court, (Tucson) Arizona
North County Municipal Court, California
Oregon Administrative Office of the Courts
9th Judicial Circuit, Florida
32nd Judicial District, Pennsylvania
Denver County Court, Colorado
San Bernardino County, California
Pierce County District Court, Washington
Alaska Court System
Baton Rouge City Court, Louisiana
Stanislaus County Municipal and Superior Courts, California
Los Angeles Municipal court, California
Howard County, Maryland
Washoe County, (Reno) Nevada
Harris County, (Houston) Texas
Ada County, Idaho
Las Vegas Municipal Court, Nevada
Phoenix, Arizona
Potter County, Texas
7th Judicial District, Utah
State of Utah, Salt Lake City, Utah
Scott County, Iowa
Kent County, Michigan
Genesee County, Michigan
Riverside County, California
Macomb County, Michigan
Los Angeles County, Long Beach Municipal Court, California
Los Angeles County, Criminal Courts (Felony), California
Los Angeles County, Avalon, Catalina Island, California
Spokane County, Washington
Contra Costa County, California
San Bernardino County, California
Moreno Valley, California
Kitsap County, Washington
Mesa County, Colorado
Los Angeles County, Glendale, California
District Court of Hawaii
Los Angeles County, Torrance, California
Santa Barbara County, California
State of Utah, District Court, Price, Utah
Ventura County Municipal Court, California
Scott County District Court, Iowa
15th Judicial Circuit, Michigan
7th Judicial Circuit, (Flint) Michigan
6th Judicial Circuit, Michigan
Wayne County Circuit, Michigan
Dade County (Miami), Florida

Attachment A

Table M-3 U.S. DISTRICT COURTS.
MATTERS DISPOSED OF BY U.S. MAGISTRATE JUDGES
PURSUANT TO TITLE 28 U.S.C. SECTION 636(A)
DURING THE TWELVE MONTH PERIOD ENDED JUNE 30, 1991

CIRCUIT AND DISTRICT	TOTAL	SEARCH WARRANTS	ARREST WARRANTS	SUMMONSES	INITIAL APPEARANCES	PRELIMINARY EXAMINATIONS	BAIL REVIEWS	GRAND JURY SESSIONS	ARRAIGNMENTS	OTHER
Total	178,789	23,887	17,896	2,048	51,745	8,116	8,246	4,992	35,699	26,160
DC-	3,467	329	216	8	1,141	681	114	132	138	708
1st... ME-	487	53	13	0	138	24	43	15	135	66
MA-	2,460	211	307	59	562	71	81	175	480	514
NH-	287	24	20	0	89	0	7	17	115	15
RI-	2,288	85	136	5	656	163	139	50	611	443
PR-	696	99	52	30	78	59	7	28	154	191
2nd... CT-	1,442	395	120	2	255	35	134	93	178	230
NYN	1,424	141	187	7	395	9	158	81	268	178
NYE	4,869	606	656	1	1,736	43	227	313	339	948
NYS	5,142	1,187	748	6	1,896	0	106	156	178	865
NYW	1,031	271	76	4	285	8	26	75	251	35
VT-	378	37	38	0	74	15	10	29	129	46
3rd... DE-	425	69	32	0	124	7	4	17	131	41
NJ-	2,080	377	265	4	737	13	149	256	42	237
PAE	4,317	544	943	2	884	289	62	168	847	578
PAM	516	70	71	3	256	17	6	1	1	91
PAW	1,294	231	110	68	217	70	18	144	292	144
VI-	864	55	82	0	214	86	75	34	208	110
4th... MD-	2,305	526	299	3	552	41	128	51	342	363
NCE	997	111	85	0	457	68	28	78	1	169
NCM	1,021	63	150	0	362	79	34	11	96	226
NCW	1,970	172	229	7	854	39	112	25	248	284
SC-	2,406	307	466	13	368	35	163	114	832	108
VAE	2,877	505	429	23	803	323	62	55	154	523
VAW	769	103	104	1	319	34	39	12	30	127
WVN	442	102	46	29	75	24	8	1	131	26
WVS	1,246	54	214	5	292	86	65	45	362	123
5th... LAE	2,512	170	158	7	809	10	162	88	722	386
LAM	287	5	18	0	79	22	8	0	47	28
LAW	1,056	67	108	81	253	29	99	28	210	181
MSN	572	52	30	0	183	28	20	11	194	54
MSS	912	121	77	0	252	41	35	21	253	112
TXN	3,009	464	318	47	1,196	169	120	10	177	508
TXE	1,029	58	75	10	302	26	39	31	267	221
TXS	12,124	1,219	1,078	502	3,432	519	520	139	2,825	1,890
TXW	6,433	592	1,092	155	2,313	467	370	122	416	906
6th... KYE	677	98	83	10	99	50	25	24	177	111
KYW	828	117	88	1	158	42	9	30	248	135
MIE	4,449	837	652	8	1,366	73	43	161	971	338
MIW	823	84	148	0	200	17	20	45	248	61
OHN	1,876	352	325	37	276	148	20	41	412	265
OHS	1,695	248	267	0	458	196	69	67	116	274
TNE	1,064	138	110	1	317	35	12	38	306	107
TNM	953	136	65	0	440	63	32	12	74	131
TNW	1,823	63	19	0	773	160	31	12	508	257

Attachment B

Table M-3 U.S. DISTRICT COURTS.
MATTERS DISPOSED OF BY U.S. MAGISTRATE JUDGES
PURSUANT TO TITLE 28 U.S.C. SECTION 636(A)
DURING THE TWELVE MONTH PERIOD ENDED JUNE 30, 1991

CIRCUIT AND DISTRICT	TOTAL	SEARCH WARRANTS	ARREST WARRANTS	SUMMONSES	INITIAL APPEARANCES	PRELIMINARY EXAMINATIONS	BAIL REVIEWS	GRAND JURY SESSIONS	ARRAIGNMENTS	OTHER
7th... ILN	2,700	501	155	7	839	300	134	14	255	495
ILC	906	97	75	10	212	24	21	4	285	178
ILS	669	76	55	0	168	23	3	21	217	106
INN	766	158	43	4	286	17	14	34	92	118
INS	677	132	91	0	309	12	17	14	2	100
WIE	1,403	190	92	0	465	47	38	49	363	159
WIW	416	24	67	0	125	13	19	16	110	47
8th... ARE	716	145	40	0	154	3	41	13	232	88
ARW	395	165	64	0	38	3	9	2	79	35
IAN	398	58	32	36	48	7	8	30	137	42
IAS	683	140	51	1	106	38	18	74	140	115
MN-	2,362	444	260	7	571	228	39	18	501	294
MOE	1,515	366	164	3	397	77	15	1	251	241
MOW	1,816	273	129	0	613	95	71	37	433	165
NE-	631	135	45	1	100	5	66	19	164	96
ND-	450	24	47	0	119	40	21	1	137	61
SD-	765	8	20	0	335	14	4	8	250	126
9th... AK-	597	131	26	5	68	44	75	15	158	75
AZ-	7,139	935	392	41	2,015	258	552	125	1,436	1,385
CAN	3,184	435	361	79	927	13	283	12	698	376
CAE	2,180	225	125	6	503	30	113	59	700	419
CAC	6,822	1,225	538	71	1,902	121	126	170	1,655	1,014
CAS	6,389	486	235	7	2,609	85	701	15	1,481	770
HI-	1,461	778	21	0	221	86	3	75	183	94
ID-	343	28	35	1	76	17	1	6	117	62
MT-	697	97	82	1	143	39	26	0	239	70
NV-	2,962	379	461	108	983	10	86	76	546	313
OR-	2,580	377	160	66	562	235	22	51	637	470
WAE	1,211	128	120	0	237	69	77	16	431	133
WAW	2,132	249	121	21	560	179	93	0	495	414
10th.. CO-	2,371	280	373	12	690	116	45	73	466	316
KS-	1,898	139	18	0	415	18	22	2	348	136
NM-	2,834	216	114	27	704	317	81	15	784	576
OKN	554	42	27	0	164	19	22	1	223	56
OKE	221	41	5	0	36	8	4	3	77	47
OKW	1,137	241	158	3	213	66	31	7	157	241
UT-	1,453	74	274	0	241	57	30	10	516	251
WY-	298	24	52	20	140	22	5	0	18	25
11th.. ALN	838	166	68	2	174	24	49	11	263	81
ALM	434	120	55	1	138	12	11	7	25	65
ALS	675	34	35	0	172	11	23	17	299	84
FLN	1,018	108	93	6	442	17	31	15	153	153
FLM	5,597	596	499	51	1,423	224	265	207	1,602	730
FLS	11,072	1,109	811	256	3,101	316	1,073	465	2,478	1,463
GAN	2,841	375	235	46	717	243	141	109	603	372
GAM	839	59	56	0	368	28	13	0	215	100
GAS	1,000	306	116	10	191	52	65	19	192	49

Defendant's Perspective of the court video system

Questionnaire Item	N	Yes %	No %	Unsure %
1. I think that using TV limited ability to argue my case	345	31.6	**64.3**	4.1
2. There were questions I wanted to ask but didn't because I was on TV	338	20.1	**78.4**	1.9
3. I acted or spoke differently because I was on TV	349	18.9	**79.1**	2.1
4. The use of TV Made me nervous	342	29.2	**70.2**	6
5. I feel that the use of TV violated my legal rights	342	15.2	**79.5**	5.3
6. If I wasn't on TV I would have pled differently	338	10.7	**85.5**	3.8
7. I think that using TV for court appearances is a good idea	348	**72.1**	20.4	7.5
8. I was happy with my televised court appearance	344	**78.5**	19.5	2.0
9. I feel that the use of TV made my case go faster	340	**84.4**	12.1	3.5

Source: Media Technology and the Courts: The Case of Closed Circuit Video Arraignments in Miami, Florida, W. Clinton Terry, III and Ray Surette, Department of Criminal Justice, Florida International University, North Miami, Florida 33181 (1986).

Attachment C

In order to preclude the necessity of moving an inmate to court from prison, would you consider the use of interactive video technologies useful for the conduct of some pre-trial court function?

9th Circuit

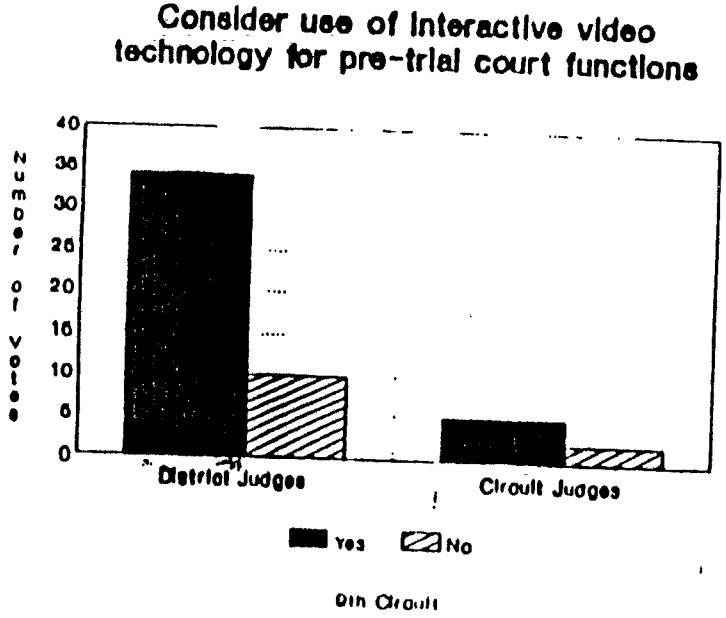
	District Judge	Circuit Judge
NUMBER OF VOTES	44	7
Yes	34 (77.3%)	5 (71.4%)
No	10 (22.7%)	2 (28.6%)

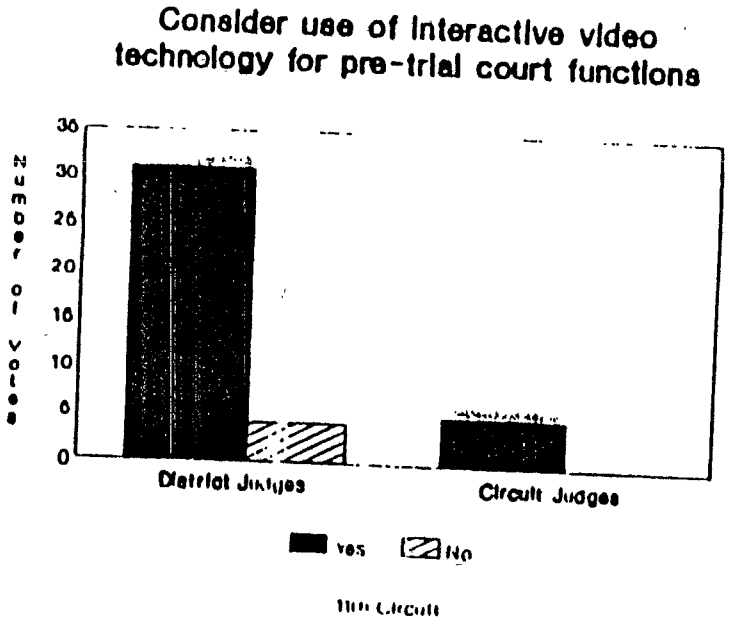
11th Circuit

	District Judge	Circuit Judge
NUMBER OF VOTES	35	5
Yes	31 (73.8%)	5 (83.3%)
No	4 (9.5%)	0 (0.0%)

Attachment D

Attachment E





Amendments to Federal Rules of Criminal Procedure

Rule 10 of the Federal Rules of Criminal Procedure shall be amended to read as follows:

Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called upon to plead. The use of video teleconferencing technology, where the defendant is not physically present in court, is consistent with the requirements of this rule.

Rule 43(a) of the Federal Rules of Criminal Procedure shall be amended to read as follows:

(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. During pre-trial proceedings, the use of video teleconferencing technology, where the defendant is not physically present in court, is consistent with the presence requirement of this rule.

Attachment F

THE FEDERAL JUDICIAL CENTER
FEDERAL JUDICIARY BUILDING
ONE COLUMBUS CIRCLE, N.E.
WASHINGTON, D.C. 20002

William B. Eldridge
Director of Research

((202) 273-4071
FAX 273-4021

October 8, 1992

Honorable Wm. Terrell Hodges
United States District Court
for the Middle District of Florida
Post Office Box 1620
Jacksonville, Florida 32201-1620

Dear Judge Hodges,

Enclosed is the summary of the provisions of district court local rules dealing with the functions of the probation officers in cases under the guidelines.

I am sorry this has not reached you sooner, but the move to our new building has intervened. The move was actually smooth, but my personal organization is somewhat frazzled.

Copies will be mailed or faxed to whomever you direct.I will bring sufficient copies with me to the meeting for distribution there should you wish it.

I look forward to seeing everyone on the rainy coast.

Sincerely yours,

Bill

cc: David Adair
John Rabiej

SUMMARY OF SENTENCING PROCEDURES PROVIDED IN DISTRICT COURT LOCAL RULES

REPORT TO
THE ADVISORY COMMITTEE ON CRIMINAL RULES
AND
THE COMMITTEE ON CRIMINAL LAW
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Prepared by

Pamela Lawrence
Research Division
Federal Judicial Center

SUMMARY OF SENTENCING PROCEDURES IN DISTRICT COURT LOCAL RULES

At the request of the Advisory Committee on Criminal Rules and the Criminal Law Committee, the Research Division of the Federal Judicial Center has reviewed sentencing procedures in 90 of the 94 judicial districts. Districts have promulgated these sentencing procedures as rules, standing or general orders, internal policy guidelines or scheduling orders. In this report, all these forms will be referred to as rules.

This report contains descriptions and comparisons of rules as they appear in publicly available form but provides no information about how the rules are being implemented nor what results are being obtained. Consequently, any observed differences or similarities among the texts of rules could, in practice, prove illusory or exaggerated. To explore these issues, the Research Division will soon send a survey to Chief United Sates Probation Officers about sentencing practices, and plans to submit a report with its findings to the committees at spring meetings.

Most of the rules are based on one of two models, either the Model Local Rule (Model Rule)[1] promulgated by the Judicial Conference or that of former Guideline §6A1.2 (Guideline Rule), the Sentencing Commission's original proposed approach (withdrawn in favor of a less prescriptive guideline). These rules vary primarily in the responsibilities of the probation officer (PO) in resolving disputes about the Presentence Report (PSR).

The Model Rule gives the probation officer a significant role in the dispute resolution procedures. Parties submit objections to the PO who may require the parties to meet with him or her. The PO then revises the PSR and, if objections remain, prepares an addendum. The addendum includes, not the parties' written objections , but the PO's summary of those objections with his or her comments. The PO then submits to the court the revised PSR, which the court may accept as accurate, and the addendum. The Model Rule provides no opportunity for the parties to submit any additional memoranda in support of their objections.

In the Guideline Rule, the parties first must seek "informal" or "administrative" resolution, not included in the record, of their disputes with the probation officer. Once the probation officer issues the PSR revised to reflect the results of the informal resolution, the parties file with the court a pleading entitled "Position of the Parties With Respect to Sentencing Factors" (Position Paper), in which the parties state their objections to the now-revised PSR. The probation officer, who also receives a copy of the position paper, prepares an

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[1] "Recommended Procedures for Guideline Sentencing and Commentary" August 1987

addendum summarizing the remaining objections, but does not comment on them. The sentencing judge, with access to the parties' own statements as well as to the revised PSR (no requirement that it be deemed accurate) and the addendum, issues tentative findings of fact and conclusions of law. The parties then have a "reasonable opportunity" to respond, in some cases with additional memoranda.

The following chart shows the time scheme of the two approaches. For the Guideline Rule, Kansas's rule was used as a model.

	Model Rule	Kansas
	Days prior to Sentencing	
PO discloses PSR to parties	20	25
Parties notify PO of objections to PSR	10 or more (w/i 10 days of disclosure; PO may call conference with counsel)	prior to filing Position Paper (parties initiate conference w/PO. opposing counsel, mandatory unless no disputes)
Parties file Position Paper	no provision	5
PO submits revised PSR and addendum	"prior to sentencing" (addendum includes PO's comments)	unspecified (addendum does not include PO's comments)
Judge advises parties of tentative findings	no provision	"before imposing sentence"; parties have opportunity to respond, form of response subject to discretion of judge

In Table 1, we have divided the rules into five groups: those following the Model Local Rule closely (30), those following it with some variation (18) (both groups referred to in this report as "Model Rules"), those following the Guideline Rule, both closely and with variation (17) (referred to in this report as "Guideline Rules"), those combining features of both (16) ("Combination

Rules"), and those which simply provide that objections go directly to the judge (9) without little or no input from the probation officer ("Direct Rules").

TABLE 1
CATEGORIZATION OF SENTENCING PROCEDURE RULES

Circuit	MODEL RULES		GUIDELINE RULES	COMBINATION RULES	DIRECT RULES
	CLOSELY FOLLOWED	WITH VARIATIONS			
1st	NH, RI	ME, MA		PR	
2nd	CT, NY(E)	VT	NY(W)		NY(N)
3rd	DE, NJ, PA(E), PA(M)			PA(W)	
4th	NC(W), SC, VA(W), WV(N), WV(S)	MD	NC(M), VA(E)	NC(E)	
5th	LA(E), LA(M), LA(W), TX(E), TX(W)	TX(S)	MS(N), MS(S)	TX(N)	
6th	KY(E), TN(E)	MI(W)	TN(M), TN(W)	MI(E), OH(N), OH(S)	
7th		IL(N), IN(N), WI(E)		IL(C), IN(S)	IL(S), WI(W)
8th		AR(E), AR(W), IA(N), IA(S)	MN, MO(E), ND	MO(W), NE	SD
9th	ID, WA(E)	MT, OR	CA(N), GUAM, HI	AK, AZ, CA(E), WA(W)	CA(C), CA(S), NV
10th	OK(E), OK(N), OK(W), WY		KS, UT	NM	CO
11th	AL(M), FL(M), FL(N), GA(M)	GA(N), GA(S)	AL(S), FL(S)		AL(N)
D.C.		DC			

Variations on Model Rules (48)

Only a few of the 48 districts that adopted the Model Rule did so verbatim, but the amount and type of variation was not as much as for the other groups. Variations on the Model Rule (number of Model Rule jurisdictions adopting the variation in parentheses) included:

- PO shall or will (rather than may) require attendance of counsel at conference (3);
- PO may request (rather than require) counsel to meet at conference (1);
- no provision for PO to call counsel to a conference (3);
- addendum to revised PSR includes copies of parties' written objections (instead of the PO setting forth those objections remaining) (6);
- addendum also to include factual stipulations regarding disputed matters (1)
- no provision for probation officer's comments (required in the Model Rule) on the remaining objections in addendum (4);
- no provision for addendum to revised PSR (2);
- PO certification of addendum does not include (as does the certification in the Model Rule) a certification that the addendum fairly states any remaining objections (5);
- no provision for certification of the addendum by PO (4)
- submission of additional memoranda after issuance of revised PSR (not provided for in Model Rule) (2);
- additional formalized court proceedings, either an evidentiary hearing, conference, or review of materials to determine necessity of additional conference and proceedings (3);
- revised PSR, except as objected to, will (instead of may) be deemed accurate (4);
- historical facts in PSR will be prima facie evidence of those facts; court may review applications of guidelines de novo, even without objections (2);
- the revised PSR and its addendum shall be the tentative findings of the court (1);
- objections not presented to probation officer will not be considered (instead of being considered for good cause) (2) or will be deemed waived (1);
- no provisions for additional objections are made (9); and
- the court may issue tentative findings and give parties an opportunity to respond (a Guideline Rule provision) (2).

Variations on Guideline Rules (17)

For the Guideline Rule, variations (including some borrowed from the Model Rule) on the procedure for resolving objections to the PSR include:

- parties file written (rather than communicating in an unspecified fashion) objections to PSR to begin informal resolution (6);
- Position Papers filed before informal resolution period, instead of after (2)
- no provision for mandatory presentence conference (3);
- addendum includes parties' written objections (4);
- no provision for addendum (1);
- in lieu of Position Paper, parties file statement of unresolved objections (1);
- PO files additional addendum after parties file Position Papers (1)
- court issues two sets of tentative findings, one at least five days prior to sentencing hearing and one "before imposing sentence". Parties respond to both, the first time in writing three days prior to sentencing and the second time orally at the sentencing hearing (1); and
- no provision for the tentative findings procedure (6).

Some of the variations among the Guideline Rules were borrowed from the Model Rule:

- PO officer may require presentence conference (1);
- PO comments in the addendum on the parties' objections (4); and
- court may accept PSR as accurate (2).

Combination Rules (16)

These rules each borrowed some elements from the Model Rule procedure and some from the Guideline Rule procedure, but used them in different ways. Table 2 summarizes the variations in the Combination Rules jurisdictions. Note that Ohio South, the last line, also has a second revised PSR and addendum following the second round of Position Papers or Written Objections.

TABLE 2
SUMMARY OF COMBINATION RULES PROVISIONS

DISTRICTS	INFORMAL RESOLUTION INITIATED BY PARTIES	POSITION PAPERS OR WRITTEN OBJECTIONS	PO-INITIATED RESOLUTION	REVISED PSR ISSUED	INFORMAL RESOLUTION INITIATED BY PARTIES	POSITION PAPERS OR WRITTEN OBJECTIONS
MO(W)	Yes	Yes	Yes	Yes	No	Yes
PA(W), PR, WA(W)	Yes	Yes	Yes	Yes	No	No
AK, AZ, CA(E), IL(C), NE, OH(N), TX(N)	No	Yes	Yes	Yes	No	Yes
IN(S), MI(E), NM, NC(E)	No	Yes	Yes	Yes	No	No
OH(S)	No	Yes	Yes	Yes	Yes	Yes

Thirteen (13) of these jurisdictions require that PO prepare an addendum, with twelve (12) requiring the PO's comments and two (2) requiring that the parties' written materials be included. Ten (10) of these districts also require that the judge announce tentative findings, usually prior to sentence, and provide some opportunity for the parties to respond.

Direct Rules (9)

Of the direct rules, four (4) have an informal conference requirement. One (1), Alabama North, requires counsel involvement in the preparation of the PSR, including meeting with the PO. Only one (1) jurisdiction requires an addendum to the initial PSR, but without comment; none require a revised PSR.

Variations on All Rules

A. Presentence Report Preparation

1. PSR preparation may/may not begin before determination of guilt

May (4) May not (5)

2. Parties provide written statements to PO to assist in preparation of PSR (12)

Counsel for government only (4)

Counsel for both parties simultaneously (5)

Counsel for government first, with defense counsel filing response later (3)

3. Counsel meet with PO during PSR preparation in an effort to resolve and/or isolate disputes (3)

4. Counsel may be present at interview (3)

B. Sentencing

1. Sentencing Date

Sentencing to occur within (time) after determination:

8 weeks (1) 60 to 70 days (5) 90 days (2) between 91 and 126 days (1)

Sentencing to occur no earlier than (time) after determination of guilt):

50 days (1) 8 weeks (1) 60 to 70 days (21) 80 days (1) 90 days (1)

Sentencing to occur no earlier than (days) after disclosure of PSR

10 days after final PSR (1) 20 days after first PSR (3)

2. Earlier sentencing when defendant in custody (3)

3. Provisions facilitating earlier sentencing in absence of objections (3)

C. PSR Disclosure

1. PSR Disclosure Date

PSR disclosed at least (number of days) BEFORE sentencing

35 days (3) 30 days (8) 25-28 days (21) 20 or 21 days (25) 10 days (4)

PSR disclosed within (number of days) AFTER determination of guilt

35 days (7) 40 days (3) 45 days (2) 49 days (1) 55 days (1)

PSR disclosed no later than (number of days) AFTER determination of guilt

30 days (1)

PSR disclosed within 35 days if defendant is in custody and within 50 days if defendant is at liberty (1) (Note: sentencing dates also vary in this district depending on the status of the defendant)

2. PSR Disclosed to:

Counsel and defendant (43)
Defense counsel must review report with defendant (2);
Disclosure to defense counsel constitutes disclosure to defendant (1);

Counsel or defendant if *pro se* (6)
Defense counsel must disclose the report to the defendant (2).

Counsel only (25)
Counsel is responsible for disclosing/reviewing the report with the defendant (14);
Disclosure to defense counsel constitutes disclosure to the defendant (1).

"Parties" (12) Unspecified (3) Defendant alone (1)

3. Disclosure effected by:

Physical delivery, availability one day after oral communication, mailed (45)

Physical delivery or mail (14) Mail (10) Available in probation office (7)

PO "shall furnish" or "shall provide" (2) Unspecified (11)

At discretion of Chief Probation Officer, disclosure at a "disclosure conference" w/ defendant and defense counsel present (1).

D. Objections to PSR In Districts without Informal Resolution (67)

1. Deadline for objections

Deadlines calculated from day of disclosure

5 days (6)	7 days (3)	10 days (37)	11 days (4)
14 days (5)	15 days (5)	17 days (1)	

Deadlines calculated prior to sentencing

5 days prior (3)	10 days (1)	21 days (1)	25 days (1)

2. Form of objections

Written/Position Papers (46)

Oral but PO may require confirmation in writing (8)

Oral but must be confirmed in writing (10) (in three jurisdictions, writing not required if probation officer "accedes forthwith" to objection)

Unspecified (3)

3. Objections signed by defendant and defense counsel (3)

4. Material facts in objections may be attributed to defendant; if false, possible penalty for obstruction of justice (1)

5. Counsel must positively affirm no objections (7)

E. Informal Resolution (Guideline Provision) (23)

1. Initiation of Informal Resolution

Counsel shall communicate/contact PO (means unspecified) (16)

Initiated by Position Papers of the Parties with Respect to Sentencing (§6A1.2 of Guidelines) or similar Sentencing Statement (3)

Initiated by Written Objections (4)

F. Conference to Resolve Objections

1. Model Rule: "PO may require counsel to meet" and variations (60)

PO may require parties to meet to resolve disputes (55)

PO shall require parties to meet to resolve disputes (3)

PO may request parties to meet to resolve disputes (2)

2. Guideline Rule formulation: "Presentence conference mandatory unless no disputes"(18)

3. No requirement for conference (12)

4. Parties File Position Papers/Written Objections after Informal Resolution (14)

G. Revised PSR and Addenda

1. Revised PSR and/or addendum required (82)

With comments by PO (56)

With written materials of counsel attached (12)

With certification that revised PSR and addendum have been disclosed (4)

With certification that revised PSR and addendum have been disclosed and that the addendum fairly states the remaining objections (48)

2. Deadline for Delivery of Revised PSR and Addendum to Judge

Delivery calculated prior to sentencing

2 days (1)	3 days (3)	5 days (18)	7 days (6)
10 days (9)	11 days (1)	14 days (2)	15 days (2)

Delivery calculated as days after receipt of objections

4 days (1)	5 days (1)	10 days (3)	12 days (1)	15 days (1)

Other

within 14 days from disclosure of PSR (1)
within 80 days from determination of guilt (1)

Wednesday before sentencing date (1)

"Prior to Sentencing" / upon completion of processing / other unspecified (29)

H. Parties File Position Papers/Sentencing Memoranda/Statement of Remaining Objections After Issuance of Revised PSR and/or Addendum (13)

I. Effect of PSR

PSR may be accepted as accurate (46)

PSR shall or will be accepted as accurate (5)

Historical facts of PSR shall be accepted as prima facie evidence; court may conduct de novo review of guideline applications, even if not objected to (2)

Revised PSR and addendum serve as court's tentative findings (1)

J. New Objections or Sentencing Factors Allowed/Not Allowed

1. Allowed (57)

New objections allowed even if not raised with PO, upon a showing of good cause (54)
or raised to revised PSR (1)
or not raised prior to a certain time before sentencing (1)

New objections allowed even if not raised within a certain time prior to sentencing, upon a showing of good cause (1)

New sentencing factors permitted to be raised upon reasonable notice (2)

2. Not allowed (13)

New objections deemed waived if not filed (4)

New objections not permitted (8)

New sentencing factors will not be taken into consideration (1)

3. No mention of new objections (20)

K. Announcement of Tentative Findings and Opportunity to Respond

1. Judge Shall Issue Tentative Findings (18)

Only when no evidentiary hearing is required (1)
Only if court concludes that disputes can be resolved prior to hearing (1)
Only when appropriate to permit court to correct errors and oversights (1)

2. Judge Shall Issue Tentative Findings Two Times (1)

3. Judge May Issue Tentative Findings (3)

4. Time of Issuance of Tentative Findings

Prior to imposition of sentence (8)
At least three days prior to sentencing hearing (1)
At least five days prior to sentencing hearing (1)
At least seven days prior to sentencing hearing (1)

5. Reasonable Opportunity to Respond (18)

Manner and form of response to be decided by judge (5)
Parties should be prepared to make arguments and present evidence at hearing (1)
Written response specified (1)
Hearing may be continued if necessary (3)
Hearing only to be continued under extraordinary circumstances (2)

L. Court resolution of disputes

1. Court may accept reliable evidence from PO or the parties (56)

2. Court may accept reliable evidence from PO or parties, and disputes are to be resolved on a preponderance of the evidence (1)

3. Court may accept reliable evidence from the parties (2)

4. Court may accept relevant evidence w/o regard to its admissibility at trial, as long as there are sufficient indicia of reliability (4)

5. Court may accept both reliable evidence and relevant evidence w/o regard to its admissibility at trial as long as there are sufficient indicia of reliability (2)

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

October 1, 1992

MEMORANDUM TO THE SENIOR STAFF

SUBJECT: Actions of the Judicial Conference, September 22, 1992

Attached is a copy of the Preliminary Report of Judicial Conference actions of September 22, 1992. Many decisions made by the Conference require action on our part, and the responsible offices are noted in the left margin of the Preliminary Report. The action required is, for the most part, self-explanatory. If a particular item is unclear, please contact Jim Macklin, Karen Siegel or me.

Please report back on the status of your activities no later than October 23, 1992.

L. Ralph Mecham

Attachment

cc: Honorable Gustave Diamond

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

L. RALPH MECHAM
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 22, 1992

****

All of the following matters which require the expenditure of funds were approved by the Judicial Conference subject to the availability of funds, and subject to whatever priorities the Conference might establish for the use of available resources.

****

At its September 22, 1992, session, the Judicial Conference:

Committee on Automation and Technology

JD — Disapproved a policy on the standard electronic citation of opinions.

JD — Approved an amended lawbook list for magistrate judges.

Committee on Administration of the Bankruptcy System

Bky Div. — Declined to support an amendment to 28 U.S.C. § 157(c)(2) that would provide for implied consent to final determination by a bankruptcy judge in a non-core proceeding.

Bky Div. — Approved the amendment of existing bankruptcy administrator regulations in light of the standing conferred by legislation.

Bky Div. — Designated Fayetteville as an official duty station for a bankruptcy judge in Arkansas.

Bky Div. — Approved a requirement for a full field background investigation for future chapter 13 standing trustees and a name check investigation for chapter 7 trustees in those districts served by the bankruptcy administrator program.

Preliminary Report

Committee on the Budget

BUD — Approved alternative, or lower, budget requests for fiscal year 1994, subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference or (c) other reasons the Director of the Administrative Office considers necessary and appropriate, not to exceed a total increase of 29 percent over the fiscal year 1993 budget appropriation.

Committee on the Codes of Conduct

EEOSP — Approved revisions to the Code of Conduct for United States Judges.

JCS — Adopted a resolution commending Judge Walter Stapleton for his service to the Conference as Chairman of the Committee on Codes of Conduct.

Committee on Court Administration and Case Management

CAD — Encouraged the district courts to provide to part-time magistrate judges who perform their duties in federal court space the same level of administrative support afforded to full-time magistrate judges, to the extent feasible.

CAD — Regarding the experimental use of videotape as the record on appeal (pending decision on the use of this method at the September 1993 session), authorized participating district courts to continue the use of the videotaping systems beyond the end of the two-year experiment, and authorized participating appellate courts to continue to accept videotape as the record on appeal from pilot district courts.

CAD — Directed the Administrative Office to provide for full certification of interpreters in Cantonese (Chinese), Ilocano, Korean, Mandarin (Chinese), Punjabi, Tagalog and Vietnamese; modified certification of interpreters in Armenian, Japanese, Laotian and Polish; and "Otherwise Qualified" status in Mein.

EEOSP — With regard to bias in the federal judiciary, adopted a resolution encouraging all circuits to sponsor educational programs for judges, attorneys, supporting personnel and all others within the judicial branch to sensitize them to

the concerns and effects of bias based on race, ethnicity, gender, age, and disability. The Conference encouraged all circuits to report to the Committee on Court Administration and Case Management on action taken to implement this resolution.

CAD — Amended the schedule of fees for the United States Claims Court to include a $25.00 fee for checks paid into the court which are returned for a lack of funds.

CAD/Bky Div. — With regard to bankruptcy fees, approved the collection of an administrative fee of $30 in all chapter 7 and 13 cases, in lieu of noticing fees which currently exist for these chapters under 28 U.S.C. § 1930(b). The Bankruptcy Committee shall study and propose an alternative fee arrangement for chapter 11 and 7 asset cases, and if the results of the study conclude that substantial funds could be raised by the chapter 11 and 7 asset case fees, then such fees, if passed by the Congress, would replace the $30 administrative fee.

CAD/LPA — Supported an amendment to 28 U.S.C. 1914(a) to increase the civil case filing fee from $120.00 to $150.00

LPA — Supported section 9(b) of the draft Claims Court Technical and Procedural Improvement Act of 1991, concerning hearings in foreign countries, with the proviso that the section be amended to include an interlocutory appeal provision, similar to that provided in 28 U.S.C. § 256(b) for the Court of International Trade.

Committee on Court and Judicial Security

CSO — Endorsed a policy that the District Court Security Committees, in conjunction with the United States Marshals Service, at least every two years, should present a program on security to all judicial officers and court employees. The program should be tailored to address local conditions and should include a plan for dealing with civil unrest.

Committee on Defender Services

LPA/DSD — Agreed to seek legislation that would amend the Criminal Justice Act to eliminate the requirement that a district have 200 CJA appointments annually in order to establish a federal public or community defender organization.

LPA/DSD — Endorsed legislation that would authorize the payment of legal expenses of persons providing services pursuant to the Criminal Justice Act, where such expenses arise from representation in connection with an investigation (which results in no adverse action) of conduct in the course of that person's official duties.

DSD — Approved the modification of the requirement for an annual report on CJA panel attorney compensation in excess of $24,000 to include only those attorneys earning in excess of $50,000 during the preceding year.

Committee on Federal-State Jurisdiction

JCS — Adopted a resolution commending former Chairman Thomas M. Reavley for his service to the Federal-State Jurisdiction Committee and to the Conference.

Committee on the Judicial Branch

LPA/JD — Opposed enactment of H.R. 4530, 102d Cong., 2d Sess., as currently drafted, on grounds that its provisions would 1) impose unjustifiable administrative burdens; 2) unnecessarily require advance clearance for travel plainly appropriate in purpose and scope; 3) create ambiguities regarding the availability of funds for official travel and the travel authority of the Federal Judicial Center and the Sentencing Commission; and 4) curtail judiciary access to the expertise found in other federal agencies.

Committee on Judicial Resources

LPA/SD — Authorized transmittal to Congress of a request for nine additional court of appeals judgeships.

LPA/SD — Authorized transmittal to Congress of a request for an additional five permanent and eleven temporary district judgeships and the conversion of one roving position to permanent in the State of Kentucky.

LPA/SD — Authorized transmittal to Congress of detailed data showing the impact on the judgeship requirements of the U.S. district courts of eliminating or limiting diversity jurisdiction.

HRD	Approved for FY 1994, the addition of fifteen permanent positions, three temporary positions, and six permanent JSP-14 data network administrator positions for circuit executives' offices in ten circuits.
CAD/HRD	Approved for FY 1994, the addition of fifteen attorney and five secretarial positions for preargument attorney offices in eight courts of appeals.
CAD/HRD	Approved a new staffing formula for district court clerks' offices with the understanding that any resulting increases be phased-in over five years and that allocations be made to offices on the basis of need.
CAD/HRD	Approved one additional court reporter for Georgia (Northern), for funding in FY 1993, upon confirmation of the first replacement judge.
CAD/HRD	Approved the addition of ten court interpreter positions for FY 1994, one each for the District of Columbia, Florida (Southern), New York (Eastern), and Washington (Eastern); three for New York (Southern); and three for temporary assignments to courts with special needs.
SFD	Approved for FY 1994, 35 additional positions to be allocated to court units to perform project coordination functions for major space and facilities projects.
CAD/HRD	Amended the bankruptcy clerks' work measurement formula to delete the deviation factor and to include a judgeship factor of 1.5 per judgeship approved by Congress.
Bky/HRD	Approved for FY 1994, seven additional positions in bankruptcy administrator offices.
HRD/CAD/ PROB	Eliminated the restrictive grade provision for bankruptcy clerks, chief probation officers, and chief pretrial services officers. In lieu thereof, the Conference instituted a new provision that would allow for an increase in the grade of district court clerks in those instances where the grade of the district court clerk would otherwise be lower than the grade of either the bankruptcy clerk, the chief probation officer or the chief pretrial services officer in the same district; *provided*, that the Chief Judge certifies that 1) the court has assigned responsibilities to the district court clerk equal to or

greater than the responsibilities of the other unit heads in the district court and, 2) the district court clerk is responsible for performing certain administrative support functions for the other units of the district court.

HRD — Approved an upgrade to JSP-18 for the Clerk of the United States Court of Appeals for the Ninth Circuit.

HRD — Regarding chief deputies and other second-in-command positions, approved a one grade gap between target grades of court unit executives and type II second-in-command positions, with no second-in-command classification exceeding a cap of JSP-16; approved the necessary changes to the Judiciary Salary Plan's chief deputy positions policy to broaden its coverage to deputy circuit executives, and deputy chief probation and pretrial services officers; and approved an upgrade from JSP-13 to JSP-14 for deputy circuit librarians.

HRD — Approved revision of the landmark job standard for systems manager JSP-13 to allow for its joint use by probation and pretrial services offices which have implemented, or shortly will implement, PACTS.

HRD — Approved the upgrade of assistant librarians in circuit headquarters libraries from JSP-11 to JSP-12.

HRD — Approved revisions to the landmark job standard for financial administrators to allow for JSP-9 financial specialists to support JSP-11 financial administrators, and JSP-11 financial specialists to support JSP-12 financial administrators.

HRD — Approved an administrative officer landmark job standard at JSP-11.

LPA/HRD — Agreed to seek amendment of 5 U.S.C. § 6304(f) to include court unit executives in the exemption from the limitation on annual leave accumulation.

HRD — Approved revisions to the Within-Grade Increase Policy to provide a two-level rating process, acceptable and unacceptable, and to require the filing of a report to the Administrative Office only if an unacceptable rating is given.

Disapproved a motion to increase the target grades of judges' secretaries from JSP-11 to JSP-12, for persons who have served as secretaries to federal judges for a minimum of 10 years and have been at step 10 of JSP-11 for at least one year.

Committee on the Administration of the Magistrate Judges System

MJD — Adopted revised "Regulations of the Judicial Conference of the United States Establishing Standards and Procedures for the Appointment and Reappointment of United States Magistrate Judges."

MJD — Approved changes in specific magistrate judge positions.

MJD — Designated the new full-time magistrate judge positions at Worcester (or Boston), Massachusetts; New Haven, Connecticut; New York City, New York; Los Angeles (or Long Beach), California; and Tampa, Florida, for accelerated funding in fiscal year 1993.

Committee on Rules of Practice and Procedure

RCSO — Endorsed a request to the Chief Justice that he reactivate an Advisory Committee on the Federal Rules of Evidence with the suggestion of some overlapping membership with the Advisory Committees on the Federal Rules of Civil and Criminal Procedure, and further that the Chief Justice appoint a reporter to serve the reactivated Evidence Rules Committee.

RCSO — Approved proposed amendments to Rules 3, 3.1, 4, 5.1, 6, 10, 12, 15, 25, 28, and 34 of the Federal Rules of Appellate Procedure and to Forms 1, 2, and 3; and agreed to transmit them to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant to law.

RCSO — Approved proposed new Rule 26.3 and amendments to Rules 1, 3, 4, 5, 5.1, 6, 9, 12, 16, 17, 26.2, 32, 32.1, 40, 41, 44, 46, 49, 50, 54, 55, 57, and 58 of the Federal Rules of Criminal Procedure; and agreed to transmit them to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant law.

Preliminary Report

RCSO Approved a proposed amendment to Rule 8 of the Rules Governing Section 2255 Proceedings; and agreed to transmit it to the Supreme Court for its consideration with the recommendation that it be approved by the Court and transmitted to Congress pursuant to law.

RCSO Approved proposed new Bankruptcy Rule 9036, and proposed amendments to Bankruptcy Rules 1010, 1013, 1017, 2002, 2003, 2005, 3009, 3015, 3018, 3019, 3020, 5005, 6002, 6006, 6007, 9002, and 9019; and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress pursuant to law.

RCSO Approved proposed amendments to Official Bankruptcy Forms 5, 9B, 9D, 9F, and 9H.

RCSO Approved a proposed amendment to Rule 4 of the Federal Rules of Civil Procedure and the proposed adoption of Forms 1A and 1B as modified by alternative language proposed by the Committee regarding the extraterritorial service of process, and the proposed abrogation of Form 18-A; and agreed to transmit these proposals to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant to law.

RCSO Approved new Civil Rule 4.1; proposed amendments to Civil Rules 1, 5, 11, 12, 15, 16, 26, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 50, 52, 53, 54, 58, 71A, 72, 73, 74, 75, and 76; proposed new Form 35; and proposed amendments to Forms 2, 3, 34, and 34A; and agreed to transmit them to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant to law.

RCSO Declined to approve proposed amendments to Civil Rule 56.

RCSO Approved proposed amendments to Rules 101, 705, and 1101 of the Federal Rules of Evidence, and agreed to transmit them to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant to law.

Committee on Space and Facilities

SFD — Amended the United States Courts Design Guide by incorporating technical and editorial changes and recommendations from the General Services Administration.

SFD — Amended the United States Courts Design Guide by changing the finish standards for grand jury hearing room suites, the space standard for fitness facilities, and the space standard for circuit judges' chambers, and by adding a space standard for news media rooms.

Committee to Review the Criminal Justice Act

Judge Diamond — Approved a resolution requesting the Defender Services Committee to undertake a detailed review of the "Interim Report of the Committee to Review the Criminal Justice Act of the Judicial Conference of the United States" and report back by January 15, 1993.

Rule 32. Sentence and Judgment

(a) IN GENERAL.

(b) PRESENTENCE INVESTIGATION

(1) In General (When Made)(now (a))

(2) Presence of Counsel (now (c)(2))

(3) Presentence Report (now (c)(3))

(4) Disclosure and Resolution of Disputes (now (c)(4))

(c) SENTENCING HEARING (now (a))

(1) In General; Time for Hearing (now (a)(1))

(2) Procedures (now (a)(1)(A) to (E))

(3) Presentation of Evidence and Consideration of Report (now (c)(4)(F))

(4) Testimony of Victims (now (d))

(5) Production of Statements at Sentencing Hearing (now (f)).

(6) Notification of Right to Appeal (now (a)(2))

(d) PLEA WITHDRAWAL (now (e))

(e) JUDGMENT (now (b))

Rule 412. ~~Victim's Past Sexual Behavior or Predisposition~~

(a) Notwithstanding Rule 404, evidence of past sexual behavior or predisposition of an alleged victim of sexual misconduct is not admissible in any civil or criminal proceeding except as provided in subdivision (b).

(b) Evidence of the past sexual behavior or predisposition of an alleged victim of sexual misconduct may be admitted under the following circumstances:

(1) evidence of specific instances of sexual behavior with persons other ~~that~~ than the person whose sexual misconduct is alleged if offered to prove that another person was the source of semen or injury;

(2) evidence of specific instances of sexual behavior with the person whose sexual misconduct is alleged if offered to prove consent;

(3) evidence of specific instances of sexual behavior if offered under circumstances in which exclusion would violate the constitutional rights of a defendant in a criminal case or in a civil case would deprive the trier of fact of evidence which is essential to a fair and accurate determination of a claim or defense; or

(4) evidence of reputation or opinion ~~evidence~~ in a civil case in which exclusion of the evidence would deprive the trier of fact of evidence which is essential to a fair and accurate determination of a claim or defense.

(c) No evidence covered by this rule ~~shall~~ may not be admitted unless the party offering it files a motion under seal, not less than 15 days prior to trial or at such other time as the court may direct, seeking leave to offer the evidence at trial. The motion must describe with particularity the evidence and the purposes for which it is offered. The court shall permit any other party as well as the alleged victim to be heard in camera on the motion and shall determine whether the evidence will be admitted, the conditions of admissibility and the form in which the evidence may be admitted. The court may ~~permit~~ grant a motion to be made under seal during trial ~~if a party claims~~ for good cause shown ~~for not making a pretrial motion, and the court may consider the motion if it finds good cause shown.~~ The motion and the record of any in camera proceeding ~~shall~~ must remain under seal during the course of all further proceedings both in the trial and appellate courts.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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EDWARD LEAVY
BANKRUPTCY RULES

September 14, 1992

TO: ALL MEMBERS OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

RE: Item II C 4 of the agenda for the meeting of October 12 - 13 in Seattle.

Enclosed is some updated material relating to Item II C 4 on the agenda of our upcoming meeting. This enclosure is intended to replace the letter from Professor Ehrhardt to Judge O'Brien dated June 23, 1992.

I am very much looking forward to seeing all of you in Seattle.

Warm personal regards.

Cordially,

Wm. Terrell Hodges

enclosure

c: Honorable Robert E. Keeton
Mr. William R. Wilson
Professor David A. Schlueter
Professor Charles W. Ehrhardt

The Florida State University
Tallahassee, Florida 32306-1034

College of Law

July 14, 1992

Judge Donald E. O'Brien
U.S. District Court
Post Office Box 267
Sioux City, Iowa 51102

Dear Judge O'Brien:

I am enclosing the Proposed Amendments to Rule 16 which you requested that I draft.

There is a proposal (Alternative 1) which requires the government to specifically identify otherwise discoverable materials which name or clearly refer to a defendant who files such a request. This amendment does not expand the materials which a defendant may discover under Rule 16 but only imposes upon the government the obligation to identify those materials which specifically name a defendant. Additionally, other documents which refer to the defendant by an alias or nickname should be identified.

Alternative 2 is another approach to the problem. When a case involves multiple defendants and has voluminous documents, the government usually will have a method of identifying the documents which are relevant to each defendant. If such a method is pre-existing, this amendment requires the government to produce it on request. Using this aid, defense counsel can eliminate much wasted time.

To address the concern that the prosecution may in good faith overlook a single document naming a defendant, I have included a provision which would deal with this problem. The provision gives the trial judge the discretion to rule in the interests of justice. It is modeled on a similar provision of the Florida Rules of Criminal Procedure, where it has worked well.

I appreciate the opportunity to provide input on this important issue. Please let me know if I can be of further assistance.

Very truly yours,

Charles W. Ehrhardt
Ladd Professor of Evidence

CWE:jvs

PROPOSED AMENDMENTS
TO RULE 16
OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

RULE 16(a)(1)(C).

Alternative 1

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant. Upon the request of a defendant, the government shall also identify any materials set forth in this paragraph which directly name the defendant or clearly refer to the defendant.

COMMENT

Alternative 1 adds a final sentence to the presently existing Rule 16(a)(1)(C) requiring the government to specifically identify discoverable materials which "directly name the defendant or clearly refer to the defendant."

Alternative 2

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant. Upon the request of a defendant, the government shall make available to the defendant any existing electronic or other method of indexing or organization which would facilitate the examination of documents set forth in this paragraph.

COMMENT

Alternative 2 adds a final sentence to Rule 16(a)(1)(C) which encompasses a different approach to the problem. Most prosecutions of multiple defendants have multiple counts in the indictment. The government usually has some method of identifying which documents are relevant to each of the separate counts. Upon the defendant's request, this amendment would require the government to produce such an index or other organizational method, if it already exists.

RULE 16(a)(4).

The court may prohibit the government from introducing in evidence any of the foregoing material not disclosed, so as to secure and maintain fairness in the just determination of the cause.

COMMENT

In order to deal with the inadvertent failure of the government to identify the materials which directly implicate a defendant, this amendment provides that the trial court has wide discretion in dealing with the matter in order to secure and maintain fairness in the just determination of the cause. This provision is identical to Florida Rule of Criminal Procedure 3.220(a)(1)(xiii).

The provision may be unnecessary in light of Rule 16(d)(2) which seems to provide this same discretion.