ADVISORY COMMITTEE ON CRIMINAL RULES

File Copy

Santa Fe, New Mexico
October 6-7, 1994

AGENDA
CRIMINAL RULES COMMITTEE
MEETING

October 6-7, 1994
Santa Fe, New Mexico

I. PRELIMINARY MATTERS

A. Administrative Announcements and Comments by Chair

B. Approval of Minutes of April 1994, Meeting in Washington, D.C.

II CRIMINAL RULES UNDER CONSIDERATION

A. Rules Approved by the Supreme Court and Forwarded to Congress: Effective December 1, 1994 (No Memo).

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

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

3. Rule 32, Sentence and Judgment (Further amendment by Congress re Victim Allocution)

4. Rule 40(d), Conditional Release of Probationer

B. Rules Approved by Standing Committee at June 1994 Meeting and Forwarded to Judicial Conference:

1. Rule 5(a), Initial Appearance Before the Magistrate

2. Rule 43, Presence of Defendant

3. Rule 46(1), Production of Statements.

4. Rule 49(e), Filing of Dangerous Offender Notice (Repeal of Provision).

5. Rule 53, Regulation of Conduct in the Court Room

6. Rule 57, Rules by District Courts

C. **Rules Approved by Standing Committee for Publication and Comment:**

1. Rule 16(a)(1)(E), (b)(1)(C), Discovery of Experts.

2. Rule 16(a)(1)(F), (b)(1)(D), Disclosure of Witness Names and Statements.

3. Rule 32(d). Sentence and Judgment; Forfeiture Proceedings Before Sentencing.

D. **Rules Under Consideration by Advisory Committee**

1. Rule 5(c). Offenses Not Triable by the United States Magistrate; Proposal to amend rule to address issue of defendant not in custody. (Memo).

2. Rule 6. Grand Jury Disclosure (Memo)

3. Rule 16, Discovery and Inspection; Proposal to include provision requiring parties to confer on discovery (Memo).

4. Rule 24(a). Trial Jurors; Proposal Re Voir Dire by Counsel (Memo).

5. Rule 40. Commitment to Another District; Exception for transporting UFAP defendants across state lines (Memo).

6. Rule 46. Release from Custody, Proposal to add provision for release of persons after arrest for violation of Probation or Supervised Release (Memo).

7. Rule 53. Regulation of Conduct in the Court Room; Report of Subcommittee on Guidelines (Memo).

E. Rules and Projects Pending Before Standing Committee and Judicial Conference

1. Status Report on Local Rules Project; Compilation of Local Rules for Criminal Cases

2. Status Report on Crime Bill Amendments Affecting Federal Rules of Criminal Procedure

III. MISCELLANEOUS

IV. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

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10/1/94

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ORAL REPORTS

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

April 18 & 19, 1994
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. April 18 and 19, 1994. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Jensen, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, April 18. The following persons were present for all or a part of the Committee's meeting:

Hon. D. Lowell Jensen, Chair
Hon. W. Eugene Davis
Hon. Sam A. Crow
Hon. George M. Marovich
Hon. David D. Dowd, Jr.
Hon. D. Brooks Smith
Hon. B. Waugh Crigler
Prof. Stephen A. Saltzburg
Mr. Tom Karas, Esq.
Ms. Rikki J. Klieman, Esq.
Mr. Henry A. Martin, Esq.
Ms. Jo Ann Harris, Assistant Attorney General &
Mr. Roger Pauley, Jr., designate of Ms. Jo Ann Harris
Professor David A. Schlueter, Reporter

Also present at the meeting were Judge Alicemarie H. Stotler and Judge William R. Wilson, Jr., chair and member respectively of the Standing Committee on Rules of Practice and Procedure; Professor Daniel Coquillette, Reporter to the Standing Committee; Mr. Peter McCabe, Mr. John Rabiej, Mr. Paul Zingg, and Mr. David Adair of the Administrative Office of the United States Courts and Mr. James Eaglin from the Federal Judicial Center.

I. HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE.

The attendees were welcomed by the chair, Judge Jensen, who introduced the three new members to the Committee,

Judges Dowd and Smith and Mr. Henry Martin.

The Committee's business meeting was preceded by a public comment hearing, taped by C-Span for broadcasting, during which the Committee heard from three witnesses who offered comments on proposed amendments to Rules 10, 43, and 53: Mr. Steven Brill (Rule 53); Mr. Tim Dyk (Rule 53) and Ms. Elizabeth Manton and Mr. Alan DuBois (Rules 10 and 43). Those proposed amendments are discussed, *infra*.

II. APPROVAL OF MINUTES OF FALL 1993 MEETING

Mr. Karas moved that the minutes for the October 1993 meeting in San Diego, be approved and Judge Marovich seconded the motion. Following corrections suggested by Mr. Wilson and Mr. Pauley, concerning their positions on witness safety, the motion carried by a unanimous vote.

III. CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

A. Rule Amendments Effective December 1, 1993

The Reporter indicated that a number of amendments had taken effect on December 1, 1993:

1. Rule 12.1, Discovery 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 Section 2255 Hearings; and
11. Technical Amendments to other rules.

B. Rules Approved by the Supreme Court and Pending Before Congress

The Reporter also indicated that the Supreme Court was in the process of approving a number of amendments for transmittal to Congress. If Congress takes no action on the proposals, the amendments would be effective on December 1, 1994:

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

2. Rule 29(b), Delayed Ruling on Judgment of Acquittal;
3. Rule 32, Sentence and Judgment; and
4. Rule 40(d), Conditional Release of Probationer

C. Rules Approved by the Standing Committee for Public Comment

The Committee was also informed that comments had been received on amendments which had been approved for public comment by the Standing Committee at its June 1993 meeting.

1. Rule 5(a), Initial Appearance Before the Magistrate; Exception for UFAP Defendants

The Reporter summarized the few comments received on the proposed amendment to Rule 5, which would create an exception for the prompt appearance requirement in those cases where the defendant is charged only with the offense of unlawful flight to avoid prosecution. One commentator raised the question of whether there should be a cross-reference to the proposed amendment in Rule 40 as well and another commentator writing on behalf of the American Bar Association indicated that the proposed amendment was in conflict with Section 10-4.1 of the ABA Standards for Criminal Justice. The proposed amendment was endorsed by the National Association of Criminal Defense Lawyers. Following brief discussion of the comments, Professor Saltzburg moved that the amendment be forwarded without change to the Standing Committee. Mr. Pauley seconded the motion, which carried by a vote of 9 to 2.

Mr. Pauley moved that Rule 40 be amended to reflect a cross-reference to the change in Rule 5 and Professor Saltzburg seconded the motion. The motion carried by a vote of 9 to 0 with two abstentions.

2. Rule 10, Arraignment; Video Teleconferencing.

The Reporter and Chair informed the Committee that several written comments had been received on the proposed amendment to Rule 10 which would permit arraignments by video teleconferencing, with the consent of the defendant. The American Bar Association and National Association of Criminal Defense Lawyers were opposed to the proposal, as were two witnesses who had appeared before the Committee. The Committee was also informed that Judge Diamond of the Committee on Defender Services had requested deferral of action on the proposed amendment pending completion of a pilot program on use of video teleconferencing technology in

federal courts. The United States Marshals Service expressed strong support for the amendment.

Observing that the amendment would dehumanize the trial, Professor Saltzburg moved that the Committee withdraw the amendment from further consideration. Mr. Karas seconded the motion. Several of the members of the Committee expressed concern about the fact that permitting video arraignments would probably simply shift the costs and time associated with transporting the defendant to the courthouse to the defense counsel, who would in all likelihood feel compelled to stand with his or her client. Mr. Pauley noted that approximately 80 percent of the defendants would opt to remain in the penal institution rather than being transported to court for an arraignment and that there are legitimate security concerns in moving defendants to and from court. Judge Marovich echoed that point. Judge Dowd questioned the mechanics of obtaining a waiver from the defendant and Mr. Karas expressed concern about starting down the slippery slope of permitting trial of defendants in absentia. Following additional discussion about the role of arraignments and the question of possible pilot programs which might address the Committee's concerns, Professor Saltzburg modified his motion to reflect that the Committee would defer the proposed amendment to the Committee's Spring 1995 meeting, after completion of those pilot programs. The motion to defer carried by a vote of 10 to 0 with 1 abstention.

3. Rule 43, Presence of Defendant; Video Teleconferencing

In light of the Committee's action on Rule 10, Professor Saltzburg moved that Rule 43 be approved and forwarded to the Standing Committee with the provision permitting video teleconferencing deleted. Judge Davis seconded the motion.

Mr. Pauley briefly addressed the issue of in absentia sentencing and noted that United States Attorneys have reported problems with fugitivity. He also noted a possible ambiguity in the proposed revision of Rule 43(b) and suggested language which would make it clear that in absentia proceedings may be conducted after jeopardy has attached by entry of a plea of guilty or nolo contendere. The Committee agreed with his suggestion and in a brief discussion concluded that Mr. Pauley's suggested language did not require additional public comment. The motion carried by a vote of 9 to 1 with one member abstaining.

4. Rule 53, Regulation of Conduct in the Court Room; Permitting Cameras and Broadcasting[1]

In addressing the proposed amendment to Rule 53 which would permit broadcasting from, and cameras in, federal criminal trials, Professor Saltzburg observed that although the proposed amendment seemed an easy rule to implement, he was concerned about simply deferring to the Judicial Conference to promulgate guidelines for implementing the rule. Instead, the Committee should consider drafting a rule which included such standards.

Judge Stotler informed the Committee that the Judicial Conference's Committee on Court Administration and Case Management was very interested in the proposed amendment and its potential implications for federal criminal trials. She emphasized that the amendment would definitely require coordination between a number of entities and committees. She noted that the Judicial Conference had voted to extend the pilot program for civil trials until December 31, 1994.

The Reporter indicated that as proposed, the amendment would clearly authorize the Judicial Conference to determine whether to conduct a pilot program for criminal trials or to implement guidelines or standards. If that language were removed, the Standing Committee might question the potential role of the Judicial Conference and put the language back in.

Judge Jensen observed that unless Rule 53 is amended in some way, there is no authority to conduct any pilot programs like those conducted by the Judicial Conference for federal civil trials. In response, Judge Crigler raised the possibility of amending Rule 53 simply to provide for pilot programs in criminal trials. But Judge Wilson questioned whether there was any need to proceed with any pilot programs.

Mr. Rabiej indicated that the Standing Committee could transmit the Committee's desire to be actively involved in drafting any guidelines, or suggesting any pilot programs. Judge Jensen added that the Committee's report to the Standing Committee could emphasize the difference in civil and criminal trials. He also noted that the report could include a statement that the Committee would remain available to assist in establishing a pilot program and any pertinent guidelines.

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1. The Committee's discussion of the amendment to Rule 53 took place on the first day of the meeting, April 18 and on the second day, April 19. It is presented in its entirety here to provide continuity.

Judge Marovich moved that the proposed amendment to Rule 53 be approved, as it was published for public comment, and forwarded to the Standing Committee along with comments that the Committee would hope to remain actively involved in promulgating standards or guidelines. Judge Davis seconded the motion.

Mr. Karas expressed concern about the negative impact of cameras in the courtroom and noted that several commentators had expressed similar concerns. He thereafter moved to amend the amendment by including language which would permit cameras and broadcasting only if both the government and defense consented. Judge Smith seconded the amendment. In the brief discussion which followed, there was a consensus that the amendment would in effect kill the possibility of cameras and broadcasting and any pilot programs. Mr. Karas stated that in his experience in the Arizona courts, there are tremendous problems with broadcasting trials. Ms. Klieman disagreed, noting that in her experience as a defense counsel, cameras and broadcasting are not distracting and that most defense counsel she has spoken to recognize there are certain benefits from giving the public greater access to what goes on in criminal trials. The motion to amend failed by a vote of 2 to 8, with one abstention.

Mr. Karas questioned whether the Committee could recommend to the Judicial Conference that in any pilot program should include the option for either party to veto the use of cameras in the courtroom. In a brief discussion Judge Jensen indicated that in his report to the Standing Committee he would indicate that the proposal had been raised in the Committee's discussion.

Following some discussion about rephrasing the amendment to make it more neutral in tone, the Committee voted to approve the amendment, as published, by a vote of 9 to 1.

Judge Jensen indicated that his report to the Standing Committee would note the Committee's strong interest in drafting the guidelines and assisting in conducting any pilot programs. Judge Stotler agreed that the Committee's input would be invaluable, especially in those areas which are unique to criminal trials. At the suggestion of Professor Saltzburg, Judge Jensen appointed a subcommittee to begin the process of drafting suggested guidelines and report to the Committee at its Fall 1994 meeting. The subcommittee consists of Ms. Klieman (chair), Judge Dowd, Professor Saltzburg, Mr. Martin, and Mr. Pauley.

5. Rule 57, Rules by District Courts

The Reporter informed the Committee that the proposed amendments to Rule 57 were being coordinated by the Standing Committee which hoped to maintain consistency in all of the rules addressing this particular topic. He noted that the Bankruptcy Advisory Committee had suggested using the term "nonwillful" instead on "negligent failure" in Rule 57(a)(2). Professor Saltzburg moved that Rule 57 be approved as published. Mr. Pauley seconded the motion. Following brief discussion of the issue, the Committee agreed with Judge Stotler's suggestion that the reference in the Advisory Committee's note to waiving a jury trial be deleted. The motion to approve the amendment and forward it to the Standing Committee carried by a unanimous vote.

6. Rule 59, Effective Date; Technical Amendments

Following a brief description concerning the proposed amendment to Rule 59 which would permit the Judicial Conference to make minor, technical changes to the Rules, Mr. Karas moved that the amendment be approved and forwarded to the Standing Committee. Judge Crigler seconded the motion, which carried by a unanimous vote.

D. Rules Under Consideration by Advisory Committee

1. Rule 6; Amendment to Permit Disclosure of Grand Jury Materials to State Judicial and Discipline Agencies.

The Reporter informed the Committee that Mr. Barry Miller of Chicago had suggested to the Committee that Rule 6(e) be amended to permit disclosure of grand jury testimony to state judicial and attorney discipline regulatory agencies. He also briefly reviewed the Committee's prior positions on grand jury secrecy and its rejection of earlier proposals to expand the disclosure of grand jury proceedings. Judge Jensen noted that the proposal apparently arose from situations where federal grand juries had heard testimony or information which implicate rules of professional responsibility and possible discipline by state agencies.

Mr. Pauley noted that the Seventh Circuit had addressed the question and had concluded that disclosure might be permitted under Rule 6(e)(3)(C)(i) where a state judicial body is seeking disclosure. Judge Jensen and Judge Crigler noted that if there is question about possible violation of state criminal laws, disclosure might be possible under

subdivision (e)(3)(C)(iv).

Mr. Karas questioned what the standard would be for disclosure and raised the possibility that there might be a conflict of interest if the government disclosed grand jury information which it knew at the time, might support an indictment. Judge Crow expressed concern that the grand jury might become a discovery tool for civil proceedings. Mr. Pauley responded that the test is one of "particularized need" and that disclosure cannot be made under the rule simply because an entity wants the information. Judge Jensen observed that grand juries might typically hear evidence involving professions other than attorneys and judges and that the proposed amendment would probably only address those situations where neither state nor federal criminal proceedings were involved.

Mr. Pauley moved that the Committee draft an amendment to Rule 6(e) to implement the suggestion from Mr. Miller. Professor Saltzburg seconded the motion, which failed by a vote of 1 to 10.

2. Rule 16. Discovery and Inspection

a. Report of Subcommittee on O'Brien Proposals

Ms. Klieman, chair of a subcommittee to study proposed changes to Rule 16 suggested by Judge Donald O'Brien, reported the subcommittee's findings and recommendations. She noted the background of the proposals and the Committee's prior positions on the issue. The proposed amendments would authorize trial courts to order the government to produce any directory, index or inventory which might assist the defense in reviewing massive documents and materials under Rule 16. She noted that the subcommittee had thoroughly reviewed the materials submitted in support of the amendments and the opposing views of the Department of Justice and had concluded that no amendment should be made to Rule 16 for several reasons. First, there was concern about cluttering the discovery rules to meet what does not appear to be a major problem with criminal discovery. Second, most of the members of the subcommittee believed that trial judges currently have sufficient authority to order such production under the rules. Nothing in the rule currently forbids such discovery and the 1974 Advisory Committee Note indicates that the provisions of Rule 16 are intended to provide the minimum discovery available in criminal trials.

Ms. Klieman also indicated that the Reporter had supplied the subcommittee with a memo indicating a lack of

any dispositive caselaw on the subject and suggesting that a minor amendment to Rule 16 might be appropriate. She noted that she had informally spoken with a number of defense counsel who were not in favor of the amendment because it might encourage laziness on the part of young or inexperienced defense counsel who would not conduct meaningful discovery on behalf of their clients.

Judges Davis and Marovich agreed with that assessment and in particular, the fact that Rule 16 sets out only the minimum standards and that judges have the authority to order such discovery in a particular case. Mr. Pauley, while arguing against a rule change, nevertheless disagreed with that conclusion. He noted that if read literally, the 1974 Committee Note would eliminate the necessity of any additional discovery amendments in Rule 16, including a proposed amendment to require the government to disclose the names of its witnesses before trial. Judge Jensen observed that a trial court's order to the government to produce what amounts to its work product in a major case would be unwarranted.

Ms. Klieman indicated that what the defense really wants is an indication from the government as to what information it will be introducing at trial. Professor Saltzburg agreed, noting that under Rule 16, as written, there are clear differences between various documents and materials and that the problem often arises where defense counsel do not clearly articulate just what they want from the government.

Following additional brief discussion on whether any special action should be taken with regard to accepting formally the subcommittee's report, Judge Jensen indicated that no action would be necessary on the report itself and that if there was interest in amending Rule 16, a motion to do so would be in order. There was no such motion.

b. Prado Report Re Allocation of Costs of Discovery

The Reporter indicated that portions of the Report of the Judicial Conference of the United States on the Federal Defender Program, i.e., the Prado Report had been referred to the Committee for its consideration. The Report recommended consideration of amendments to the rules which would address the issue of assessing or allocating discovery costs between the defense and government. Judge Crigler questioned whether any amendment was appropriate. Mr. Martin gave examples of how the government currently provides defense access to photocopying machines for purposes of discovery. Following additional brief

discussion of the issue, a consensus emerged that the matter was more appropriately a question for statutory amendments. Judge Marovich moved that no amendment be made to the criminal rules. Judge Crigler seconded the motion, which carried by a vote of 10 to 1.

c. Production of Witnesses' Names

The Reporter provided background information on a proposal to amend Rule 16 which would require the prosecution to disclose to the defense seven days before trial, the names, addresses and statements of the witnesses it intended to call at trial.[2] He noted that a proposal approved by the Advisory Committee at its Fall 1993 meeting in San Diego had been presented to the Standing Committee at its January 1994 meeting in Tucson, Arizona. At that meeting, a representative from the Justice Department, Mr. Nathan, urged the Committee to defer action on the amendment until the Department had had an opportunity to work on a compromise provision with the Advisory Committee. Although the Standing Committee was in general agreement with the intent of the amendment, it referred the proposal back to the Advisory Committee for further consideration of any additional proposals from the Department of Justice. The Advisory Committee was also asked to address possible concerns about whether the amendment would conflict with the Jencks Act. The Standing Committee took special note of the fact that referring the matter back to the April 1994 meeting of the Advisory Committee would not delay the process of seeking public comments.

The Reporter indicated that in response to suggestions from members of the Standing Committee, he had made minor changes to both the Rule and the Advisory Committee Note.

Ms. Jo Ann Harris, Assistant Attorney General, urged the Committee to defer any further action the proposed amendment pending the development of hard data which would show whether any problems might exist with disclosing witness names. She noted that the information driving the proposed amendment seems to be largely anecdotal and that proposed amendments to the rules should not be based on anecdotes. She assured the Committee that the Department of Justice was working in good faith toward obtaining "hard data" on this issue and developing internal guidelines but that there was concern among United States Attorneys about

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2. The proposed amendment to Rule 16 dealing with disclosure of witness names was discussed first on April 18 and concluded on April 19. It it is presented here in its entirety for purposes of continuity.

codifying what they generally do -- provide open disclosure to the defense. Ms. Harris added that the Department was willing to work toward a uniform policy of discovery and asked for time to conduct a thorough survey of current practices. In response to a comments from Judge Jensen and Judge Smith that the comment period would not interfere with the Department's proposed survey, Ms Harris noted that the results of the survey might affect even the initial draft sent out for public comment.

Professor Saltzburg noted that the issue before the Committee was not new and that there is a real policy question at issue. He added that the draft amendment provided more than adequate protection for government witnesses who were in danger. Mr. Wilson noted that open file discovery was often inversely proportional to the strength of the government's case.

Judge Marovich indicated that a system of informal discovery practices often depended on the trial judge. He also cited his experience in state courts, which often involve questions of witness safety and yet discovery is provided.

The Reporter commented on the history of the present amendment and that the Department of Justice had assured the Committee several years earlier that it would consider internal policy changes to provide broader pretrial discovery and that the Department had worked actively to stem any formal amendments. He also indicated that the Department had assured the Standing Committee that it would work in good faith to reach an accommodation on this particular amendment and that it had not indicated that it would seek further delay in the amendment process.

Ms. Harris indicated that the Department was simply recommending that the Committee have the benefit of a formal survey of United States Attorneys before moving forward with the amendment. She also noted that the present draft did not give sufficient attention to the privacy interests of the witnesses.

Concerning specific comments on the proposed amendment, Ms. Harris and Mr. Pauley noted that there were problems with the Jencks Act, which they believed was clearly at odds with the amendment. Mr. Pauley also stated that there might be potential separation of powers issues.

Professor Saltzburg agreed with the view that the amendment is inconsistent with Jencks but that that argument is merely a screen for not addressing the merits of the amendment. He also indicated that in his view there is no

constitutional law issue and that in enacting the Rules Enabling Act, including a supersession clause, Congress recognized that the courts have special expertise in drafting proposed rules and that amendments might be necessary from time to time. The process of amending the rules is special because it is not adversarial.

Judge Stotler indicated that the litigation battles over discovery are being fought today and that trial judges are capable of applying any amendment to Rule 16.

Ms. Klieman moved that the proposed amendment be sent forward to the Standing Committee, as changed by the Reporter. Mr. Martin seconded the motion.

Ms. Harris and Judge Dowd raised questions about including the witness's address in the amendment. Ms. Klieman responded that in other discovery rules, in particular Rule 12.1 requires the defense to provide the names and addresses of its witnesses to the government. Ms. Harris responded by noting that there is a difference in alibi witnesses and other witnesses and that alibi witnesses are seldom encountered in federal cases. She added that if the defense counsel wishes to talk to the government witness, the Department will always make arrangements for such interviews. Judge Marovich agreed that that procedure seemed to be satisfactory. Professor Saltzburg indicated that he could accept deletion of the requirement to give the witness' address. Judge Jensen indicated that removal of the references to addresses from the rule should not be interpreted to frustrate the defense's attempts to actually speak with the government witness.

Judge Dowd moved to amend the proposal by deleting references to a witness' address. Judge Marovich seconded the motion, which carried by a vote of 8 to 1. Judge Jensen suggested that the Advisory Committee Note reflect the fact that the deletion of references to witnesses' addresses was not intended to frustrate the ability of the defense to attempt to speak with the witness before trial.

Ms. Harris expressed concern that the proposed amendment is too narrow in stating the reasons which could be relied upon by the prosecution to refuse to disclose information about a witness. She indicated that the list of reasons should include recognition that witnesses often face hardships, intimidation, and economic or social disadvantage by agreeing to testify for the government. Mr. Pauley indicated that excellent examples of intimidation have arisen in the civil rights cases where witnesses have faced what amounts to a form of excommunication. He believed that on balance, in those cases the harm to society would exceed

the interests of the defense in discovering the witness' identity. Many witnesses are aware that most cases will not go to trial, but will have been needlessly identified. Judge Davis indicated that he could support an amendment to the rule to cover a separate class of witnesses who fear intimidation and that the trial court could review the government's reasons for not disclosing those witnesses. The Reporter indicated that the Committee Note recognizes that other provisions of Rule 16 might be invoked by the prosecution to protect its witnesses and those provisions might be relied upon to protect witnesses not otherwise covered by the proposed amendment. There was no motion to further amend the Rule or the Committee Note regarding the possibility of additional criteria for withholding disclosure.

Ms. Harris stated that the Department of Justice was concerned about the seven day period envisioned by the rule. She would favor a shorter time frame. Mr. Pauley indicated that the seven-day provision was inconsistent with the three-day disclosure provision in capital cases. Mr. Wilson urged the Committee to retain the seven-day provision and Judge Jensen noted that in actual practice, 10 days is a typical time frame. Mr. Pauley responded that the proposal did not take into account long trials. Professor Saltzburg stated that it would be important to keep the seven day provision because the defense needs to know early in the trial who the government intends to call. There was no formal motion to change the time period envisioned in the proposal.

Turning to the question of whether the rule envisioned an all or nothing approach to reciprocal discovery, Judge Davis moved to amend the proposal to reflect the fact that the court has the discretion to limit the government's reciprocal discovery rights if the government has filed an ex parte affidavit indicating its refusal to disclose information. Judge Dowd seconded the motion. Following additional brief discussion on the motion, the Committee voted 5 to 3 to amend the proposal.

On the main motion, the Committee voted 9 to 1 to send the amendment to the Standing Committee for public comment.

d. Defense Disclosure to Government of Summary of Expert Testimony on Defendant's Mental Condition

Mr. Pauley indicated that the Department of Justice had proposed an amendment to Rule 16, which would require the defense to disclose, upon a triggering request from the government, information about its expert witnesses who would

testify on an insanity defense. He noted that amendments to Rule 16, which were effective on December 1, 1993, provided for defense discovery of a government's witness's expected testimony and qualifications. The proposed amendment, he explained, would afford the government the limited right to initiate discovery where the defense has given notice under Rule 12.2 of an intent to rely on the insanity defense. In offering the amendment, he indicated that the amendment would reduce surprise to the government and possible delays in the trial.

Professor Saltzburg voiced agreement with the proposed amendment, and the Department of Justice's recognition that reduction of surprise and delay were valid reasons for expanding federal criminal discovery. He also expressed hope that the Department would not oppose attempts to expand defense discovery, in particular, the proposed amendment to provide the defense with the names and statements of government witnesses before trial.

Mr. Pauley moved that Rule 16 be amended to incorporate the Department's suggested change. Professor Saltzburg seconded the motion which carried by a unanimous vote.

3. Rule 26; Proposal to Permit Questioning by Jurors

The Reporter indicated that the Committee at its Fall 1993 meeting had deferred any action on a possible amendment to Rule 26 which would address the issue of questioning of witnesses by the jury. Following brief discussion, no action was taken on the issue.

4. Rule 32; Amendment Permitting Criminal Forfeiture Before Sentencing

Mr. Pauley noted that as presently written, Rule 32 envisions that forfeiture proceedings are part of the sentence. The Department of Justice's view, he said, is that any delays in sentencing, and thus forfeiture, can make it difficult to seize the property and protect the government's interest and interest of third parties, e.g. lien holders. He indicated that there are examples of defendants who have ruined the property in question while awaiting sentencing. Under an amendment proposed by the Department, the trial court would have the discretion to order forfeiture before sentencing.

Mr. Pauley moved to adopt the written proposal from the Department of Justice and Judge Dowd seconded the motion.

Judge Jensen queried whether the trial court has any authority to impose forfeiture notwithstanding the sentence. Mr. Pauley indicated that while a court may freeze assets, there is no authority to actually proceed with forfeiture and protect third party interests. Professor Saltzburg expressed concern that the amendment would actually prevent destruction of the property and stated that in his view, the All Writs Act provided authority to the trial court. Other members raised questions about the practical aspects of entering a forfeiture order and then incorporating that order as part of the judgment in the case. Mr. Pauley indicated that the Department's proposal paralleled part of a larger legislative package on forfeiture and that the amendment could be made a part of that legislative package instead of proceeding through the rules enabling act.

The Reporter expressed concern about the timing of the proposed amendment to Rule 32 in light of the fact that Congress would be considering the massive amendments to that rule, at the same time the proposed amendment would be out for public comment. Several members indicated in response that if the Standing Committee views that as a legitimate issue, it could delay publication of the proposal pending any final action by Congress on Rule 32.

The Committee voted 6 to 4 to amend Rule 32 as recommended by the Department of Justice in its letter to the Committee.

5. Rule 46; Typographical Error

The Reporter informed the Committee that a typographical error had been discovered in Rule 46(i), an amendment which went into effect on December 1, 1993. That new provision addresses the issue of disclosing statements by witnesses who testify at pretrial detention proceedings. The rule, however, cites 18 U.S.C. § 3144 instead of § 3142, which governs pretrial detention hearings. Apparently, several magistrate judges are reading the rule literally although it is clear in the Advisory Committee Note and in other amendments to the rules that the Committee intended the rule to apply at detention hearings. Mr. Pauley indicated that the United States Attorneys have been instructed to not argue for literal application of the provision. The Reporter indicated that Judge Jensen had requested the Administrative Office to initiate any necessary legislative action to correct the provision.

6. Rule 49(e); Repeal of Provision

The Reporter noted that the statutory provisions cited in Rule 49(e) concerning filing notice of dangerous offender status had been abrogated, thus removing the necessity for the rule. Upon motion by Judge Marovich, seconded by Judge Dowd, the Committee voted unanimously to recommend that the provision be deleted.

E. Rules and Projects Pending Before Standing Committee and Judicial Conference

1. Status Report on Local Rules Project; Compilation of Local Rules for Criminal Cases

The Reporter informed the Committee that the Local Rules Project, which had compiled helpful information on local rules governing civil cases, would be conducting a similar study for criminal cases. That project is being coordinated by Professor Daniel Coquillette and Professor Mary Squires of Boston College School of Law.

2. Status Report on Proposal to Implement Guidelines for Filing by Facsimile

The Committee was informed by the Reporter that the Standing Committee had given considerable time and effort at its January 1994 meeting toward redrafting and clarifying some uniform guidelines for facsimile filing and had forwarded them to the Judicial Conference for action.

3. Status Report on Crime Bill Amendments Affecting Federal Rules of Criminal Procedure

The Committee was also informed that pending legislation in the Crime Bill might affect rules of criminal procedure and evidence. In particular, Congress is considering an amendment to Rule 32 which would provide for victim allocution at sentencing. The Administrative Office and Judicial Conference are monitoring the legislation and have urged the Congressional leadership to follow the procedures set out in the Rules Enabling Act.

IV. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

After brief discussion the Committee decided to hold its next meeting in Santa Fe, New Mexico on October 6 & 7, 1994. Alternate dates are October 13 & 14, 1994.

The meeting adjourned at 10:30 a.m. on April 19, 1994.

Respectfully submitted,

David A. Schlueter
Professor of Law
Reporter

Agenda Item II-A-C
Santa Fe New Mexico
10/6-7/1994

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code. While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

Honorable Thomas S. Foley
Speaker of the House of Representatives
Washington, D.C. 20515

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Criminal Rules 16, 29, 32, and 40.

[See infra., pp. _____ _____ _____.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 1994, and shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

Agenda F-19 (Summary)
Rules
September 1994

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Appellate Rules 4, 8, 10, and 47 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.....pp. 2-4

2. Approve the proposed amendments to Bankruptcy Rules 8018 and 9029 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.....pp. 5-6

3. Approve proposed amendments to Civil Rules 50, 52, 59, and 83 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the court and transmitted to Congress in accordance with the law.....pp. 9-10

4. Approve the proposed amendments to Criminal Rules 5, 40, 43, 46, 49, 53, and 57 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.....pp. 11-14

5. Refer the proposal in the Report on the Federal Defender Program (March 1993) to allocate certain discovery costs between the government and the defense in criminal cases to the Committee on Defender Services for further consideration.....pp. 14-15

6. Continue the existing policy on facsimile filing and take no action to permit facsimile filing on a routine basis.....pp. 18-20

The remainder of the report is for information and the record.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

September 1, 1994

TO THE BENCH, BAR, AND PUBLIC:

The Judicial Conference Advisory Committees on the Appellate, Bankruptcy, Civil, and Criminal Rules have proposed various amendments to the federal rules and have requested that the proposals be circulated to the bench, bar, and public generally for comment. The advisory committee notes explain the proposals.

The Advisory Committee on Evidence Rules has been engaged in a comprehensive review of all the Evidence Rules, and it has completed an initial assessment of 25 rules. The committee has decided tentatively not to amend any of those rules. It believes that public comment on its work would be helpful and seeks comment on its tentative decision not to amend the 25 rules, which are listed later in this pamphlet.

We request that all suggestions and comments, whether favorable, adverse, or otherwise, be placed in the hands of the Secretary as soon as convenient and, in any event, **no later than February 28, 1995**. All communications on rules should be addressed to the Secretary of the Committee of Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544.

To provide persons and organizations wishing an opportunity to comment orally on the proposed amendments, a hearing is scheduled to be held on the amendments to the Appellate Rules in Denver, Colorado on January 23, 1995; to the Bankruptcy Rules in Washington, D.C. on February 24, 1995; to the Civil Rule in Dallas, Texas on January 10, 1995; to the Criminal Rules in New York, New York on December 12, 1994, and in Los Angeles, California on January 27, 1995. A hearing on the Evidence Rules will be held in New York, New York on January 5, 1995.

The respective advisory committees will review all timely received comments and will take a fresh look at the proposals in light of the comments. If an advisory committee approves a proposal, it and any revisions as well as a summary of all comments received from the public will then be considered by the Standing Committee.

The Judicial Conference Standing Committee on Rules of Practice and Procedure **has not approved these proposals**, except to authorize their publication for comment. These proposed amendments have not been submitted to or considered by the Judicial Conference of the United States or the Supreme Court.

Alicemarie H. Stotler
Chair

Peter G. McCabe
Secretary

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United States District Court
District of Massachusetts
918 John W. McCormack Post Office & Courthouse
Boston, Massachusetts 02109-4565

Robert B. Collings
United States Magistrate Judge

March 18, 1994

Peter G. McCabe, Secretary
Committee on Rules of Practice
and Procedure,
Administrative Office of the
United States Courts
Thurgood Marshall Federal
Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

RE: Proposal for Additional Amendments to the Federal Rules of Criminal Procedure

Dear Peter:

As we discussed last week, I am forwarding herein proposals for additional amendments to the Federal Rules of Criminal Procedure which, if possible, I would like the Advisory Committee to take up at their April meeting.

1. RULE 16

I propose an addition to Rule 16(d), Fed.R.Crim.P., which would be numbered 16(d)(2) and the present 16(d)(2) would be renumbered 16(d)(3) and changed in a minor way. The new 16(d)(2) would read:

> (2) Obligation to Confer. **No motion or other pleading seeking to compel discovery and inspection shall be filed unless the movant includes in the motion or pleading a certification that the movant has in good faith conferred or attempted to confer with the party not providing the discovery and inspection in an effort to secure the discovery and inspection without court action.**

magistrate judge in the district of arrest.

4. RULE 5(c)

There is a conflict between Rule 5(c) and Rule 58(b)(2)(G). The second paragraph of Rule 5(c) provides as follows:

> A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court.

Rule 58(b)(2)(G) requires that at an initial appearance "on a misdemeanor or other petty offense charge, the court shall inform the defendant of":

> (G) if the defendant is held in custody and charged with a misdemeanor other than a petty offense, the right to a preliminary examination in accordance with 18 U.S.C. § 3060 and the general circumstances under which the defendant may secure pre-trial release.

The question is whether a defendant who is charged with a misdemeanor but is not held in custody is entitled to a preliminary examination. Rule 5 seems to indicate that the defendant is; Rule 58(b)(1)(G) seems to indicate that the defendant is not. I suggest that the second paragraph of Rule 5 be amended to read as follows:

> A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, **if the offense is a felony or if the offense is a misdemeanor and the defendant is held in custody on said misdemeanor charge.**

I hope that the Advisory Committee will be able to consider these suggested changes. I would be happy to consult with the committee and/or its staff, in person or otherwise, if such a consultation is desired.

Very truly yours,

ROBERT B. COLLINGS
United States Magistrate Judge

By Fax and U.S. Mail

AGENDA ITEM - II-D-2
Santa Fe, New Mexico
October 6-7, 1994

MEMO TO: Advisory Committee on Criminal Rules

FROM: Prof. Dave Schlueter, Reporter

RE: Rule 6; Possible Amendments to Title 18 Which Would Allow DOJ to Share Grand Jury Information With Departmental Attorneys for Health Care Offenses.

DATE: August 39, 1994

Attached for the Committee's information is a copy of proposed legislation which would permit the Department of Justice to share grand jury information with other attorneys in the Department for purposes of civil enforcement of health care legislation.

John Rabiej notes in his letter that the proposed legislation raises a number of issues which ultimately involve the Advisory Committee. In the past, the Committee has generally rejected any efforts to permit greater disclosure of grand jury proceedings.

The matter is on the agenda for the Committee's October meeting in Santa Fe.

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

July 8, 1994

MEMORANDUM TO JUDGE D. LOWELL JENSEN

SUBJECT: Grand Jury Disclosure

I am attaching a copy of § 5436 of the Administration's Health Care Act (S. 1757 and H.R. 3600). The provision would amend Title 18 to allow the Department of Justice to share grand jury information with other Departmental attorneys who need the information for civil enforcement purposes in a case involving a health care offense.

A similar, but more general, proposal was considered by the Advisory Committee on Criminal Rules at its meeting in April 1992. On a closely divided vote, the committee decided not to amend Rule 6 to permit the disclosure of grand jury information in a civil case. A copy of the DOJ proposal and an excerpt from the pertinent minutes of the meeting explain the committee's action.

The legislative proposal raises several questions, including:

(1) Whether the proposal is a statutory matter (outside our bailiwick) or a rules matter?

(2) If it is a rules-related matter, should the committee advise Congress of its position in writing? Or should the committee delay taking action until it has an opportunity to reconsider its position at the October meeting?

A subcommittee of the Judicial Conference Committee on Federal-State Relations is meeting during the week of July 18 to discuss the judiciary's general response to the Health Care Act as it affects the judiciary.

The rules committees have not yet been requested by Congress for a position on this provision. I will keep you posted of any developments on the status of the bill and this particular provision.

John K. Rabiej

Attachments

cc: Honorable Alicemarie H. Stotler
Professor David A. Schlueter
Professor Daniel R. Coquillette

"(2) the term 'health care sponsor' means any individual or entity serving as the sponsor of a health alliance or health plan for purposes of the Health Security Act, and includes the joint board of trustees or other similar body used by two or more employers to administer a health alliance or health plan for purposes of such Act.".

(b) CLERICAL AMENDMENT.—The table of chapters at the beginning of chapter 11 of title 18, United States Code, is amended by adding at the end the following:

"226. Bribery and graft in connection with health care.".

SEC. 5435. INJUNCTIVE RELIEF RELATING TO HEALTH CARE OFFENSES.

Section 1345(a)(1) of title 18, United States Code, is amended—

(1) by striking "or" at the end of subparagraph (A);

(2) by inserting "or" at the end of subparagraph (B); and

(3) by adding at the end the following:

"(C) committing or about to commit a Federal health care offense (as defined in section 5402(d) of the Health Security Act);".

SEC. 5436. GRAND JURY DISCLOSURE.

Section 3322 of title 18, United States Code, is amended—

(1) by redesignating subsections (c) and (d) as subsections (d) and (e), respectively; and

(2) by inserting after subsection (b) the following:

"(c) A person who is privy to grand jury information concerning a health law violation—

"(1) received in the course of duty as an attorney for the Government; or

"(2) disclosed under rule 6(e)(3)(A)(ii) of the Federal Rules of Criminal Procedure;

may disclose that information to an attorney for the Government to use in any civil proceeding related to a Federal health care offense (as defined in section 5402(d) of the Health Security Act).".

SEC. 5437. THEFT OR EMBEZZLEMENT.

(a) IN GENERAL.—Chapter 31 of title 18, United States Code, is amended by adding at the end the following:

"§ 668. Theft or embezzlement in connection with health care

"(a) Whoever embezzles, steals, willfully and unlawfully converts to the use of any person other than the rightful owner, or intentionally misapplies any of the moneys, securities, premiums, credits, property, or other assets of a health alliance, health plan, or of any fund connected

AGENDA ITEM - II-D-3
Santa Fe, New Mexico
October 6-7, 1994

MEMO TO: Advisory Committee on Criminal Rules

FROM: Prof. Dave Schlueter, Reporter

RE: Rule 16(d), Proposed Amendment Requiring Counsel to Confer During Discovery.

DATE: August 31, 1994

Attached is a portion of a letter from Magistrate Judge Robert Collings (Boston) in which he recommends that Rule 16(d) be amended to require both parties to confer before asking the court to compel discovery. His proposal is based upon recent amendments to Rules 26 and 37, Rules of Civil Procedure. He notes in his letter that he believes that it makes sense to require counsel in both civil and criminal cases to confer on the issue of discovery before submitting the issue to the court.

This matter is on the agenda for the October meeting.

United States District Court
District of Massachusetts
918 John W. McCormack Post Office & Courthouse
Boston, Massachusetts 02109-4565

Robert B. Collings
United States Magistrate Judge

March 18, 1994

Peter G. McCabe, Secretary
Committee on Rules of Practice
and Procedure,
Administrative Office of the
United States Courts
Thurgood Marshall Federal
Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

RE: Proposal for Additional Amendments to the Federal Rules of Criminal Procedure

Dear Peter:

As we discussed last week, I am forwarding herein proposals for additional amendments to the Federal Rules of Criminal Procedure which, if possible, I would like the Advisory Committee to take up at their April meeting.

1. RULE 16

I propose an addition to Rule 16(d), Fed.R.Crim.P., which would be numbered 16(d)(2) and the present 16(d)(2) would be renumbered 16(d)(3) and changed in a minor way. The new 16(d)(2) would read:

> (2) Obligation to Confer No motion or other pleading seeking to compel discovery and inspection shall be filed unless the movant includes in the motion or pleading a certification that the movant has in good faith conferred or attempted to confer with the party not providing the discovery and inspection in an effort to secure the discovery and inspection without court action.

The first sentence of the new Rule 16(d)(3) would read:

> (3) Failure to Comply With a Request. If at any time during the course of the proceedings, it is brought to the attention of the court, **after compliance with subdivision (d)(2)**, that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

This suggested change is based on the changes to Rule 26(c) and 37(a)(2) to the Federal Rules of Civil Procedure which became effective on December 1, 1993. It seems to me to make eminent sense to require that any disputes respecting discovery in **both** criminal and civil cases to be conferenced between the parties before submitting it to the Court. If after conferring, agreement is reached, there is no need for the Court to become involved at all, thereby saving scarce judicial resources. If conferring does not result in complete agreement, it may result in partial agreement so that the dispute is narrowed when it is presented to the judicial officer. I would require that the obligation to confer be imposed not only on motions seeking the discovery provided in Rule 16 but in **any** situation in which discovery is sought in a criminal case.

2. RULE 46 (and conforming changes to Rules 32.1 and 40(d))

I suggest adding a new subdivision (d) to Rule 46 and renumbering the present subdivisions (d), (e), (f), (g) and (h) as (e), (f), (g), (h) and (i). The new subdivision would read as follows:

> (d) Release after Arrest for Violation of Probation or Supervised Release. **Eligibility for release after the arrest of a probationer or supervised releasee charged with violating the terms of probation or supervised release shall be in accordance with 18 U.S.C. § 3143. The burden of proving that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant by clear and convincing evidence.**

This change would require that the references to Rule 46(c) contained in Rule 32.1(a) and the proposed Rule 40(d) be changed to refer to Rule 46(d) rather than 46(c).

AGENDA ITEM - II-D-4
Santa Fe, New Mexico
October 6-7, 1994

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

FROM: **Prof. Dave Schlueter, Reporter**

RE: **Rule 24(a), Proposed Amendment to Permit Counsel to Conduct Voir Dire**

DATE: **August 31, 1994**

Attached are materials relating to the issue of questioning of prospective jurors by counsel. The issue has been raised by several sources in the recent past, and most recently by the Civil Rules Committee and Judge Wilson. To the best of my knowledge the Committee has not directly visited this issue in a number of years; when it has been raised, it normally addressed in the context of possibly equalizing peremptory challenges.

The materials include a letter from Judge Wilson, urging an amendment to both Civil Rule 47 and Criminal Rule 24; a letter from Professor Ed Cooper, Reporter to the Advisory Committee who has drafted several possible versions of an amendment to Civil Rule 47; a possible amendment to Criminal Rule 24(a); and portions of a survey of federal judges taken in 1992 concerning their views on voir dire of prospective jurors.

Also attached is a cover letter for an in-depth collection of materials provided by John Rabiej to both Judge Jensen and Judge Higginbotham. As noted in Mr. Rabiej's cover letter for those materials, the Judicial Conference has opposed direct attorney participation in voir dire examination for since 1943. Nontheless, over the years there have been repeated attempts to enact legislation which would provide for such examination. I will attempt to bring those materials with me to the Committee's meeting.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
P. O. BOX 1379
LITTLE ROCK, ARKANSAS 72203-1379
(501) 324-6863
FAX (501) 324-6869

BILL WILSON
JUDGE

May 19, 1994

The Honorable D. Lowell Jensen
United States District Judge
Chair, Advisory Committee on Criminal Rules
Post Office Box 36060
San Francisco, CA 94102

Dear Judge Jensen:

I propose the following amendments to Rule 47 of the Federal Rules of Civil Procedure, and to Rule 24 of the Federal Rules of Criminal Procedure:

RULE 47(a) FEDERAL RULES OF CIVIL PROCEDURE
SELECTION OF JURORS

The Court may conduct an examination of prospective jurors, and the parties or their attorneys shall be permitted to conduct an examination. The Court may place reasonable limits on the time and nature of examination by the parties or their lawyers.

RULE 24(a) FEDERAL RULES OF CRIMINAL PROCEDURE
TRIAL JURORS

The Court may conduct an examination of prospective jurors, and the parties or their attorneys shall be permitted to conduct an examination. The Court may place reasonable limits on the time and nature of examination by the parties or their lawyers.

During recent sessions of Congress Senator Heflin of Alabama has introduced legislation which would secure the right of voir dire examination by lawyers. This legislation passed the Senate last year, but was stalled in the House Committee on the Judiciary.

Senator Pryor of Arkansas first introduced this legislation soon after he was elected to the Senate (1978). Since Senator Pryor is not a member of the Senate Committee on the Judiciary he handed the baton to Senator Heflin.

Nearly all -- if not all -- of the trial lawyers associations in the United States supported the legislation. It was also endorsed by the Scott County (Arkansas) Democratic Women's Club (since you are a very discerning person, I know that you will guess that I have some connection with Scott County -- it is my home county). There is no Scott County Republican Women's Club, or I am sure it would have supported this worthy cause too.

Federal judges and federal prosecutors have been the primary opponents of lawyer voir dire.

I have always believed that it is a violation of due process to prohibit voir dire by lawyers. Unfortunately my opinion has not been adopted by the courts. See U.S. v. White, 750 F.2d 726 (8th Cir. 1984).

There are several reasons why lawyers should be permitted to conduct voir dire. In the first place, while lawyers too often do not do a very good job of questioning prospective jurors, they do a better job than judges (no offense intended). Several years ago the late Charlie Cable of Kennett, Missouri and I were up in the Boot Heel of Missouri interviewing witnesses. We met a local judge at lunch. Charlie had tried a case before the judge a few days earlier. Apparently the voir dire by the other lawyer had not been very good. The judge asked, "Charlie, after seeing that other lawyer conduct voir dire, do you still contend that lawyers should be allowed to participate in this process?" Charlie replied, "Judge, that voir dire was awful -- it stunk. In fact, it was so bad that it was just barely better than the best judge-only voir dire I ever saw."

Amen brothers and sisters, amen.

I have always wondered why a judge, who is not familiar with the nuances of a case, presumes to think that (s)he can ferret out hidden fixed notions (a/k/a prejudices). "Upon what meat doth this our Caesar feed?"

Most judges do a once-over-lightly-let's-get-on-with-it examination. Too often judges are hell bent to "make a jury and get on with it." Virtually all judges deny this fact -- even those who do the most cursory examinations. In fact, the less trial experience a judge had before (s)he had goes on the bench the more likely (s)he is to preclude lawyer voir dire.

I don't want to belabor this point, but judges who have not had much trial experience tend to believe that a juror is a juror is a juror is a juror.

When judges have testified against lawyer voir dire (before Senator Heflin's subcommittee) they have raised the horrible specter of voir dire taking three weeks and the evidentiary stage three days.

These examples would be amusing if the judges didn't present them so seriously -- and with straight faces. These same judges can (and often do) limit opening statements to ten or fifteen minutes and summation to twenty or thirty minutes -- yet they aver, seriously, that those rapacious advocates will "take over the courtroom" if permitted to voir dire!

Enclosed is a copy of the guidelines I give to lawyers regarding voir dire. While I have been a judge for only seven months, we have always had the jury in the box before lunch of the first day of the trial; and often opening statements have been completed.

While undue delay is to be condemned, we must not worship at the alter of "judicial economy of time." Justice first, speed second.

Before I became a judge I spent over a quarter of a century trying civil and criminal cases. I can only remember three cases where voir dire took nearly all of the first day of trial. One was a multiparty racketeering case, another a multiparty antitrust (criminal case). The other was a capital murder case -- the prospective jurors were "Witherspooned" individually in chambers. In the capital case we finished voir dire at 6:00 p.m. on the first day of trial.

The vast majority of cases reasonable voir dire can be completed in an hour or less. It is true that voir dire is the most "free wheeling" part of the trial, and I believe many judges are uncomfortable because of this -- but it ain't no big deal. I promise.

Judges are wont to observe "those lawyers just want to pick a favorable jury." I first ask, "so what? Do we believe in the adversary system?" I mean if one side is trying to pick a favorable jury, and the other side is trying to pick a favorable jury, don't we believe that it will come out right? Be that as it may, let's think about this assertion. In a civil case each side has only three peremptory challenges.* The best a lawyer can hope for is that (s)he can discern (divine) the worst prospective jurors. There is no reasonable chance, with only three strikes, that one can pare it down to the "good" jurors. While there are more peremptories in criminal cases, one can still only hope to get rid of "bad" jurors.

We must not blink at reality -- far too many judges are too anxious to qualify jurors. How many times have we heard, "Mr. Jones, despite the fact that you are a next door neighbor of the plaintiff, and have been for twenty years, can you, and will you,

* And these must not be based on race or sex.

set that relationship aside, and decide this case solely on the evidence and the law? Will you do this? How about, in a bank robbery case, "Mrs. Jones, will you set aside the fact that your son is a teller at a savings and loan, and base your decision..., etc.?"

The above are not extreme examples. "Questions" of this nature are asked regularly in courtrooms across the country -- in federal courtrooms too.

A lawyer for a party should be able to probe further when a judge strives to qualify a juror in this manner. It is no solution for judges to sniff and opine that judges shouldn't act like this -- they do, and will continue to do so. And how often does an appellate court reverse on this ground?

The judge-only variety of voir dire favors the wealthy. A jury background investigation is quite expensive. A reasonable amount of lawyer voir dire will help level the playing field. I believe, as do about all casual and scientific observers of human nature, save and except judges, that jurors are less likely to be forthcoming with the judge, the authority figure.

It is important to note the new limitations on peremptory strikes (they may not be based upon race or gender). Some believe that the peremptory strike is on the way out. I hope not, but, regardless, the more limitations we have on peremptory strikes, the more important lawyer voir dire becomes.

Last, but not least, lawyers believe that they are being treated unfairly when not permitted to conduct voir dire. Some judges ask, "So what?" But why should we deny lawyer participation. Unlike some, I believe that the vast majority of lawyers want a fair system. It is true that, in a specific case, a lawyer's duty is that of advocate, but, on the whole, the profession has supported improvements in the system. Even if a judge believes that (s)he is gifted at voir dire and that lawyers do poorly, what real harm is done by a brief lawyer voir dire? I have never had the privilege of seeing one of these gifted voir dire judges in action, but even in those courtrooms, isn't permitting lawyer voir dire harmless charity at worst?

While there is a natural tension between judges and advocates, there is no reason for creating unnecessary friction -- especially when it can be removed easily at no appreciable cost.

If we are after speed only, why not have the Court review the pleadings and give a three or four minute opening statement for each party. Even better, why not have the judge briefly review the depositions and conduct cross-examination. Now that I've suggested this, I wish I hadn't. I fear that I may one day see a new rule

stating, "The Court may permit the parties, or their lawyers, to conduct cross-examination."

In all seriousness, I believe that we should permit reasonable voir dire examinations by lawyers.

Thank you very much for your consideration.

Cordially,

Wm. R. Wilson, Jr.

cc: Members of the Advisory Committee
on Criminal Rules
Professor David A. Schlueter, Reporter
Mr. Peter G. McCabe, Secretary
The Honorable Alicemarie H. Stotler

Enclosure

P.S. If the peremptory strike is taken away, there must be some replacement such as a rule requiring a judge, in case of doubt, to excuse a prospective juror. An "appearance of conflict" should require excusing a prospective juror. My primary peeve, over the years, has been judges striving to qualify jurors with obvious fixed notions or connections.

M E M O R A N D U M

TO: Lawyers

FROM: Judge Wilson

DATE:

RE: Guidelines for Trial

Please keep in mind the following:

1. Be prepared, during the court portion of the voir dire, to stand and call out the names of each of your witnesses, as well as your client(s) or representative of your party.

2. Guidelines for voir dire by lawyers:

   a. Take long enough, but not too long;

   b. Ask questions of the entire panel, unless there is a reasonable ground for singling out an individual juror (examples: something on the jury questionnaire form, such as former employment if the juror has listed "retired"; juror raises hand in response to a general question, etc.); and

   c. If you want to challenge a juror during voir dire, please feel free to request a bench conference to make the challenge.

   d. If there are questions you would prefer that the Court ask, please advise.

3. Objections and motions in front of the jury should be spare and to the legal point (examples of improper objections: "I object to that question, Your Honor, because I am sure that Charlie Witness didn't read that document very carefully before he signed it;" or "I object, Your Honor, because Charlene Witness has already testified that she can't remember." [Obviously these "speaking objections" would suggest an answer]). While bench conferences can be distracting, they are preferable to statements such as those cited above.

4. Speaking objections and sidebar comments are inappropriate.

5. Please advise the Court and opposing counsel before voir dire of any person known to you or to your client who may come to counsel table or who may be seen during the trial with you, your client or your witness. Of course, you may not be able to anticipate all such persons, but counsel are instructed to take affirmative action in this regard. The Court does not want a mistrial.

6. Please stand when you speak.

Federal Rules of Criminal Procedure
Rule 24(a).
June 1994 Draft
D. Schlueter

Rule 24. Trial Jurors.

(a) VOIR DIRE EXAMINATION. The court ~~may~~ must permit the defendant or the defendant's attorney and the attorney for the government to conduct the voir dire examination of prospective jurors, subject to reasonable limitations which the court may establish. The court may also conduct its own ~~or may itself conduct the~~ examination. ~~In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.~~

* * * * *

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
HUTCHINS HALL
ANN ARBOR, MICHIGAN 48109

ASSOCIATE DEAN

June 16, 1994

Professor David A. Schlueter
St. Mary's University of San Antonio
School of Law
One Camino Santa Maria
San Antonio, Texas 78284
by FAX: 210-436-3717

Re: Party Participation in Voir Dire

Dear David:

As we discussed earlier this afternoon, I am sending along a first version of an amended Civil Rule 47(a). Or, to be somewhat more precise, four first versions. The last one in the list is designed to be the "least threatening" version. The only reason for characterize questioning by the parties as a "supplement" is to make the idea seem more gradual.

I believe John Rabiej has sent you the large volume of Judicial Conference history, going back to 1924. It includes in parallel the history of Congressional interest. Congress remains interested.

As you know, I prefer to keep things short. Usually my short first drafts get expanded, and this one is likely to meet the same fate. And of course the Criminal Rules may face issues that require greater elaboration.

I expect it will be time enough to discuss this topic when we're all in Washington next week. But irrepressible comments are always welcome. Either way, I look forward to seeing you soon.

Best regards,

Edward H. Cooper

EHC/lm

Rule 47. Selecting ~~Selection of~~ Jurors

(a) ~~Examination of~~ Examining Jurors. The court may must permit the parties ~~or their attorneys to conduct the examination of~~ examine prospective jurors ~~or~~ and may itself ~~conduct the examination~~ examine prospective jurors. ~~In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.~~

(a) Examining Jurors. [The court must permit the parties to](The parties may) examine prospective jurors within reasonable limits. The court also may examine prospective jurors before or after examination by the parties.

(a) Examining Jurors. The parties may examine prospective jurors within reasonable limits of time, manner, and subject-matter set by the court. The court also may examine prospective jurors before or after examination by the parties.

(a) Examining Jurors. The court may examine prospective jurors [before or after examination by the parties], and must permit the parties to supplement the court's examination within reasonable limits of time, manner, and subject-matter set by the court.

Committee Note

Rule 47(a) in its original and present form permits the court to exclude the parties from direct examination of prospective jurors. This power is often exercised. Courts that exclude the parties from direct examination express two concerns. One is that direct participation by the parties extends the time required to select a jury. The second is that counsel frequently seek to use voir dire not as a means of securing an impartial jury but as the first stage of adversary strategy, attempting to establish rapport with prospective jurors and influence their views of the case.

The concerns the lead many courts to undertake all direct examination of prospective jurors have earned deference by long tradition and widespread adherence. The need to revise the balance

between court- and party-examination does not arise from new doubts about the cogency of these concerns. The doubts have been debated for years, have persuaded some judges to make party examination a routine practice, and have failed to persuade many other judges. The need for revision arises instead from the constitutional limits that have come to circumscribe the use of peremptory challenges in both civil and criminal cases. The controlling decisions begin with *Batson v. Kentucky*, 476 U.S. 79 (1986) and continue through *J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. 1419 (1994). Prospective jurors "have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination." *J.E.B.*, 114 S.Ct. at 1428. These limits enhance the importance of searching voir dire examination to preserve the value of peremptory challenges and buttress the role of challenges for cause. When a peremptory challenge against a member of a protected group is attacked, it can be difficult to distinguish between group stereotypes and intuitive reactions to individual members of the group as individuals. A stereotype-free explanation can be advanced with more force as the level of direct information provided by voir dire increases. As peremptory challenges become less peremptory, moreover, it is increasingly important to ensure that voir dire examination be as effective as possible in supporting challenges for cause.

Fair opportunities to exercise peremptory and for-cause challenges in this new setting require the assurance that the parties can supplement the court's examination of prospective jurors by direct questioning. The importance of party participation in voir dire has been stressed by trial lawyers for many years. They believe that just as discovery and other aspects of pretrial preparation and trial, voir dire is better accomplished through the adversary process. The lawyers know the case better than the judge can, and are better able to frame questions that will support challenges for cause or informed use of peremptory challenges. Many also believe that prospective jurors are intimidated by judges, and are more likely to admit potential bias or prejudgment under questioning by the parties.

Party examination need not mean prolonged voir dire, nor subtle or brazen efforts to argue the case before trial. The court can undertake the initial examination of prospective jurors, restricting the parties to supplemental questioning controlled by direct time limits. Effective control can be exercised by the court in setting reasonable limits on the manner and subject-matter of the examination.

Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges

Federal Judicial Center
1994

INTRODUCTION

In October 1992, the Federal Judicial Center surveyed nearly all federal judges on a wide range of issues of concern to the federal courts. The survey was conducted for two main purposes: to inform the deliberations of the Judicial Conference Committee on Long Range Planning and to inform the Center's congressionally mandated study of structural alternatives for the federal courts of appeals. Although the purposes were distinct, the areas of interest overlapped, resulting in a hybrid survey instrument that addressed many issues at differing levels of detail. Some topics—particularly those in sections 5, 7, 8, 10, and 11—were included at the request of the Long Range Planning Committee or were designed to address issues on the committee's agenda. Wendy Pachter and Gordon Bermant of the Center's Planning & Technology Division had primary responsibility for these portions of the survey. Items focusing on problems related to the courts of appeals and possible structural and nonstructural solutions to those problems were developed by Judith McKenna and Donna Stienstra of the Center's Research Division, who had primary responsibility for sections 1, 2, 3, 4, 6, and 9. Notwithstanding this general allocation of responsibility, much of the survey was developed jointly by the project staff.[1]

A survey was mailed to anyone who was, as of October 1992, an active or senior circuit or district judge, a judge on the Court of Federal Claims or the Court of International Trade, a bankruptcy judge, or a full-time or part-time magistrate judge. In all, 1,826 surveys were mailed; 1,489 completed surveys were returned by the cutoff date of January 15, 1993, for an overall response rate of 81.5%. Response rates for the individual groups follow.

Judge category	Total surveys mailed	Completed surveys[2]	Response rate (percentage)
Active circuit	160	129	80.6
Senior circuit	75	59	78.7
Active district	550	457	83.1
Senior district	244	182	74.6
Court of International Trade	11	9	81.8
Bankruptcy	291	257	88.3
Full-time magistrate	349	307	88.0
Part-time magistrate	128	76	59.4
Court of Federal Claims	18	13	72.2
Total	1,826	1,489	81.5

The tables that follow present the survey responses, which are grouped as follows:

- Part 1: active and senior circuit judges;
- Part 2: active and senior district judges;
- Part 3: judges on the Court of Federal Claims and the Court of International Trade;
- Part 4: bankruptcy judges; and
- Part 5: full-time and part-time magistrate judges.

The response categories used in the tables are the same as those used on the survey instrument for Categories 1 through 6. Instructions on the survey asked respondents to "Check one response for each item, circling any 'no opinion' response that is based only on inexperience." In the tables, Category 7 reflects those circled responses. Thus, the total "no opinion" response for any item can be obtained by adding the percentages in Categories 6 and 7. Category 8 gives the percentage of unclear or illegible responses to each item, and Category 9 gives the percentage of returned surveys that did not contain a response to the item.

The project staff thanks all of the responding judges—a much-surveyed group—for the time and thought they devoted to this long survey. The results have been of great value in the Center's research and planning work in support of the federal judiciary, and we hope that they will be equally valuable to individual courts and scholars interested in matters of concern to the federal

THE JURY

Like discovery, the jury has been the subject of much debate and many reform proposals. Please indicate the extent to which you support or oppose the following policy directions by checking one response for each item. Circle any "no opinion" response that is based only on inexperience.

Survey Item	1 Strongly support	2 Moderately support	3 Have mixed feelings	4 Moderately oppose	5 Strongly oppose	6 No opinion	"7" No opinion/ inexperience	"8" Unclear/ illegible	"9" No answer
CIVIL JURY	6.3	7.0	6.3	20.6	58.4	0.9	0.0	0.0	0.4
7.01 Return to the 12-person jury.	*7.7*	*3.8*	*2.7*	*17.6*	*66.5*	*0.5*	*0.0*	*0.0*	*1.1*
	6.7	**6.1**	**5.3**	**19.7**	**60.7**	**0.8**	**0.0**	**0.0**	**0.6**
7.02 Permit attorneys to address voir dire questions to prospective jurors directly.	10.7	14.2	9.4	12.0	52.1	0.0	0.2	0.2	1.1
	9.9	*15.4*	*3.8*	*12.1*	*56.6*	*0.5*	*0.0*	*0.0*	*1.6*
	10.5	**14.6**	**7.8**	**12.1**	**53.4**	**0.2**	**0.2**	**0.2**	**1.3**
7.03 Eliminate peremptory challenges.	9.4	9.8	7.7	15.1	57.1	0.2	0.0	0.0	0.7
	9.3	*9.3*	*10.4*	*7.7*	*59.9*	*1.1*	*0.0*	*0.0*	*2.2*
	9.4	**9.7**	**8.5**	**13.0**	**57.9**	**0.5**	**0.0**	**0.0**	**1.1**
7.04 Use expert jury panels in certain types of cases.	11.8	24.7	17.9	12.9	28.4	1.8	1.8	0.0	0.7
	12.1	*18.1*	*15.4*	*14.3*	*29.7*	*3.8*	*2.2*	*0.0*	*4.4*
	11.9	**22.8**	**17.2**	**13.3**	**28.8**	**2.3**	**1.9**	**0.0**	**1.7**
7.05 Use court-appointed experts more frequently in cases involving difficult scientific or technical evidence.	24.9	42.7	16.4	7.4	6.3	1.3	0.4	0.0	0.4
	33.0	*36.3*	*17.0*	*6.6*	*3.3*	*1.6*	*0.0*	*0.0*	*2.2*
	27.2	**40.8**	**16.6**	**7.2**	**5.5**	**1.4**	**0.3**	**0.0**	**0.9**
7.06 Use more aids to jury comprehension and decision-making (e.g., juror notebooks, written or taped instructions).	42.9	35.2	10.1	6.3	3.7	1.1	0.0	0.2	0.4
	37.4	*30.8*	*13.2*	*4.9*	*10.4*	*1.1*	*0.0*	*0.0*	*2.2*
	41.3	**34.0**	**11.0**	**5.9**	**5.6**	**1.1**	**0.0**	**0.2**	**0.9**
7.07 Eliminate the civil jury.	2.6	4.8	5.5	4.8	81.2	0.4	0.0	0.0	0.7
	5.5	*4.4*	*6.0*	*9.3*	*71.4*	*0.5*	*0.0*	*0.5*	*2.2*
	3.4	**4.7**	**5.6**	**6.1**	**78.4**	**0.5**	**0.0**	**0.2**	**1.1**
CRIMINAL JURY	9.8	15.8	8.1	12.5	52.7	0.0	0.2	0.2	0.7
7.08 Permit attorneys to address voir dire questions to prospective jurors directly.	*9.9*	*13.2*	*5.5*	*8.2*	*57.7*	*1.1*	*0.5*	*0.0*	*3.8*
	9.9	**15.0**	**7.4**	**11.3**	**54.1**	**0.3**	**0.3**	**0.2**	**1.6**
7.09 Eliminate peremptory challenges.	7.9	8.1	7.7	10.5	64.8	0.2	0.2	0.0	0.7
	8.8	*5.5*	*7.1*	*5.5*	*67.0*	*2.2*	*0.5*	*0.0*	*3.3*
	8.1	**7.4**	**7.5**	**9.1**	**65.4**	**0.8**	**0.3**	**0.0**	**1.4**
7.10 Use court-appointed experts more frequently in cases involving difficult scientific or technical evidence.	19.7	35.7	16.4	9.8	14.0	2.4	1.1	0.0	0.9
	24.7	*35.2*	*15.4*	*6.6*	*11.0*	*2.7*	*0.5*	*0.5*	*3.3*
	21.1	**35.5**	**16.1**	**8.9**	**13.1**	**2.5**	**0.9**	**0.2**	**1.6**

Active District Judges (N = 457)
Senior District Judges (N =182)
All District Judges (N = 639)

THE JURY

Like discovery, the jury has been the subject of much debate and many reform proposals. Please indicate the extent to which you support or oppose the following policy directions by checking one response for each item. Circle any "no opinion" response that is based only on inexperience.

Survey Item	1 Strongly support	2 Moderately support	3 Have mixed feelings	4 Moderately oppose	5 Strongly oppose	6 No opinion	"7" No opinion/ inexperience	"8" Unclear/ illegible	"9" No answer
CIVIL JURY	14.7	6.2	13.2	29.5	23.3	7.8	3.9	0.0	1.6
7.01 Return to the 12-person jury.	*8.5*	*13.6*	*6.8*	*25.4*	*35.6*	*3.4*	*6.8*	*0.0*	*0.0*
	12.8	**8.5**	**11.2**	**28.2**	**27.1**	**6.4**	**4.8**	**0.0**	**1.1**
7.02 Permit attorneys to address voir dire questions to prospective jurors directly.	7.8	21.7	10.1	17.8	30.2	5.4	4.7	0.0	2.3
	15.3	*15.3*	*5.1*	*23.7*	*35.6*	*1.7*	*3.4*	*0.0*	*0.0*
	10.1	**19.7**	**8.5**	**19.7**	**31.9**	**4.3**	**4.3**	**0.0**	**1.6**
7.03 Eliminate peremptory challenges.	3.1	12.4	5.4	20.9	49.6	4.7	2.3	0.0	1.6
	3.4	*6.8*	*5.1*	*13.6*	*66.1*	*1.7*	*3.4*	*0.0*	*0.0*
	3.2	**10.6**	**5.3**	**18.6**	**54.8**	**3.7**	**2.7**	**0.0**	**1.1**
7.04 Use expert jury panels in certain types of cases.	7.8	24.8	18.6	16.3	23.3	5.4	2.3	0.0	1.6
	8.5	*33.9*	*11.9*	*10.2*	*25.4*	*5.1*	*3.4*	*0.0*	*1.7*
	8.0	**27.7**	**16.5**	**14.4**	**23.9**	**5.3**	**2.7**	**0.0**	**1.6**
7.05 Use court-appointed experts more frequently in cases involving difficult scientific or technical evidence.	25.6	41.9	17.1	5.4	1.6	4.7	2.3	0.0	1.6
	30.5	*44.1*	*13.6*	*3.4*	*5.1*	*0.0*	*3.4*	*0.0*	*0.0*
	27.1	**42.6**	**16.0**	**4.8**	**2.7**	**3.2**	**2.7**	**0.0**	**1.1**
7.06 Use more aids to jury comprehension and decision-making (e.g., juror notebooks, written or taped instructions).	34.9	41.9	9.3	1.6	0.8	6.2	3.9	0.0	1.6
	27.1	*45.8*	*6.8*	*5.1*	*6.8*	*1.7*	*5.1*	*1.7*	*0.0*
	32.4	**43.1**	**8.5**	**2.7**	**2.7**	**4.8**	**4.3**	**0.5**	**1.1**
7.07 Eliminate the civil jury.	3.9	4.7	11.6	9.3	64.3	2.3	2.3	0.0	1.6
	6.8	*5.1*	*3.4*	*10.2*	*71.2*	*0.0*	*1.7*	*0.0*	*1.7*
	4.8	**4.8**	**9.0**	**9.6**	**66.5**	**1.6**	**2.1**	**0.0**	**1.6**
CRIMINAL JURY	10.1	22.5	7.0	14.0	34.1	6.2	3.9	0.8	1.6
7.08 Permit attorneys to address voir dire questions to prospective jurors directly.	*15.3*	*20.3*	*1.7*	*13.6*	*42.4*	*1.7*	*5.1*	*0.0*	*0.0*
	11.7	**21.8**	**5.3**	**13.8**	**36.7**	**4.8**	**4.3**	**0.5**	**1.1**
7.09 Eliminate peremptory challenges.	4.7	9.3	3.1	17.1	57.4	3.9	3.1	0.0	1.6
	1.7	*3.4*	*6.8*	*11.9*	*71.2*	*1.7*	*3.4*	*0.0*	*0.0*
	3.7	**7.4**	**4.3**	**15.4**	**61.7**	**3.2**	**3.2**	**0.0**	**1.1**
7.10 Use court-appointed experts more frequently in cases involving difficult scientific or technical evidence.	23.3	34.9	17.8	7.0	6.2	4.7	3.9	0.8	1.6
	28.8	*42.4*	*6.8*	*1.7*	*13.6*	*3.4*	*3.4*	*0.0*	*0.0*
	25.0	**37.2**	**14.4**	**5.3**	**8.5**	**4.3**	**3.7**	**0.5**	**1.1**

Active Circuit Judges (N = 129)
Senior Circuit Judges (N = 59)
All Circuit Judges (N = 188)

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

JUNE 7, 1994

MEMORANDUM TO JUDGES HIGGINBOTHAM AND JENSEN

SUBJECT: Background Material on Voir Dire

I am attaching a binder containing background material on the actions of the Judicial Conference regarding voir dire. It includes a copy of the Federal Judicial Center 1977 survey of judges on the subject, a subsequent FJC analytical study of the survey results, various legislative bills, and copies of relevant Conference committee reports.

In summary, the Judicial Conference has opposed direct attorney participation in voir dire since 1943. The Committee on the Operation of the Jury System exercised oversight of jury matters and maintained this position throughout its existence. Its successor committee, the Committee on Judicial Improvements, also adopted the same position when it was established in 1977. But just prior to its expiration, the chairman of the committee agreed with others to recommend that the Judicial Conference not object to legislation then pending which would create a four-year pilot program allowing direct attorney voir dire participation in four districts. In September 1990, the Executive Committee, on behalf of the Conference, agreed and did not object to the legislation.

The Committee on Court Administration and Case Management was established in 1991 and now handles jury issues. It has taken no formal position on the issue.

John K. Rabiej

Attachment

cc: Honorable Alicemarie H. Stotler
Dean Edward H. Cooper (with/att.)
Professor David A. Schlueter (with/att.)

AGENDA ITEM - II-D-5
Santa Fe, New Mexico
October 6-7, 1994

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

FROM: **Dave Schlueter, Reporter**

RE: **Rule 40(a); Proposal to Amend Rule to Permit Alternative Procedure Where Place of Arrest is 100 Miles or Less from Nearest Magistrate**

DATE: **September 1, 1994**

Attached is correspondance from Magistrate Judge Robert Collings (Boston) who has proposed that Rule 40 be amended. As written, Rule 40(a) requires that where a defendant is arrested in a district other than where the offense occurred, authorities are required to take the defendant to a magistrate judge in the district of arrest. Magistrate Judge Collings recommends that where a defendant is arrested in a district other than where the offense occurred, authorities may take the defendant to a magistrate judge in the latter district if the judge is located within 100 miles of the place of arrest. The reasons for his proposal are set out in his letters.

If the Committee is inclined to consider this proposal, I recommend that the matter be deferred until a later meeting. As a number of members have noted, Rule 40 needs to be re-styled and restructured. If the Committee intends to amend the rule, it would be appropriate to take the time to rewrite the rule.

United States District Court
District of Massachusetts
918 John W. McCormack Post Office & Courthouse
Boston, Massachusetts 02109-4565

Robert B. Collings
United States Magistrate Judge

March 18, 1994

Peter G. McCabe, Secretary
Committee on Rules of Practice
and Procedure,
Administrative Office of the
United States Courts
Thurgood Marshall Federal
Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

RE: Proposal for Additional Amendments to the Federal Rules of Criminal Procedure

Dear Peter:

As we discussed last week, I am forwarding herein proposals for additional amendments to the Federal Rules of Criminal Procedure which, if possible, I would like the Advisory Committee to take up at their April meeting.

1. RULE 16

I propose an addition to Rule 16(d), Fed.R.Crim.P., which would be numbered 16(d)(2) and the present 16(d)(2) would be renumbered 16(d)(3) and changed in a minor way. The new 16(d)(2) would read:

> (2) Obligation to Confer **No motion or other pleading seeking to compel discovery and inspection shall be filed unless the movant includes in the motion or pleading a certification that the movant has in good faith conferred or attempted to confer with the party not providing the discovery and inspection in an effort to secure the discovery and inspection without court action.**

The reason for this change is that both Rule 46(c) and 18 U.S.C. § 3143 deal with release or detention of a defendant pending sentence or appeal. Neither deals with those arrested for violation of probation or supervised release. Rule 32.1(a) and the proposed Rule 40(d) make Rule 46(c) applicable, which, in turn, provides that § 3143 is applicable. The problem arises because § 3143(a) excepts from it terms "a person for whom the applicable guidelines promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment." Since the Sentencing Commission has elected at this time to promulgate only "policy statements" rather than guidelines with respect to revocation of probation and supervised release, it can be argued that the requirement of detention unless the defendant proves by clear and convincing evidence that he/she will not flee or pose a danger is inapplicable to cases in which a defendant is charged with violating the conditions of probation or supervised release. I do not believe that the drafters of the rule intended such a result. Rather, I think that they intended that the burden be on the defendant by clear and convincing evidence. Thus, Rule 46 should be changed so that it is clear that in cases of arrests for violations of probation or supervised release, the burden is on the defendant to prove **by clear and convincing evidence** that the defendant will not flee or pose a danger to the community. As Rule 46(c) presently reads, the burden is on the defendant but what that burden is (i.e. preponderance of the evidence, clear and convincing evidence) is not stated and not discernible from a reference to § 3143 because no guidelines have been promulgated for those categories of cases.

3. RULE 40(a)

I propose a change to Rule 40(a) which would allow a person who is arrested in one district be taken before the nearest available magistrate judge in the district of origin[1] **if** (1) the nearest available magistrate judge in the district of origin is less than 100 miles from the place of arrest **and** (2) an initial appearance before a magistrate judge in the district of origin can be scheduled before the close of business on the day of arrest or on the day after arrest if the arrest is made after business hours. I believe that such a change would be of substantial benefit to a defendant and result in a considerable saving of judicial time as well as the time of deputy U.S. marshals and other law enforcement personnel.

The problem as I see it rests on the notion that the term "nearest available federal magistrate [judge] in the first sentence of Rule 40(a) refers to the nearest available federal magistrate judge **in the district of arrest.** If this is a correct interpretation, a considerable amount of time is wasted when a

[1] Hereinafter, "district of origin" shall refer to the district in which the charge is pending.

defendant is arrested in a contiguous district and can just as easily, if not more easily, be brought before a federal magistrate judge in the district of origin as in the district of arrest. An example will suffice to make the point. A person is arrested in Fall River, Massachusetts on a Rhode Island federal warrant. The nearest available federal magistrate judge in the district of arrest is in Boston; the nearest available federal magistrate judge in Rhode Island is in Providence. Fall River is considerably closer to Providence than it is to Boston, yet under the present version of Rule 40(a), the defendant would have to be brought to Boston for removal proceedings before being transported to Rhode Island. The same thing is true of arrests in Kansas City, Kansas on warrants issued in Kansas City, Missouri, or arrests in Newark, New Jersey on warrants issued in the Southern District of New York.[2]

It would seem to me to make more sense to permit federal law enforcement officers to take a defendant in one district to the nearest federal magistrate judge in the district of origin without the necessity of an appearance in the district of arrest if the nearest federal magistrate judge in the district of origin is 100 miles or less from the place of arrest and the defendant will have an initial appearance in the district of origin before the close of business on the day of arrest or the day after arrest if the arrest is made after business hours. Hence, I would suggest that Rule 40(a) be amended to make the current Rule 40(a) with a minor addition Rule 40(a)(1) and that a subsection (2) be added as follows:

> (a)(1) Appearance Before a Federal Magistrate Judge in the District of Arrest. If a person is arrested in a district other than that in which the offense is alleged to have been committed, that person shall be taken before the nearest available federal magistrate **judge in the district of arrest.** [Rule then continues as currently stated]
>
> (a)(2) **Alternative Procedure when the Place of Arrest is 100 Miles or Less from the Nearest Federal Magistrate Judge in the District in which the Crime is Alleged to have been Committed. If a person is arrested in a district other than that in which the offense is alleged to have been committed and the place of arrest is 100 miles or less from the**

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[2] Many other examples come to mind, i.g., Philadelphia, Pennsylvania and Camden or Trenton, New Jersey, Baltimore, Maryland and Washington, D.C., Chicago, Illinois and Milwaukee, Wisconsin, Charlotte, North Carolina and Columbia, South Carolina.

nearest federal magistrate judge in the district in which the crime is alleged to have been committed and an appearance before the federal magistrate judge in the district in which the crime is alleged to have been committed is able to be scheduled on the day on which the arrest took place or on the day after the arrest took place if the arrest is made after normal business hours, the person may be transported to the district in which the crime is alleged to have been committed for an appearance before the nearest federal magistrate judge in that district without the necessity of an appearance before a federal magistrate judge in the district of arrest. Thereafter, the federal magistrate judge in the district in which the crime is alleged to have been committed shall proceed in accordance with Rules 5 and 5.1.

As I say, I think that such a rule would save considerable judicial time and expense as well as expenses to the federal law enforcement agents and the defenders. It would also work to the advantage of the defendant whose roots are more often in the district in which the crime is alleged to have been committed than in the district of arrest. In my experience, more often than not, the delay attributable to removal proceedings works to the defendant's disadvantage.

There are variations to this suggestion which could be adopted. A provision could be added to the proposed Rule 40(a)(2) whereby the defendant could be given a choice as to which federal magistrate judge to be taken and if he or she elects to be taken before the federal magistrate judge in the district of origin, the defendant would sign a form to that effect which could then be presented to the federal magistrate judge in the district of origin and filed in the case. If the defendant wishes to appear before a federal magistrate judge in the district of arrest, he would elect to do so by declining to sign the form. I do not think such a provision would be necessary or desirable, but it would be an improvement on the present system.

I can find no statutory nor constitutional impediment to the suggested change. The present rule should remain in effect as to all arrests made beyond 100 miles of the nearest federal magistrate judge in the district of origin. The provision about not permitting the alternate procedure to be used if the defendant cannot be seen by the federal magistrate judge on the day of arrest or the day after arrest if the arrest occurs after normal business hours is to ensure that the defendant will appear before the federal magistrate judge in the district of origin within relatively the same time he would appear before a federal

magistrate judge in the district of arrest.

4. RULE 5(c)

There is a conflict between Rule 5(c) and Rule 58(b)(2)(G). The second paragraph of Rule 5(c) provides as follows:

> A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court.

Rule 58(b)(2)(G) requires that at an initial appearance "on a misdemeanor or other petty offense charge, the court shall inform the defendant of":

> (G) if the defendant is held in custody and charged with a misdemeanor other than a petty offense, the right to a preliminary examination in accordance with 18 U.S.C. § 3060 and the general circumstances under which the defendant may secure pre-trial release.

The question is whether a defendant who is charged with a misdemeanor but is not held in custody is entitled to a preliminary examination. Rule 5 seems to indicate that the defendant is; Rule 58(b)(1)(G) seems to indicate that the defendant is not. I suggest that the second paragraph of Rule 5 be amended to read as follows:

> A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, **if the offense is a felony or if the offense is a misdemeanor and the defendant is held in custody on said misdemeanor charge.**

I hope that the Advisory Committee will be able to consider these suggested changes. I would be happy to consult with the committee and/or its staff, in person or otherwise, if such a consultation is desired.

Very truly yours,

ROBERT B. COLLINGS
United States Magistrate Judge

By Fax and U.S. Mail

United States District Court
District of Massachusetts
918 John W. McCormack Post Office & Courthouse
Boston, Massachusetts 02109-4565

Robert B. Collings
United States Magistrate Judge

March 29, 1994

Peter G. McCabe, Secretary
Committee on Rules of Practice
and Procedure,
Administrative Office of the
United States Courts
Thurgood Marshall Federal
Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

RE: Proposal for Additional Amendments to the Federal Rules of Criminal Procedure

Dear Peter:

Thank you for your letter of March 22, 1994. As I have thought about the proposals I made after sending my letter of March 18, 1994, it occurred to me that I should have put an exception in my proposed Rule 40(a)(2) for arrests in unlawful flight cases. Since these cases involve extradition and rendition between the states on the underlying state charge, we should not authorize transportation of defendants charged with those offenses across state lines even if they are within the 100 mile limit. Accordingly, the proposed changes I suggest to Rule 40 would be as follows:

> (a)(1) Appearance Before a Federal Magistrate **Judge in the District of Arrest**. If a person is arrested in a district other than that in which the offense is alleged to have been committed, that person shall be taken before the nearest available federal magistrate **judge in the district of arrest.** [Rule then continues as currently stated]

(a)(2) **Alternative Procedure when the Place of Arrest is 100 Miles or Less from the Nearest Federal Magistrate Judge in the District in which the Crime is Alleged to have been Committed. Except for an arrest upon a warrant issued upon a complaint charging a violation of 18 U.S.C § 1073, if a person is arrested in a district other than that in which the offense is alleged to have been committed and the place of arrest is 100 miles or less from the nearest federal magistrate judge in the district in which the crime is alleged to have been committed and an appearance before the federal magistrate judge in the district in which the crime is alleged to have been committed is able to be scheduled on the day on which the arrest took place or on the day after the arrest took place if the arrest is made after normal business hours, the person may be transported to the district in which the crime is alleged to have been committed for an appearance before the nearest federal magistrate judge in that district without the necessity of an appearance before a federal magistrate judge in the district of arrest. Thereafter, the federal magistrate judge in the district in which the crime is alleged to have been committed shall proceed in accordance with Rules 5 and 5.1.**

As I indicated in my March 18th letter, I hope that the Advisory Committee will be able to consider these suggested changes at its meeting next month. I would be happy to consult with the committee and/or its staff, in person or otherwise, if such a consultation is desired.

Very truly yours,

ROBERT B. COLLINGS
United States Magistrate Judge

AGENDA ITEM - II-D-6
Santa Fe, New Mexico
October 6-7, 1994

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

FROM: **Prof. Dave Schlueter, Reporter**

RE: **Rule 46; Proposal to Amend Rule to Include Reference to Release After Arrest for Violation of Probation or Supervised Release.**

DATE: **August 31, 1994**

Magistrate Judge Robert Collings (Boston) has suggested that Rule 46 be amended by adding a new provision which specifically addresses the applicability of the rule to those cases where a person has been arrested for violation of probation or supervised release. The amendment would require redesignation of a number of provisions in Rule 46 and conforming changes to Rules 32.1 and 40(d).

Currently, the topic of revocation or modification of probation or supervised release are covered in Rule 32.1 which specifically indicates that a person may be released pursuant to Rule 46(c) pending the revocation hearing. The problem, according to Magistrate Judge Collings is that the current version of Rule 46 does not include a reference to the defendant's burden of proof.

The first sentence of the new Rule 16(d)(3) would read:

> (3) Failure to Comply With a Request. If at any time during the course of the proceedings, it is brought to the attention of the court, **after compliance with subdivision (d)(2)**, that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

This suggested change is based on the changes to Rule 26(c) and 37(a)(2) to the Federal Rules of Civil Procedure which became effective on December 1, 1993. It seems to me to make eminent sense to require that any disputes respecting discovery in **both** criminal and civil cases to be conferenced between the parties before submitting it to the Court. If after conferring, agreement is reached, there is no need for the Court to become involved at all, thereby saving scarce judicial resources. If conferring does not result in complete agreement, it may result in partial agreement so that the dispute is narrowed when it is presented to the judicial officer. I would require that the obligation to confer be imposed not only on motions seeking the discovery provided in Rule 16 but in **any** situation in which discovery is sought in a criminal case.

2. RULE 46 (and conforming changes to Rules 32.1 and 40(d))

I suggest adding a new subdivision (d) to Rule 46 and renumbering the present subdivisions (d), (e), (f), (g) and (h) as (e), (f), (g), (h) and (i). The new subdivision would read as follows:

> (d) Release after Arrest for Violation of Probation or Supervised Release. **Eligibility for release after the arrest of a probationer or supervised releasee charged with violating the terms of probation or supervised release shall be in accordance with 18 U.S.C. § 3143. The burden of proving that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant by clear and convincing evidence.**

This change would require that the references to Rule 46(c) contained in Rule 32.1(a) and the proposed Rule 40(d) be changed to refer to Rule 46(d) rather than 46(c).

The reason for this change is that both Rule 46(c) and 18 U.S.C. § 3143 deal with release or detention of a defendant pending sentence or appeal. Neither deals with those arrested for violation of probation or supervised release. Rule 32.1(a) and the proposed Rule 40(d) make Rule 46(c) applicable, which, in turn, provides that § 3143 is applicable. The problem arises because § 3143(a) excepts from it terms "a person for whom the applicable guidelines promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment." Since the Sentencing Commission has elected at this time to promulgate only "policy statements" rather than guidelines with respect to revocation of probation and supervised release, it can be argued that the requirement of detention unless the defendant proves by clear and convincing evidence that he/she will not flee or pose a danger is inapplicable to cases in which a defendant is charged with violating the conditions of probation or supervised release. I do not believe that the drafters of the rule intended such a result. Rather, I think that they intended that the burden be on the defendant by clear and convincing evidence. Thus, Rule 46 should be changed so that it is clear that in cases of arrests for violations of probation or supervised release, the burden is on the defendant to prove **by clear and convincing evidence** that the defendant will not flee or pose a danger to the community. As Rule 46(c) presently reads, the burden is on the defendant but what that burden is (i.e. preponderance of the evidence, clear and convincing evidence) is not stated and not discernible from a reference to § 3143 because no guidelines have been promulgated for those categories of cases.

3. RULE 40(a)

I propose a change to Rule 40(a) which would allow a person who is arrested in one district be taken before the nearest available magistrate judge in the district of origin[1] **if** (1) the nearest available magistrate judge in the district of origin is less than 100 miles from the place of arrest **and** (2) an initial appearance before a magistrate judge in the district of origin can be scheduled before the close of business on the day of arrest or on the day after arrest if the arrest is made after business hours. I believe that such a change would be of substantial benefit to a defendant and result in a considerable saving of judicial time as well as the time of deputy U.S. marshals and other law enforcement personnel.

The problem as I see it rests on the notion that the term "nearest available federal magistrate [judge] in the first sentence of Rule 40(a) refers to the nearest available federal magistrate judge **in the district of arrest.** If this is a correct interpretation, a considerable amount of time is wasted when a

[1] Hereinafter, "district of origin" shall refer to the district in which the charge is pending.

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

FROM: **Prof. Dave Schlueter, Reporter**

RE: **Rule 53; Report of Subcommittee on Guidelines for Cameras in the Courtroom**

DATE: **September 1, 1994**

At its June 1994 meeting the Standing Committee voted, by a narrow margin, to forward the Committee's proposed amendment to Rule 53. That amendment would permit the Judicial Conference to promulgate guidelines for the use of cameras and other broadcasting equipment in federal criminal trials. In transmitting the amendment to the Conference, the Standing Committee indicated that the Advisory Committee was interested in participating in the drafting of such guidelines.

At the Committee's April 1994 meeting in Washington, D.C., Judge Jensen appointed a subcommittee, chaired by Ms. Rikki Klieman, to begin the process of drafting suggested guidelines. The Subcommittee's report is attached.

PROPOSED REPORT OF SUBCOMMITTEE ON GUIDELINES FOR CAMERAS IN THE COURTROOM

Chairperson:

Rikki J. Klieman, Esquire
KLIEMAN, LYONS, SCHINDLER,
GROSS & PABIAN
21 Custom House Street
Boston, MA 02110

The Honorable David D. Dowd, Jr.
United States District Judge
United States District Court
510 Federal Building
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Mary Harkenrider, Esquire
Criminal Division
2244 U.S. Department of Justice
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Washington, D.C. 20530

Roger Pauley, Esquire
Director, Office of Legislation,
Criminal Division
2244 U.S. Department of Justice
Washington, D.C. 20530

Professor Stephen A. Saltzburg
George Washington University
National Law Center
720 20th Street, N.W. Room 308
Washington, D.C. 20052

Henry A. Martin, Esquire
Federal Public Defender
810 Broadway, Suite 200
Nashville, TN 37203

I. CHARGE

Following a discussion of the proposed amendment to Rule 53 at the April, 1994 meeting of the Advisory Committee on Criminal Rules, the Chairman appointed this SubCommittee.

The purpose of the SubCommittee was to examine various rules and regulations for expanded media coverage in the courtroom in order to suggest specific guidelines to the Judicial Conference for its consideration of cameras being present during federal criminal trials.

II. PROCESS

The SubCommittee reviewed materials including (a) Guidelines for the Pilot Program on Photographing, Recording and Broadcasting in the Courtroom as approved by the Judicial Conference in September, 1990; (b) Memorandum of Action by the Executive Committee modifying those guidelines; (c) Sample guidelines adopted by state courts sent by Douglas A. Fellman of Hogan & Hartson, counsel to Steve Brill of Courtroom Television Network; and, (d) Documents from the National Center for State Courts.

The Subcommittee digested and discussed these materials. Each person was given an individual assignment concerning the language of specific provisions or questions of law.

The following proposal is one born of consensus gathered by the Chairperson from the various written submissions of the members of the SubCommittee. Individuals on the SubCommittee have their own opinions, particularly about questions of notice and limitations of coverage. The individual assessments had to give way to the group judgment.

All members of the SubCommittee agreed that we would be concerned with proceedings in the District Courts and not with appellate issues, since they are beyond the purview of this Advisory Committee.

III. GUIDELINES FOR THE PILOT PROGRAM ON PHOTOGRAPHING, RECORDING & BROADCASTING OF CRIMINAL CASES IN THE COURTROOM.

1. POLICY [1]

It is believed that allowing electronic media access to federal criminal proceedings will demonstrate a more complete and accurate portrayal of the operation of the federal criminal justice system. This will lead to greater understanding by the public at large which will encourage public belief in a system of laws and reliance upon the criminal justice system to resolve disputes. Greater awareness of what happens in federal criminal cases could also deter the commission of crime. Guidelines for allowing such access by the electronic media should insure that the access does not hinder the fair determination of the issues brought before federal courts in criminal cases, nor infringe upon the rights of the criminally accused arising under the Constitution and laws of the United States, nor add significantly to the administrative burdens of the federal judiciary.

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[1] The Department of Justice has not yet taken a position on the merits of cameras in the courtroom in federal criminal trials. The Department voted against the proposed amendment in the Standing Committee on the ground that the proposed change was premature. The Deputy Attorney General stated that consideration of cameras in the courtroom in criminal cases should await a full examination of the recently concluded experiment with cameras in civil cases. Therefore, the Department was unable to subscribe to the statement of the policy set forth above.

2. GENERAL PROVISIONS

(a) Media coverage of federal criminal court proceedings is permissible only in accordance with these guidelines.

(b) No public expense is to be incurred for equipment, wiring, or personnel needed to provide media coverage.

(c) Nothing in these guidelines shall prevent a court from placing additional restrictions, or prohibiting altogether, photographing, recording or broadcasting in designated areas of the courthouse.

(d) These guidelines take effect on _____.

3. PROCEDURES FOR APPROVAL OF COVERAGE

(a) Subject to the limitations in Section 4, a written request for media coverage (broadcasting, televising, electronically recording, or photographing) of any criminal proceeding shall be made at least seven (7) days prior to the start of the proceeding, unless the district court shortens the time for good cause shown.[2]

(b) Subject to the limitations in Section 4, any news gathering or reporting organization (including newspapers, radio, television, radio and television networks, news services, magazines, trade papers, in-house publications, professional journals, any other news reporting or news gathering agency whose function it is to inform the public), and any individual person involved in news gathering and reporting may make a request for media coverage.

(c) Any request for media coverage shall indicate the specific proceeding or parts thereof for which coverage is sought and shall indicate the format of the coverage requested.

(d) Each request for media coverage shall be served upon the judicial officer to whom a trial, hearing or other proceeding has been assigned, or to the clerk of the district court if no judicial officer has been assigned, and shall also be served on all counsel of record.

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[2] Court T.V. can function quite well with a seven day advance notice requirement. However, the networks and their local affiliates, who must balance court coverage with other news events, may need a shorter lead time of only 2 or 3 days.

(e) Any party or witness may object in writing to the judicial officer to coverage of all or a portion of a proceeding. The court shall rule on such an objection within a reasonable time.

(f) Should the judicial officer grant a request for media coverage in whole or in part, the judicial officer may sua sponte, at any time during a trial, hearing or proceeding, suspend, restrict, or limit media coverage.

(g) If two or more media representatives apply to cover a proceeding, no such coverage may begin until all such representatives have agreed upon a pooling arrangement for their respective news media. Such pooling arrangements shall include the designation of pool operators, procedures for cost sharing, access to and dissemination of material, and selection of a pool representative if appropriate. The presiding judicial officer may not be called upon to mediate or resolve any dispute as to such arrangements.

* * * * * * * *

NOTE:

The SubCommittee believes that the trial court should have as much discretion as possible. Therefore, the SubCommittee did not choose to provide a precise procedure that must be followed for objections in each case. Further, the SubCommittee believes that a more detailed procedural scheme may encourage litigation and involve the court in a procedural morass. However, if the Judicial Conference is inclined to adopt a specific directive, the following language has been suggested as a possible basis, and is favored by the Department of Justice.

Alternative to III. e. above:

e(1). No later than three days prior to the trial, hearing or other proceeding which is the subject of a request, unless the court shortens the time for filing, any party may object to the request. To the extent practicable, each party shall inform potential trial witnesses of the request for media coverage and inquire whether each potential witness objects to such coverage. A party may object to media coverage of all or part of any trial, hearing or other proceeding. An objection may be submitted ex parte and under seal if its contents might disclose trial strategy, provide otherwise unavailable discovery to an adversary, or provide information about witnesses or trial

participants that might expose them to harm or that otherwise would not be disclosed at trial.

e(2). A party shall inform any witness who objects to media coverage if the party does not intend to raise the objection on behalf of the witness. A witness may object to media coverage. The judicial officer may permit the witness to state the grounds for such objection in camera. The judicial officer may permit objections to expanded media coverage to be made or renewed by a party or a witness at any time during the trial.

e(3).The judicial officer may rule upon a request for media coverage on the basis of written or oral submissions alone. The judicial officer may, in the exercise of discretion, hold a hearing on the request, but the court shall not, without the consent of a party who has filed a written objection ex parte and under seal, disclose the contents of that objection.

* * * * * * * *

4. LIMITATIONS ON COVERAGE

(a) A presiding judicial officer may refuse, limit or terminate media coverage of an entire case, portions thereof, or testimony of particular witnesses, in the interests of justice to protect the rights of the parties, witnesses and the dignity of the court; to assure the orderly conduct of the proceedings; or for any other reason considered necessary or appropriate by the presiding judicial officer.

(b) Coverage of criminal proceedings shall be limited to arraignment, the entry of a guilty plea (including the trial court's compliance with Rule 11), the trial and the sentencing hearing.

(c) There shall be no audio pickup or broadcast of conversations which occur in a court facility between attorneys of different parties, between attorneys and their clients, between co-counsel of a client, between counsel and any agent or investigator working with counsel, or between counsel and the presiding judicial officer, whether held in the courtroom or in chambers.

(d) No coverage of the jury, or of any juror or alternate juror, while in the jury box, in the courtroom, in the jury deliberation room, or during recess, or while going to or from the deliberation room at any time, shall be permitted. Coverage of the prospective jury voir dire is also prohibited.

(e) Unnecessary focus upon the spectators is prohibited.

(f) Unnecessary focus upon the defendant or defendants shall be prohibited unless the defendant is actively participating in the proceeding as a witness, or is entering a plea or being sentenced.

(g) Prior to verdict, criminal defendants shall not be photographed in restraints as they are being escorted to or from court proceedings.

(h) Coverage of counsel or witness interviews in the courthouse is prohibited.

(i) Coverage of the following category of witnesses shall be prohibited unless the court finds that appropriate measures as directed and controlled by it will protect the identity of the witness:

1. Alleged sex offense victims;

2. Persons under the age of 16;

3. Law enforcement officers acting in an undercover capacity;

4. Witnesses whose exposure may cause subsequent bodily injury.[3]

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[3] The Department of Justice voiced its concerns about potential discouragement of witness participation and witness safety, both as regards non-government witnesses and undercover agents. Therefore, the Department is considering supporting a requirement that either a witness or a party have the absolute right to object to media coverage in criminal proceedings. The Department believes there should be a strong presumption written into the guidelines against allowing media coverage in the face of an objection of any witness. As to the classes of witnesses enumerated in item (i) on page 6, the Department favors an absolute right of the witness to object.

However, the SubCommittee believes that the judge presiding at the trial is the appropriate person to decide these issues. An absolute right of any witness to object to coverage would

5. EQUIPMENT AND PERSONNEL

(a) Not more than two television cameras, each operated by not more than one camera person, and not more than one single stationery sound operator, shall be permitted in any trial court proceeding.

(b) Not more than one still photographer, utilizing not more than one camera and related equipment, shall be permitted in any trial court proceeding.

(c) Equipment or clothing shall not bear the insignia or marking of a media agency. Camera operators shall wear appropriate business attire.

6. SOUND AND LIGHT CRITERIA

(a) Equipment shall not produce distracting sound or light. Signal lights or devices to show when equipment is operating shall not be visible. Moving lights, flash attachments, or sudden light changes shall not be used.

(b) Except as otherwise approved by the presiding judicial officer, existing courtroom sound and light systems shall be used without modification. Audio pickup for all media purposes shall be accomplished from existing audio systems present in the court facility, or from a television camera's built-in microphone. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes shall be unobtrusive and shall be located in places designated in advance of any proceeding by the presiding judicial officer.

7. LOCATION OF EQUIPMENT AND PERSONNEL

(a) The presiding judicial officer shall designate the location in the courtroom for the camera equipment and operators.

(b) During the proceedings, operating personnel shall not move about nor shall there be placement, movement, or removal of equipment or the changing of film, film magazines, or lenses. (However, video cassettes may be changed during the proceedings.) All such activities shall take place each day before the proceeding begins, after it ends, or during a recess.

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erode the entire premise of cameras in the courtroom.

8. COMPLIANCE

Any media representative who fails to comply with these guidelines shall be subject to appropriate sanction, as determined by the presiding judicial officer.

9. REVIEW

It is not intended that a grant or denial of media coverage be subject to appellate review insofar as it pertains to and arises under these guidelines, except as otherwise provided by law.

* * * *

END OF GUIDELINES

* * * *

III. THE QUESTION OF REVIEW

In order to eliminate ambiguity and reduce litigation over whether review under section 1291 would lie, the SubCommittee recommends that a Rule be promulgated, under the authority of 28 U.S.C. 2072(c), defining whether an order granting or denying courtroom broadcasting is to be deemed "final" for the purposes of section 1291.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO, CALIFORNIA 94102

CHAMBERS OF
D. LOWELL JENSEN
UNITED STATES DISTRICT JUDGE

August 10, 1994

Honorable Maryanne Trump Barry
Chair, Committee on Criminal Law
United States Post Office & Courthouse
Post Office Box 999
Newark, New Jersey 07101-0999

Dear Judge Barry:

This is to acknowledge your letter regarding cameras in the courtroom and the recent proposed amendment to Federal Rules of Criminal Procedure 53 which has been forwarded to the Judicial Conference. You are correct that an ad hoc Subcommittee to the Advisory Committee on Criminal Rules is preparing a draft of rules on this subject on behalf of the Committee. We intend to provide this draft to the Judicial Conference for any consideration they deem appropriate. It is anticipated that the draft will be completed shortly and we would be happy to provide a copy to your Committee as soon as it is available. We would also be pleased to have the benefits of your comments on the topic.

As you know, the Committee on Court Administration and Case Management has worked on the issue of cameras in the courtroom in civil cases and will have an interest in this issue in criminal cases. For your information, we intend to provide a copy of our subcommittee draft to that Committee.

Look forward to working with your Committee on this and other issues.

Sincerely,

D. Lowell Jensen, Chair
ADVISORY COMMITTEE ON FEDERAL
RULES OF CRIMINAL PROCEDURE

cc: Professor David Schleuter

Agenda Item IIE
Santa Fe New Mexico
10/6-7/1994

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

September 6, 1994

MEMORANDUM TO THE ADVISORY COMMITTEE ON CRIMINAL RULES

SUBJECT: Amendments to the Rules of Practice and Procedure Contained in the Crime Bill

Attached is memorandum sent to the courts by the Director of the Administrative Office explaining some of the provisions of the *Violent Crime Control and Law Enforcement Act of 1994* (Crime Bill). Several provisions affect the federal rules of practice and procedure, including:

(a) § 230101, which amends Criminal Rule 32, by adding a victim allocution provision;

(b) § 40141, which amends Evidence Rule 412, by reinstating the amendments approved by the Judicial Conference extending the rule to civil cases;

(c) § 320934, which adds Evidence Rules 413, 414, and 415, to make evidence of a defendant's past similar acts admissible in sexual assault or child molestation cases - but it delays the effective date of the three new rules for at least 180 days pending Judicial Conference study; and

(d) § 330003(h), which amends Criminal Rule 46(i), by correcting a cross reference.

Pertinent excerpts from the Conference Report accompanying the Crime Bill are also attached.

John K. Rabiej

John K. Rabiej

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

September 1, 1994

MEMORANDUM TO ALL: JUDGES, UNITED STATES COURTS OF APPEALS
JUDGES, UNITED STATES DISTRICT COURTS
UNITED STATES MAGISTRATE JUDGES
CIRCUIT EXECUTIVES
FEDERAL PUBLIC/COMMUNITY DEFENDERS
DISTRICT COURT EXECUTIVES
CLERKS, UNITED STATES COURTS OF APPEALS
CLERKS, UNITED STATES DISTRICT COURTS
CHIEF PROBATION OFFICERS
CHIEF PRETRIAL SERVICES OFFICERS
SENIOR STAFF/CHIEF, PREARGUMENT ATTORNEYS

Subject: H.R. 3355--Violent Crime Control and Law Enforcement Act of 1994

The House of Representatives and the Senate have both passed H.R. 3355 and the President is expected to sign the bill shortly after Labor Day. The bill is quite voluminous and we cannot distribute copies nor even summarize every provision. However, I hope you will find helpful the attached brief summary of those provisions we believe are of particular interest to the Judiciary. The text of the bill is accessible on Lexis by entering LXE 140 CONG REC H 8772. The bill will be the third document retrieved by that entry. On Westlaw, enter FI 140 CR H8772-03.

As you may know, the costs of the over $30 billion bill are expected to come from a trust fund that will be funded, at least in part, from reductions in the Federal workforce. The authorization of appropriations for the Judiciary is $200 million over a period of five years.

The bill contains new offenses, though not nearly as many as earlier versions of the legislation. It does not, for example, include any broad federalization of firearms offenses nor create a new federal offense of participating in a criminal street gang. The bill includes a "three strikes" life sentence and increases penalties for many existing

offenses. It does not, however, include any significant mandatory minimum sentences and it provides a "safety valve" for sentencing certain defendants below existing mandatory minimum sentences.

The bill also establishes three "Vice Chairs" of the Sentencing Commission, who, along with the Chair, will be full-time and who will be paid at the same rate as the Chair. No more than two of these four positions may be of the same political party. The provision does not change the total number of commissioners.

Much of the bill will become effective on the date of signature, although, of course, new offenses and changes in sentences will generally be effective only for those offenses committed after enactment of the legislation. Of particular note is the "safety valve," which will be applicable to sentences imposed ten days after enactment. More information on this provision will be provided under separate cover. Note also that amendments to F.R.Crim.P. 32 and F.R.Evid. 412 will be effective December 1, 1994.

We hope you will find this information useful. If you have any questions, please contact the Office of the General Counsel of the Administrative Office at 202-273-1100.

L. Ralph Mecham

Attachment

SUMMARY OF KEY PROVISIONS OF THE CRIME BILL

The following are highlights of the provisions of the Violent Crime Control and Law Enforcement Act of 1994 that are of interest to the Federal Judiciary:

"THREE STRIKES"

- *Mandatory life sentence.* A person convicted in Federal court of a "serious violent felony," as defined by the statute, and who has at least two prior Federal or state convictions for "serious violent felonies," or at least one conviction for a "serious violent felony" and one conviction for a "serious drug felony," defined to include only the most serious drug offenses, must be sentenced to life imprisonment. Section 70001.

- *Geriatric provision.* The Director of the Bureau of Prisons may move for the release of an offender sentenced under the "three strikes" provision who is at least 70 years old and who has served at least 30 years of his sentence. Section 70002.

"SAFETY VALVE"

- *Safety valve.* The exception to mandatory minimum drug sentences will be available for defendants with one criminal history point. It will exclude from consideration defendants who used violence or credible threats of violence or who possessed a firearm in connection with the offense or who were organizers, leaders, managers, or supervisors of the offense. In addition, it will not apply if the offense resulted in death or serious injury to another person. It will also require a defendant to disclose all information the defendant has concerning the offense or offenses that were part of the same course of conduct or same scheme or plan. Section 80001.

- *Effective date.* The provision will be available for all sentences imposed ten days after enactment. The retroactivity provision that appeared in the Conference Report has been eliminated. Section 80001(c).

- *Guidelines.* The Sentencing Commission may decide to promulgate emergency guidelines for the application of this provision. More information about the operation of this provision will be provided.

SENTENCING AMENDMENTS

- *Death penalties.* A number of new Federal death penalties and procedures are created by the bill. Of particular note are provisions stipulating a death penalty for murder of an officer listed in 18 U.S.C. § 1114. That section includes judges of the United States as well as magistrate judges, probation officers and pretrial services officers. Several provisions are designed to protect court officers and jurors and victims, witnesses and informants. The bill amends 18 U.S.C. § 3432 to permit the court to dispense with the disclosure of a list of jurors and witnesses in a capital case if such disclosure would jeopardize the life or safety of any person. Chapter VI.

- *Enhanced sentences.* A number of sections in titles IX and XI call for enhanced sentences, but these are not new mandatory minimum sentences. Most simply call for the Sentencing Commission to study sentences for certain offenses and make "appropriate enhancements." Section 100002, however, provides that under certain circumstances, the

Federal courts will be required to impose "an additional term of imprisonment" to any imprisonment imposed in accordance with the state law assimilated by 18 U.S.C. § 13.

- *Victim allocution.* The bill amends F.R.Crim.P. 32 to require the court to address the victim of a violent or sexual abuse offense, if the victim is in the courtroom at the time of sentencing, to determine if the victim wishes to make a statement. The section is effective December 1, 1994, and includes a provision that preserves those amendments submitted by the Supreme Court that are scheduled to be effective December 1. Section 230101.

- *Hate crimes.* The Sentencing Commission is directed to promulgate guidelines that provide for at least a three-level upward adjustment if the court determines beyond a reasonable doubt that the offense was a "hate crime," a crime in which the victim was selected because of "actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation." Section 280003.

- *Mandatory restitution.* Restitution is required for telemarketing fraud, but, like the mandatory restitution provisions in the Violence Against Women sections discussed below, this provision includes the discretion to award only nominal restitution if the court finds no current ability to pay and no prospects for future payment. Section 250002.

- *Reimposition of supervised release.* The bill will permit the court to order a term of supervised release, limited by the maximum term originally authorized less any term of imprisonment imposed upon revocation, to follow imprisonment after the court has revoked a term of supervised release. The same section also clarifies that a court has a reasonable time after the end of a period of supervised release to revoke the term of supervised release for a violation that occurred during that term. Section 110505.

- *Mandatory revocation of release.* As in current law, the court must revoke supervised release or probation for possession of a controlled substance, for refusal to cooperate with drug testing, or for possession of a firearm. The sanction for such violations will be a sentence that "includes a term of imprisonment." Sections 110505 and 110506. Current law requires a term of imprisonment upon revocation for drug possession of at least one-third the original sentence. The bill does not clarify the issue of what constitutes drug possession, but section 20414 provides the court with some discretion, pursuant to sentencing guidelines, to except an offender who fails a drug test from mandatory revocation in consideration of the availability of treatment programs and the offender's amenability to treatment.

- *Sentence upon revocation of probation.* The bill permits a sentence upon revocation of probation in accordance with guidelines promulgated by the Sentencing Commission. Section 280001.

JUVENILE OFFENDERS

- *Prosecution of certain juvenile as adults.* The juvenile delinquency provisions of title 18, United States Code are amended to permit juveniles as young as 13 years of age to be prosecuted as adults for listed offenses involving firearms. These offenses include bank robbery and sexual assault committed with a firearm and crimes of violence committed within the special maritime and territorial jurisdiction of the United States. Juveniles

subject to the criminal jurisdiction of an Indian tribal government will not be eligible for treatment under this provision. Section 140001.

- *Possession of a handgun or ammunition by a juvenile.* The proposal provides that these offenders be prosecuted under the Federal juvenile delinquency statute. The same provision would create a Federal offense for transferring a firearm to a juvenile. Section 110201.

- *Sentencing enhancement for gang participation.* The bill creates a sentencing enhancement of up to ten years if Federal drug or violent offenses are committed by a person participating in a criminal street gang and who has been convicted within five years of a drug or violent offense. Section 150001.

VIOLENCE AGAINST WOMEN--MANDATORY RESTITUTION AND RULES OF EVIDENCE

- *New Federal offenses.* The bill creates new offenses of traveling interstate or entering or leaving Indian territory to injure a spouse or intimate partner, and traveling interstate or entering or leaving Indian territory to commit an act that violates a protective order. This section also provides that the victim of one of these offenses be given the opportunity to testify at a pretrial release proceeding of the defendant. Section 40221.

- *New Federal civil cause of action.* Federal and state courts will have concurrent jurisdiction over new civil actions involving commission of a crime of violence motivated by gender. A civil action originally brought in state court may not be removed to Federal court under this provision. Section 40301.

- *Mandatory restitution.* These sections require the court to impose restitution in cases of sexual abuse under chapter 109A of title 18, United States Code; sexual abuse of children under chapter 110 of that title; and the new offenses of interstate domestic violence and traveling interstate to violate a protective order. All provide for an exception to the requirement if the court finds that the defendant has neither the current means to pay restitution nor any prospect of paying in the foreseeable future and if the victim's loss is noted on the record and a nominal award of restitution is ordered. Sections 40113 and 41221.

- *Federal Rule of Evidence 412.* The amendment to Rule 412, which deals with evidence of past sexual behavior of a victim of sexual misconduct, extends to civil cases those amendments scheduled to be effective December 1, 1994. Section 40141.

- *New Federal Rules of Evidence 413, 414, and 415.* These rules will govern evidence of similar crimes in criminal and civil sexual assault and child molestation cases, but will not go into effect until after the Judicial Conference has the opportunity to consider and report to Congress on the issue. Section 320934.

- *Gender bias studies.* The bill encourages circuit judicial councils to study gender bias in the Federal courts. Section 40421.

- *Pretrial Release.* Sex offenses are defined as crimes of violence for purposes of pretrial release or detention. Section 40501.

PRISONER SUITS

- *Prison overcrowding suits.* The bill removes authority from district courts to hold prison or jail crowding unconstitutional except to the extent that an individual inmate has proven that the crowding inflicts cruel and unusual punishment on that inmate. The relief provided in such a case may only be to remove the unconstitutional conditions as to the individual inmate. The proposal also prohibits the placement of a population ceiling unless crowding inflicts cruel or unusual punishment on particular inmates. This section requires reopening of any remedy at two-year intervals at the request of the defendant and will be applicable to all outstanding court orders on the date of enactment. There is a five-year sunset provision for this section. Section 20409.

- *Prisoner civil rights suits.* The bill amends the Civil Rights of Institutionalized Persons Act to lengthen the time the court may continue a case for exhaustion of administrative remedies from 90 days to 180 days. The amendment permits the Attorney General to certify, or the court to find, that administrative procedures that might not comply with the standards set forth in 42 U.S.C. § 1997e(b), are "otherwise fair and effective," thus permitting the court to require exhaustion of those remedies. Section 20416.

MISCELLANEOUS

- *Mandatory drug testing.* All probationers and supervised releasees are subject to drug testing pursuant to procedures developed by the Director of the Administrative Office in consultation with the Attorney General and the Secretary of Health and Human Services. The court may ameliorate or suspend testing if the court finds that there is a low risk of future substance abuse. Section 20414.

- *Notification of address changes.* The bill requires probation officers, in a manner specified by the Director of the Administrative Office, to notify chief state and local law enforcement officers at least five days prior to change of addresses to another jurisdiction by supervised releasees convicted of certain crimes of violence and drug crimes. The Bureau of Prisons has a like duty to advise of the locations of released prisoners. Section 20417.

- *Good time credit.* The bill will limit good time credit for those serving sentences for crimes of violence to prisoners who display "exemplary compliance" with institutional regulations. Section 20405.

- *Notice by clerks of court.* The bill requires clerks of United States district courts to report to the Secretary of the Treasury and the appropriate United States attorney amounts over $10,000 received as bond in specified cases. The effective date for this provision depends upon the promulgation of regulations by the Secretary of the Treasury. Section 20415.

- *Federal Rule of Criminal Procedure 46(i)(1).* The amendment corrects an erroneous cross reference. Section 330003(h).

103D CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
103–711

VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994

CONFERENCE REPORT

TO ACCOMPANY

H.R. 3355

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"(3) FEDERAL SHARE.—Notwithstanding subsection (c), the Secretary may provide 70 percent improvement grants for projects undertaken by any State for the purposes described in this subsection, and the remaining share of the cost shall be borne by the State.".

CHAPTER 4—NEW EVIDENTIARY RULES

SEC. 40141. SEXUAL HISTORY IN CRIMINAL AND CIVIL CASES.

(a) MODIFICATION OF PROPOSED AMENDMENT.—The proposed amendments to the Federal Rules of Evidence that are embraced by an order entered by the Supreme Court of the United States on April 29, 1994, shall take effect on December 1, 1994, as otherwise provided by law, but with the amendment made by subsection (b).

(b) RULE.—Rule 412 of the Federal Rules of Evidence is amended to read as follows:

"Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

"(a) EVIDENCE GENERALLY INADMISSIBLE.—The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

"(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

"(2) Evidence offered to prove any alleged victim's sexual predisposition.

"(b) EXCEPTIONS.—

"(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

"(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

"(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

"(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

"(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

"(c) PROCEDURE TO DETERMINE ADMISSIBILITY.—

"(1) A party intending to offer evidence under subdivision (b) must—

"(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

"(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

"(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.".

(c) TECHNICAL AMENDMENT.—The table of contents for the Federal Rules of Evidence is amended by amending the item relating to rule 412 to read as follows:

"412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition:
"(a) Evidence generally inadmissible.
"(b) Exceptions.
"(c) Procedure to determine admissibility.".

CHAPTER 5—ASSISTANCE TO VICTIMS OF SEXUAL ASSAULT

SEC. 40151. EDUCATION AND PREVENTION GRANTS TO REDUCE SEXUAL ASSAULTS AGAINST WOMEN.

Part A of title XIX of the Public Health and Human Services Act (42 U.S.C. 300w et seq.) is amended by adding at the end the following new section:

"SEC. 1910A. USE OF ALLOTMENTS FOR RAPE PREVENTION EDUCATION.

"(a) PERMITTED USE.—Notwithstanding section 1904(a)(1), amounts transferred by the State for use under this part may be used for rape prevention and education programs conducted by rape crisis centers or similar nongovernmental nonprofit entities for—

"(1) educational seminars;
"(2) the operation of hotlines;
"(3) training programs for professionals;
"(4) the preparation of informational materials; and
"(5) other efforts to increase awareness of the facts about, or to help prevent, sexual assault, including efforts to increase awareness in underserved racial, ethnic, and language minority communities.

"(b) TARGETING OF EDUCATION PROGRAMS.—States providing grant monies must ensure that at least 25 percent of the monies are devoted to education programs targeted for middle school, junior high school, and high school students.

"(c) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this section—

"(1) $35,000,000 for fiscal year 1996;
"(2) $35,000,000 for fiscal year 1997;
"(3) $45,000,000 for fiscal year 1998;
"(4) $45,000,000 for fiscal year 1999; and
"(5) $45,000,000 for fiscal year 2000.

"(d) LIMITATION.—Funds authorized under this section may only be used for providing rape prevention and education programs.

"(e) DEFINITION.—For purposes of this section, the term 'rape prevention and education' includes education and prevention efforts

directed at offenses committed by offenders who are not known to the victim as well as offenders who are known to the victim.

"(f) TERMS.—The Secretary shall make allotments to each State on the basis of the population of the State, and subject to the conditions provided in this section and sections 1904 through 1909.".

SEC. 40152. TRAINING PROGRAMS.

(a) IN GENERAL.—The Attorney General, after consultation with victim advocates and individuals who have expertise in treating sex offenders, shall establish criteria and develop training programs to assist probation and parole officers and other personnel who work with released sex offenders in the areas of—

(1) case management;
(2) supervision; and
(3) relapse prevention.

(b) TRAINING PROGRAMS.—The Attorney General shall ensure, to the extent practicable, that training programs developed under subsection (a) are available in geographically diverse locations throughout the country.

(c) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this section—

(1) $1,000,000 for fiscal year 1996; and
(2) $1,000,000 for fiscal year 1997.

SEC. 40153. CONFIDENTIALITY OF COMMUNICATIONS BETWEEN SEXUAL ASSAULT OR DOMESTIC VIOLENCE VICTIMS AND THEIR COUNSELORS.

(a) STUDY AND DEVELOPMENT OF MODEL LEGISLATION.—The Attorney General shall—

(1) study and evaluate the manner in which the States have taken measures to protect the confidentiality of communications between sexual assault or domestic violence victims and their therapists or trained counselors;

(2) develop model legislation that will provide the maximum protection possible for the confidentiality of such communications, within any applicable constitutional limits, taking into account the following factors:

(A) the danger that counseling programs for victims of sexual assault and domestic violence will be unable to achieve their goal of helping victims recover from the trauma associated with these crimes if there is no assurance that the records of the counseling sessions will be kept confidential;

(B) consideration of the appropriateness of an absolute privilege for communications between victims of sexual assault or domestic violence and their therapists or trained counselors, in light of the likelihood that such an absolute privilege will provide the maximum guarantee of confidentiality but also in light of the possibility that such an absolute privilege may be held to violate the rights of criminal defendants under the Federal or State constitutions by denying them the opportunity to obtain exculpatory evidence and present it at trial; and

(C) consideration of what limitations on the disclosure of confidential communications between victims of these crimes and their counselors, short of an absolute privilege,

are most likely to ensure that the counseling programs will not be undermined, and specifically whether no such disclosure should be allowed unless, at a minimum, there has been a particularized showing by a criminal defendant of a compelling need for records of such communications, and adequate procedural safeguards are in place to prevent unnecessary or damaging disclosures; and

(3) prepare and disseminate to State authorities the findings made and model legislation developed as a result of the study and evaluation.

(b) REPORT AND RECOMMENDATIONS.—Not later than the date that is 1 year after the date of enactment of this Act, the Attorney General shall report to the Congress—

(1) the findings of the study and the model legislation required by this section; and

(2) recommendations based on the findings on the need for and appropriateness of further action by the Federal Government.

(c) REVIEW OF FEDERAL EVIDENTIARY RULES.—The Judicial Conference of the United States shall evaluate and report to Congress its views on whether the Federal Rules of Evidence should be amended, and if so, how they should be amended, to guarantee that the confidentiality of communications between sexual assault victims and their therapists or trained counselors will be adequately protected in Federal court proceedings.

SEC. 40154. INFORMATION PROGRAMS.

The Attorney General shall compile information regarding sex offender treatment programs and ensure that information regarding community treatment programs in the community into which a convicted sex offender is released is made available to each person serving a sentence of imprisonment in a Federal penal or correctional institution for a commission of an offense under chapter 109A of title 18, United States Code, or for the commission of a similar offense, including halfway houses and psychiatric institutions.

SEC. 40155. EDUCATION AND PREVENTION GRANTS TO REDUCE SEXUAL ABUSE OF RUNAWAY, HOMELESS, AND STREET YOUTH.

Part A of the Runaway and Homeless Youth Act (42 U.S.C. 5711 et seq.) is amended—

(1) by redesignating sections 316 and 317 as sections 317 and 318, respectively; and

(2) by inserting after section 315 the following new section:

"GRANTS FOR PREVENTION OF SEXUAL ABUSE AND EXPLOITATION

"SEC. 316. (a) IN GENERAL.—The Secretary shall make grants under this section to private, nonprofit agencies for street-based outreach and education, including treatment, counseling, provision of information, and referral for runaway, homeless, and street youth who have been subjected to or are at risk of being subjected to sexual abuse.

"(b) PRIORITY.—In selecting among applicants for grants under subsection (a), the Secretary shall give priority to agencies that have

(2) TECHNICAL AMENDMENT.—The chapter analysis for chapter 25 of title 18, United States Code, is amended by adding after the item relating to section 511 the following new item:
"511A. Unauthorized application of theft prevention decal or device.".

TITLE XXIII—VICTIMS OF CRIME

Subtitle A—Victims of Crime

SEC. 230101. VICTIM'S RIGHT OF ALLOCUTION IN SENTENCING.

(a) MODIFICATION OF PROPOSED AMENDMENTS.—The proposed amendments to the Federal Rules of Criminal Procedure which are embraced by an order entered by the Supreme Court of the United States on April 29, 1994, shall take effect on December 1, 1994, as otherwise provided by law, but with the following amendments:

(b) IN GENERAL.—Rule 32 of the Federal Rules of Criminal Procedure is amended by—

(1) striking "and" following the semicolon in subdivision (c)(3)(C);

(2) striking the period at the end of subdivision (c)(3)(D) and inserting "; and";

(3) inserting after subdivision (c)(3)(D) the following:

"(E) if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence.";

(4) in subdivision (c)(3)(D), striking "equivalent opportunity" and inserting in lieu thereof "opportunity equivalent to that of the defendant's counsel";

(5) in the last sentence of subdivision (c)(4), striking "and (D)" and inserting "(D), and (E)";

(6) in the last sentence of subdivision (c)(4), inserting "the victim," before "or the attorney for the Government."; and

(7) adding at the end the following:

"(f) DEFINITIONS.—For purposes of this rule—

"(1) 'victim' means any individual against whom an offense has been committed for which a sentence is to be imposed, but the right of allocution under subdivision (c)(3)(E) may be exercised instead by—

"(A) a parent or legal guardian if the victim is below the age of eighteen years or incompetent; or

"(B) one or more family members or relatives designated by the court if the victim is deceased or incapacitated;

if such person or persons are present at the sentencing hearing, regardless of whether the victim is present; and

"(2) 'crime of violence or sexual abuse' means a crime that involved the use or attempted or threatened use of physical force against the person or property of another, or a crime under chapter 109A of title 18, United States Code.".

(c) EFFECTIVE DATE.—The amendments made by subsection (b) shall become effective on December 1, 1994.

SEC. 280003. DIRECTION TO UNITED STATES SENTENCING COMMISSION REGARDING SENTENCING ENHANCEMENTS FOR HATE CRIMES.

(a) DEFINITION.—In this section, "hate crime" means a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.

(b) SENTENCING ENHANCEMENT.—Pursuant to section 994 of title 28, United States Code, the United States Sentencing Commission shall promulgate guidelines or amend existing guidelines to provide sentencing enhancements of not less than 3 offense levels for offenses that the finder of fact at trial determines beyond a reasonable doubt are hate crimes. In carrying out this section, the United States Sentencing Commission shall ensure that there is reasonable consistency with other guidelines, avoid duplicative punishments for substantially the same offense, and take into account any mitigating circumstances that might justify exceptions.

SEC. 280004. AUTHORIZATION OF PROBATION FOR PETTY OFFENSES IN CERTAIN CASES.

Section 3561(a)(3) of title 18, United States Code, is amended by inserting "that is not a petty offense" before the period.

SEC. 280005. FULL-TIME VICE CHAIRS OF THE UNITED STATES SENTENCING COMMISSION.

(a) ESTABLISHMENT OF POSITIONS.—Section 991 (a) of title 28, United States Code, is amended—

(1) in the second sentence by striking the period and inserting "and three of whom shall be designated by the President as Vice Chairs.";

(2) in the fourth sentence by striking the period and inserting ", and of the three Vice Chairs, no more than two shall be members of the same political party."; and

(3) in the sixth sentence by striking "Chairman" and inserting "Chair, Vice Chairs,".

(b) TERMS AND COMPENSATION.—Section 992(c) of title 28, United States Code, is amended—

(1) by amending the first sentence to read as follows: "The Chair and Vice Chairs of the Commission shall hold full-time positions and shall be compensated during their terms of office at the annual rate at which judges of the United States courts of appeals are compensated.";

(2) in the second sentence by striking "Chairman" and inserting "Chair and Vice Chairs"; and

(3) in the third sentence by striking "Chairman" and inserting "Chair and Vice Chairs,".

(c) TECHNICAL AMENDMENTS.—Chapter 58 of title 28, United States Code, is amended—

(1) by striking "Chairman" each place it appears and inserting "Chair";

(2) in the fifth sentence of section 991(a) by striking "his" and inserting "the Attorney General's";

(3) in the fourth sentence of section 992(c) by striking "his" and inserting "the judge's";

or other employee of the corporation shall receive an increase in compensation solely on account of this section.

"(h) RELATIONSHIP WITH ATTORNEY GENERAL.—The duties and powers of law enforcement agents designated under subsection (a) that are described in subsection (b) shall be exercised in accordance with guidelines approved by the Attorney General.".

SEC. 320932. ASSISTANT UNITED STATES ATTORNEY RESIDENCY.

Section 545(a) of title 28, United States Code, is amended—

(1) by striking "and assistant United States attorney"; and

(2) by inserting the following after the first sentence: "Each assistant United States attorney shall reside in the district for which he or she is appointed or within 25 miles thereof.".

SEC. 320933. LABELS ON PRODUCTS.

To the extent any person introduces, delivers for introduction, sells, advertises, or offers for sale in commerce a product with a "Made in the U.S.A." or "Made in America" label, or the equivalent thereof, in order to represent that such product was in whole or substantial part of domestic origin, such label shall be consistent with decisions and orders of the Federal Trade Commission issued pursuant to section 5 of the Federal Trade Commission Act. This section only applies to such labels. Nothing in this section shall preclude the application of other provisions of law relating to labeling. The Commission may periodically consider an appropriate percentage of imported components which may be included in the product and still be reasonably consistent with such decisions and orders. Nothing in this section shall preclude use of such labels for products that contain imported components under the label when the label also discloses such information in a clear and conspicuous manner. The Commission shall administer this section pursuant to section 5 of the Federal Trade Commission Act and may from time to time issue rules pursuant to section 553 of Title 5, United States Code for such purpose. If a rule is issued, such violation shall be treated by the Commission as a violation of a rule under section 18 of the Federal Trade Commissions Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices. This section shall be effective upon publication in the Federal Register of a Notice of the provisions of this section. The Commission shall publish such notice within six months after the enactment of this section.

SEC. 320934. NON-DISCHARGEABILITY OF PAYMENT OF RESTITUTION ORDER.

Section 523(a) of title 11, United States Code, is amended—

(1) by striking "or" at the end of paragraph (11);

(2) by striking the period at the end of paragraph (12) and inserting "; or"; and

(3) by adding at the end the following new paragraph:

"(13) for any payment of an order of restitution issued under title 18, United States Code."

SEC. 320935 ADMISSIBILITY OF EVIDENCE OF SIMILAR CRIMES IN SEX OFFENSE CASES.

(a) The Federal Rules of Evidence are amended by adding after Rule 412 the following new rules:

"Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

"(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

"(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

"(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

"(1) any conduct proscribed by chapter 109A of title 18, United States Code;

"(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

"(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

"(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

"(5) an attempt or conspiracy to engage in conduct described in paragraph (1)–(4).

"Rule 414. Evidence of Similar Crimes in Child Molestation Cases

"(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

"(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

"(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

"(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

"(2) any conduct proscribed by chapter 110 of title 18, United States Code;

"(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

"(4) contact between the genitals or anus of the defendant and any part of the body of a child;

"(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

"(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).

"Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

"(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

"(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule."

(b) IMPLEMENTATION.—The amendments made by subsection (a) shall become effective pursuant to subsection (d).

(c) RECOMMENDATIONS BY JUDICIAL CONFERENCE.—Not later than 150 days after the date of enactment of this Act, the Judicial Conference of the United States shall transmit to Congress a report containing recommendations for amending the Federal Rules of Evidence as they affect the admission of evidence of a defendant's prior sexual assault or child molestation crimes in cases involving sexual assault and child molestation. The Rules Enabling Act shall not apply to the recommendations made by the Judicial Conference pursuant to this section.

(d) CONGRESSIONAL ACTION.—

(1) If the recommendations described in subsection (c) are the same as the amendments made by subsection (a) then the amendments made by subsection (a) shall become effective 30 days after the transmittal of the recommendations.

(2) If the recommendations described in subsection (c) are different than the amendments made by subsection (a), the amendments made by subsection (a) shall become effective 150 days after the transmittal of the recommendations unless otherwise provided by law.

(3) If the Judicial Conference fails to comply with subsection (c), the amendments made by subsection (a) shall become effective 150 days after the date the recommendations were due under subsection (c) unless otherwise provided by law.

(e) APPLICATION.—The amendments made by subsection (a) shall apply to proceedings commenced on or after the effective date of such amendments.

(12) in section 811(e) by striking "Law Enforcement Assistance Administration" and inserting "Bureau of Justice Assistance";

(13) in section 901(a)(3) by striking "and," and inserting ", and";

(14) in section 1001(c) by striking "parts" and inserting "part".

(i) CONFORMING AMENDMENT TO OTHER LAW.—Section 4351(b) of title 18, United States Code, is amended by striking "Administrator of the Law Enforcement Assistance Administration" and inserting "Director of the Bureau of Justice Assistance".

SEC. 330002. GENERAL TITLE 18 CORRECTIONS.

(a) SECTION 1031.—Section 1031(g)(2) of title 18, United States Code, is amended by striking "a government" and inserting "a Government".

(b) SECTION 208.—Section 208(c)(1) of title 18, United States Code, is amended by striking "Banks" and inserting "banks".

(c) SECTION 1007.—The heading for section 1007 of title 18, United States Code, is amended by striking "Transactions" and inserting "transactions".

(d) SECTION 1014.—Section 1014 of title 18, United States Code, is amended by striking the comma that follows a comma.

(e) ELIMINATION OF OBSOLETE CROSS REFERENCE.—Section 3293 of title 18, United States Code, is amended by striking "1008,".

(f) ELIMINATION OF DUPLICATE SUBSECTION DESIGNATION.—Section 1031 of title 18, United States Code, is amended by redesignating the second subsection (g) as subsection (h).

(g) TECHNICAL AMENDMENT TO PART ANALYSIS FOR PART I.—The item relating to chapter 33 in the part analysis for part I of title 18, United States Code, is amended by striking "701" and inserting "700".

(h) AMENDMENT TO SECTION 924(a)(1)(B).—Section 924(a)(1)(B) of title 18, United States Code, is amended by striking "(q)" and inserting "(r)".

(i) PUNCTUATION CORRECTION.—Section 207(c)(2)(A)(ii) of title 18, United States Code, is amended by striking the semicolon at the end and inserting a comma.

(j) CHAPTER ANALYSIS CORRECTION.—The chapter analysis for chapter 223 of title 18, United States Code, is amended by adding at the end the following:

"3509. Child Victims' and child witnesses' rights.".

(k) Elimination of Superfluous Comma.—Section 3742(b) of title 18, United States Code, is amended by striking "Government," and inserting "Government".

SEC. 330003. CORRECTIONS OF ERRONEOUS CROSS REFERENCES AND MISDESIGNATIONS.

(a) SECTION 1791 OF TITLE 18.—Section 1791(b) of title 18, United States Code, is amended by striking "(c)" each place it appears and inserting "(d)".

(b) SECTION 2703 OF TITLE 18.—Section 2703(d) of title 18, United States Code, is amended by striking "section 3126(2)(A)" and inserting "section 3127(2)(A)".

(c) SECTION 666 OF TITLE 18.—Section 666(d) of title 18, United States Code, is amended—

(1) by redesignating the second paragraph (4) as paragraph (5);

(2) by striking "and" at the end of paragraph (3); and

(3) by striking the period at the end of paragraph (4) and inserting "; and".

(d) SECTION 4247 OF TITLE 18.—Section 4247(h) of title 18, United States Code, is amended by striking "subsection (e) of section 4241, 4243, 4244, 4245, or 4246," and inserting "subsection (e) of section 4241, 4244, 4245, or 4246, or subsection (f) of section 4243,".

(e) SECTION 408 OF THE CONTROLLED SUBSTANCE.—Section 408(b)(2)(A) of the Controlled Substances Act (21 U.S.C. 848(b)(2)(A)) is amended by striking "subsection (d)(1)" and inserting "subsection (c)(1)".

(f) MARITIME DRUG LAW ENFORCEMENT ACT.—(1) Section 994(h) of title 28, United States Code, is amended by striking "section 1 of the Act of September 15, 1980 (21 U.S.C. 955a)" each place it appears and inserting "the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)".

(2) Section 924(e) of title 18, United States Code, is amended by striking "the first section or section 3 of Public Law 96–350 (21 U.S.C. 955a et seq.)" and inserting "the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)".

(g) SECTION 2596 OF THE CRIME CONTROL ACT OF 1990.—Section 2596(d) of the Crime Control Act of 1990 is amended, effective retroactively to the date of enactment of such Act, by striking "951(c)(1)" and inserting "951(c)(2)".

(h) FEDERAL RULES OF CRIMINAL PROCEDURE.—Rule 46(i)(1) of the Federal Rules of Criminal Procedure for the United States Courts is amended by striking "18 U.S.C. §3144" and inserting "18 U.S.C. §3142".

SEC. 330004. REPEAL OF OBSOLETE PROVISIONS IN TITLE 18.

Title 18, United States Code, is amended—

(1) in section 212 by striking "or of any National Agricultural Credit Corporation," and by striking "or National Agricultural Credit Corporations,";

(2) in section 213 by striking "or examiner of National Agricultural Credit Corporations";

(3) in section 709 by striking the seventh and thirteenth paragraphs;

(4) in section 711 by striking the second paragraph;

(5) by striking section 754 and amending the chapter analysis for chapter 35 by striking the item relating to section 754;

(6) in sections 657 and 1006 by striking "Reconstruction Finance Corporation," and striking "Farmers' Home Corporation,";

(7) in section 658 by striking "Farmers' Home Corporation,";

(8) in section 1013 by striking ", or by any National Agricultural Credit Corporation";

(9) in section 1160 by striking "white person" and inserting "non-Indian";

(10) in section 1698 by striking the second paragraph;

ORAL REPORTS

File

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

September 27, 1994

MEMORANDUM TO ADVISORY COMMITTEE ON CRIMINAL RULES

SUBJECT: *Supplementary Materials for the Committee Meeting*

Please bring the attached supplementary materials to the meeting in Santa Fe, including:

(1) Memorandum from Reporter David A. Schlueter with attached statement from Steven Brill regarding action of Judicial Conference on cameras in the courtroom.

(2) Memorandum from David Schlueter forwarding agenda item from Evidence Rules Committee regarding alternatives to new Evidence Rules 413-415.

(3) Results of Federal Judicial Center survey of current court practices regarding direct attorney participation in juror *voir dire*.

John K. Rabiej

Attachments

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Judicial Conference Action on Proposed Rule 53

DATE: September 23, 1994

At its meeting last week, the Judicial Conference rejected any attempts to adopt guidelines or rules amendments to permit broadcasting from federal courtrooms. Thus, the Committee's proposed amendment to Rule 53 will not be forwarded to the Supreme Court. A more detailed report on that action will be given at the Committee's meeting in Santa Fe.

The attached statement from Mr. Brill indicates that there may be a move to have the Judicial Conference reconsider it's position or have Congress consider the issue. The Judicial Conference's action apparently negates the immediate need for guideline proposals from the Committee.

COURTROOM TELEVISION NETWORK

September 21, 1994

Statement by Court TV Founder and CEO Steven Brill

This week, the U.S. Judicial Conference in a closed-door meeting voted against permitting cameras on a permanent basis in Federal civil cases. That decision affects only a handful of the cases that Court TV would have carried in the coming months and only involved about ten percent of the cases we have carried in our three years of operations. As such it has little impact on our current operations.

And, in fact, it comes at a time when many states are actively considering expanding the opportunity for camera coverage, and some countries, such as the United Kingdom, are beginning experiments of their own.

Nonetheless, the decision is frustrating because it flies in the face of the absolutely undisputed results of the federal courts' own successful experiment and because it limits -- at least temporarily -- the expanded coverage of important federal trials that we had hoped to embark on in the months ahead.

There are two great ironies here. The first is that the judges threw out their own evidence; they asked for an experiment to see if cameras could be present without impeding the judicial process, but when their own evidence came in they simply threw it out.

The second irony is that at a time when Court TV is often asked why it covers so many high profile criminal trials, a committee of leading judges has now told us that at least for the period that it takes us to change their minds or change the law we will not be able to cover some of the most important civil trials and criminal cases. We can cover O.J. Simpson but not Dan Rostenkowski. We can cover a slip and fall case but not a federal civil rights or antitrust case or an appeal of an abortion law.

The federal courts conducted a three year experiment, then asked their own in-house think tank -- the Federal Judicial Center -- to evaluate it to see if any of the feared consequences of cameras had actually materialized. That evaluation was unequivocal: nothing bad happened in any courtroom and some real benefits did result from the camera coverage.

Court TV covered 36 federal cases, and they provided some of the most educational, enlightening trials on our network: civil rights cases, an antitrust case, an intellectual property case,

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employment discrimination cases, and a variety of other important matters. After each and every trial we also surveyed the judge involved and those judges told us that the camera experience had not in any way impeded the process of justice and had, according to them, enhanced the public's understanding of the justice system.

A good example is the case of Leonard Jeffries, the City University of New York professor who sued after being removed from the chairmanship of an academic department following an allegedly anti-semitic speech. The judge who presided over the Jeffries case, Kenneth Conboy, has told me repeatedly that the fact that the public got to see that case gavel to gavel was critical to enhancing public understanding across the country of the constitutional issues in what might otherwise have been a racially volatile case. It's too bad that the judges on the Judicial Conference never heard from Judge Conboy.

We were told by the U.S. Judicial Conference staff that we should not communicate with members of the Conference prior to this meeting to remind them of the results of either their own study or our surveys, and so we didn't. We apparently should have. For the judges of the Judicial Conference have inexplicably ignored the entire experiment.

We intend in the weeks ahead to make every effort to remind them of the results of their own study, and, if necessary, to bring the issue to the attention of members of Congress, where the impetus for this experiment was originally generated and which has final jurisdiction for the rules of federal courts.

I predict that before long there will either be a federal rule, promulgated by the judges once they have reconsidered the issue, or a federal law passed by Congress that allows the public to see and understand how our federal courts function.

Now that the deliberations on the experiment have taken this surprising, indeed bizarre, turn, we will move quickly to galvanize the tens of thousands of people who have now joined Citizens For Court TV, a grassroots movement that supports open courtrooms. We will work energetically on both fronts: to get the Judicial Conference to reconsider and to take the results of their experiment to Congress.

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Congressional Adoption of Federal Rules of Evidence 414 and 415

DATE: September 23, 1994

Congress, as part of its recent Crime Bill, adopted new Federal Rules of Evidence 414 and 415 which will become effective as passed unless the Judicial Conference proposes alternative language.

The attached materials explain the status of those rules, which includes a request for comments and suggestions from the public. Also attached is a memo prepared by Professor Berger, Reporter for the Evidence Committee, which outlines several options for that Committee's consideration.

I have also included excerpts of the Minutes of the Criminal Rules Committee Fall 1991 meeting where earlier versions of Rules 414 and 415 were considered, and opposed, by the Committee.

Although the primary jurisdiction for this matter rests with the Evidence Committee, it may be helpful for the Committee to consider the matter at its Santa Fe meeting and be prepared to state a position if requested.

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

September 9, 1994

TO THE BENCH, BAR, AND PUBLIC

The House of Representatives and the Senate have passed H.R.3355, the Violent Crime Control and Law Enforcement Act of 1994. The President is expected to sign the bill soon. Section 320935 of the Act adds three new Evidence Rules 413-415, which would make evidence of a defendant's past similar acts admissible in a civil and a criminal case involving sexual assault or child molestation offense. A copy of the rules is attached.

Under the Act, the three new evidence rules take effect 180 days after the President signs the bill, unless the Judicial Conference makes alternative recommendations to Congress within 150 days. The review procedures under the Rules Enabling Act explicitly do not apply to these rules.

The Judicial Conference's Advisory Committee on Evidence Rules will meet on October 17-18, 1994, in Washington, D.C., and it will consider Rules 413-415. In making its recommendations, the committee will benefit from public comment. To accommodate the deadlines imposed under the Act, the committee requests that all suggestions and comments, whether favorable, adverse, or otherwise, be placed in the hands of the Secretary as soon as convenient and in any event, **no later than October 11, 1994.**

All communications on these rules should be addressed to:

Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544.

Ralph K. Winter, Jr.
Chair, Advisory Committee on
Evidence Rules

SEC. 320935 ADMISSIBILITY OF EVIDENCE OF SIMILAR CRIMES IN SEX OFFENSE CASES.

(a) The Federal Rules of Evidence are amended by adding after Rule 412 the following new rules:

"Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

"(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

"(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

"(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

"(1) any conduct proscribed by chapter 109A of title 18, United States Code;

"(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

"(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

"(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

"(5) an attempt or conspiracy to engage in conduct described in paragraph (1)–(4).

"Rule 414. Evidence of Similar Crimes in Child Molestation Cases

"(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

"(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

"(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

"(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

"(2) any conduct proscribed by chapter 110 of title 18, United States Code;

Brooklyn Law School

Margaret A. Berger
Professor of Law

TO: Advisory Committee on the Federal Rules of Evidence

FROM: Margaret A. Berger, Reporter MAB

DATE: September 19, 1994

RE: Rule 413

==========

At our October 1993 meeting, the Committee evinced no interest in amending Rule 404 to allow evidence of the defendant's prior sexual acts. Nevertheless, we must recommend some version of a rule admitting prior sexual acts evidence because of the political reality that both Houses of Congress will not agree to reverse themselves totally by excluding all such evidence when offered to show action in conformity therewith. As our objective must therefore be to draft the best possible provisions that might have a chance to pass, rather than to draft the best possible rule, I have drafted a number of different versions of a Rule 413 in order to facilitate a discussion about alternatives. I have also combined the three rules in the Crime Bill into one and sought to make whatever rule we recommend more consistent with the style of the Federal Rules of Evidence.

Version 1 is the most protective of the defendant. It disallows evidence of prior sexual acts for a propensity

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inference unless there has been a conviction. To provide additional protection, a balancing test and a time limitation have also been added. As the variations at the end of this version indicate, the balancing test and/or time limitation could be eliminated or modified. If the special balancing test is eliminated, Rule 403 balancing would still apply but the opponent of the evidence would have the burden of convincing the court to exclude rather than shifting to the proponent the burden of convincing the court to admit.

Version 2 would allow some evidence of uncharged acts to be admitted. However, a "clear and convincing" finding by the court would govern rather than the usual Huddleston standard. Last May, the Committee did not believe that changing to a clear and convincing standard would make much of a difference with regard to Rule 404 in general because disputes about defendant's having committed the other crime rarely arise. In the case of uncharged sexual offenses, however, this is obviously not the case. Again, a balancing test and time limit have been proposed. The variations pose less protective alternatives, and suggest as well a balancing test that would require the court to consider particular factors. This can be coupled with the requirement of an on-the-record determination.

Rule 413

Version 1: Conviction -- plus balancing test & time limit

(a) **General rule.** -- Notwithstanding Rule 404(a), a court shall admit:

(1) evidence that a person has been convicted of an offense of sexual assault

(a) in a criminal case in which the person is charged with an offense of sexual assault, or

(b) in a civil case in which a claim for relief, predicated on an act constituting an offense of sexual assault, is asserted against the person;

(2) evidence that a person has been convicted of an offense of child molestation

(a) in a criminal case in which the person is charged with an offense of child molestation, or

(b) in a civil case in which a claim for relief, predicated on an act consituting an offense of sexual assault, is asserted against the person

if the court determines that the probative value of this evidence substantially outweighs its prejudicial effect to the person against whom the evidence is offered.

(b) **Time Limit.** -- Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed

since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

Possible variations:

Eliminate "substantially" from balancing test.

Eliminate balancing test and/or time limit.

Add balancing factors to the time limit test (see Rule 609(b).

Version 2. Uncharged acts -- plus balancing test, and clear and convincing evidence test and time limit

(a) **General rule.** -- Notwithstanding Rule 404(a), a court shall admit:

(1) evidence that a person has committed an offense of sexual assault

(a) in a criminal case in which the person is charged with an offense of sexual assault, or

(b) in a civil case in which a claim for relief, predicated on an act constituting an offense of sexual assault, is asserted against the person;

(2) evidence that a person has committed an offense of child molestation

(a) in a criminal case in which the person is charged with an offense of child molestation, or

(b) in a civil case in which a claim for relief, predicated on an act consituting an offense of sexual assault, is asserted against the person

if the court determines that the probative value of this evidence substantially outweighs its prejudicial effect to the person against whom the evidence is offered.

(b) **Limits on admissibility.** Such evidence is not admissible

(1) unless the court determines on the basis of clear

and convincing evidence that the commission of an act constituting an offense of sexual assault or child molestation actually occurred and was committed by the person against whom the evidence is offered, or

(2) if more than ten years have elapsed since the commission of an offense of sexual assault or child molestation.

Possible variations:

Eliminate one or more of limitations: balancing test, clear and convincing test or time limit

Eliminate "substantially" in balancing test in (a); add balancing test to time limit

Restrict clear and convincing evidence requirement to criminal cases

Substitute for the balancing test and the time limit, a balancing test that spells out factors to be considered:

In making its determination the court shall consider the similarity between the act which is the subject of the charge or claim and the act about which evidence is being offered, the number of provable prior instances of similar acts by the person against whom the evidence is offered, the time that has elapsed since the commission of the act or acts about which evidence is being offered, and the availability of other evidence to prove the charge or claim,

(c) **Notice.** A party who intends to offer evidence under this rule must disclose the evidence to the party against whom it will be offered, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such earlier or later time as the court may allow for good cause.

(d) **Definition of offenses.** [to be added]

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

September 23, 1994

MEMORANDUM TO ADVISORY COMMITTEE ON EVIDENCE RULES

SUBJECT: *Alternative Draft Evidence Rules 413-415 Prepared by Stephen A. Saltzburg and Gregory P. Joseph*

The following draft Evidence Rule 413 was prepared by Stephen Saltzburg and Gregory Joseph:

Evidence Rule 413

(a) In a criminal case in which the defendant is accused of sexual misconduct against another person, evidence of the defendant's commission of other criminal sexual misconduct may be admitted, provided that the court determines that the probative value of such evidence is not substantially outweighed by its prejudicial effect. In determining the probative value of the evidence, the court shall identify each purpose for which the other misconduct evidence is offered and shall compare the charged misconduct and the other misconduct with respect to

(1) proximity in time;
(2) similarity of behavior;
(3) surrounding circumstances;
(4) relevant intervening events; and
(5) other relevant similarities or differences.

(b) In a civil case in which a claim is predicated on a party's alleged commission of criminal sexual misconduct, evidence of other criminal sexual conduct may be admitted pursuant to subdivision (a).

(c) In a case in which a party intends to offer evidence under this rule, that party shall disclose the evidence to all other parties including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 14 days before the scheduled date of the trial or at such later time as the court may allow for good cause.

MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE

November 7, 1991
Tampa, Florida

The Advisory Committee on the Federal Rules of Criminal Procedure met in Tampa, Florida on November 7, 1991. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Hodges called the meeting to order at 9:00 a.m. on Thursday, November 7, 1991 at the United States Courthouse in Tampa, Florida. The following persons were present for all or a part of the Committee's meeting:

Hon. Wm. Terrell Hodges, Chairman
Hon. Sam A. Crow
Hon. James DeAnda
Hon. Robinson O. Everett
Hon. Daniel J. Huyett, III
Hon. John F. Keenan
Hon. Harvey E. Schlesinger
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. William Wilson, Standing Committee member acting as liaison to the Advisory Committee, Mr. David Adair, Ms. Ann Gardner, and Mr. John Robiej of the Administrative Office of the United States Courts, and Mr. James Eaglin from the Federal Judicial Center. Judge D. Lowell Jensen, a newly appointed member of the Committee, was not able to attend.

I. INTRODUCTIONS AND COMMENTS

Judge Hodges welcomed the attendees and noted that all of the members were present with the exception of a new member, Judge D. Lowell Jensen, who had just been appointed to the Committee but was not able to attend due to previously scheduled commitments. Judge Hodges also noted

Mr. Marek expressed opposition to the concept of extending the rape shield protections any further. He noted that Rule 403 is generally adequate and that so few cases would be affected by the proposed amendment. Professor Saltzburg observed that although there may be few cases, the applicable rules of evidence have taken on great social significance.

In a discussion about what, if any, notice provisions should be included, Judge Schlesinger observed that it would beneficial to include in one rule of evidence all of the various notice provisions affecting the admissibility of evidence. Judge Keeton noted that although there seemed to be merit in such a suggestion, he believed that the various notice provisions are indeed different.

Judge Keenan indicated that he believed it would be important to act decisively in this area lest Congress enact an unworkable rule. Judge Keeton joined in that observation, noting that adoption of Professor Saltzburg's motion would do that and that it is important that any proposed amendments be processed through the Rules Enabling Act. Mr. Adair and Mr. Pauley provided a brief update on the status of the pending amendment in Congress and observed that there might be a chance that the rape shield amendments would not be considered until Spring 1992.

Judge Everett pointed out that in considering amendments to Rule 412, the Committee should give consideration to including a constitutional escape clause for opinion and reputation evidence. Mr. Wilson, however, questioned whether doing that would create an exception which would swallow the general rule of exclusion.

The motion to amend Rule 412 ultimately carried by an 8-1 vote and the Reporter was asked to give some priority to drafting appropriate language for the amendment.

b. Proposed Rules of Evidence 413, 414, and 415 (Women's Equal Opportunity Act).

Professor Saltzburg pointed out that Congress was considering adding several rules of evidence which would in effect create exceptions to Rule 404(b) by expressly permitting introduction of a person's prior sexual activity. Noting that the subcommittee was opposed to the proposed rules, he moved that the Committee oppose those amendments. Judge Keenan seconded the motion.

Mr. Pauley argued that the rules reflected studies

which show that sexual offenders and child molesters have a higher incidence of repeating their behavior and noted that this sort of evidence would probably be admissible under Rule 404(b). Judge Keeton observed that Rule 404(b) does not permit introduction of past incidents to show a defendant's propensity, whereas these proposed amendments would permit such evidence. Judge Keenan expressed concern that this type of evidence would apparently be admissible even if the defendant had been acquitted of those prior acts. Mr. Wilson also expressed concern that it appeared that the Rules would increase the likelihood that an innocent person would be convicted. But Mr. Pauley responded that the proposed rules would increase the likelihood of convicting a guilty person. Mr. Marek pointed out that the Rules would permit, or encourage, more litigation about the underlying prior acts and Judge Hodges questioned whether there was a real need for the proposed rules.

Judge Everett noted that this evidence is usually barred because it is dangerous. He noted the contrast of the proposed amendments to Rule 412, which would block the introduction of prior sexual acts of a victim, and these proposed amendments which would highlight the defendant's prior sexual acts. He also observed that although a limiting instruction may not always be effective does not mean that the rule should be effectively abandoned for certain sexual offenders.

Judge DeAnda observed that the proposed rules would not limit the prosecution to introducing this evidence in rebuttal; the defendant's past sexual acts could be introduced in the prosecution's case-in-chief.

Professor Saltzburg indicated that although this evidence would be relevant, on balance these rules should be rejected. He noted that codification of the rules of evidence makes it more difficult for counsel to argue that the courts should make common-law exceptions to the rules. Here, the proposed amendments were designed to accomplish that purpose. He added that there might be an argument that sexual offenders are different than other offenders and that the Committee should be open to considering information from the Department of Justice which indicates that indeed those offenders should be treated differently in the rules of evidence. But the information before the Committee was insufficient to support endorsement of the proposed amendments.

The Committee voted 8-1 to express opposition to the amendments.

Research Division
202-273-4070

memorandum

DATE: 9/26/94
TO: Advisory Committee on Civil Rules
FROM: John Shapard, Molly Johnson
SUBJECT: Survey Concerning Voir Dire

At the request of the Chairman of your Committee, the Center initiated a survey of active district judges concerning certain of their practices in conducting voir dire, as well as their opinions about counsel participation in voir dire and their impressions of the effect on voir dire of the line of cases beginning with *Batson v Kentucky*, 476 U.S. 79. A copy of the questionnaire is attached as exhibit A. This memorandum explains the results of the survey, and provides in a few instances comparisons to the results of a similar survey conducted by the Judicial Center in 1977.[1]

The survey was mailed to a randomly selected sample of 150 active district judges, with the sampling designed to achieve proportional representation of districts, chief judges, and time since appointment to the district bench. 124 Judges (83%) completed and returned the questionnaire. Because the information provided here is based on a sample, the results must be understood as estimates. The fact, for example, that 59% of respondents indicated that they ordinarily allowed counsel to ask questions during civil voir dire does not necessarily mean that 59% of all district judges allow some counsel questioning. There is a margin of error of roughly plus or minus 8% (hence somewhere between 51% and 67% of all district judges allow counsel questioning).[2]

Extent of Counsels' Participation in Voir Dire

One focus of the survey was the extent to which judges permit counsel to address prospective jurors directly—as opposed to the court asking all questions—in the course of voir dire. Asked about their "standard" practice, 59% indicated that they allowed at least some direct attorney participation in voir dire of civil trial juries, and 54% so indicated with regard to criminal juries. In the Center's 1977 study, less than 30% of district judges reported allowing any questioning by counsel during voir dire in "typical" civil or criminal cases. There was no marked difference in responses to a second question asking about practices in "exceptional" cases, the percentages being 67% (civil) and 51% (criminal). The extent of permitted counsel participation was indicated by three different responses, distinguished by unavoidably subjective terms. One response indicated that the judge allows counsel to "conduct most or all of voir dire," another

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[1] See Bermant, The Conduct of Voir Dire Examination: Practices and Opinions of Federal District Judges, Federal Judicial Center, 1977.

[2] To be a bit more specific, the plus-or-minus 8% figure is the size of the 95% confidence interval, which means that with random sampling from the population of active district judges, there is at most a 5% chance that the percentage given for the sample (here 59%) would occur if in fact the percentage for the entire population of active district judges was more than 8% different (i.e., below 43% or greater than 59%).

indicated that the judge conducts a preliminary examination and then gives " counsel a fairly extended opportunity to ask additional questions", and the third indicated that after the judge's examination, counsel were given "a very limited opportunity to ask additional questions." The percentages of these answers selected by the respondents are shown in Table 1.

TABLE 1

RESPONSE	"Standard Practice" Civil	"Standard Practice" Criminal	"Exceptional Cases" Civil	"Exceptional Cases" Criminal
a. I allow counsel to conduct most or all of voir dire. I either ask no questions or ask only very general, standard questions addressed to the entire venire (e.g., please raise your hand if you know any of the parties or attorneys).	9%	7%	8%	6%
b. I conduct an initial examination covering usual voir dire questions, and then give counsel a fairly extended opportunity to ask additional questions.	18%	18%	27%	26%
c. I conduct an initial examination covering usual voir dire questions, and then give counsel a very limited opportunity to ask additional questions.	33%	29%	29%	28%
d. I conduct the entire examination. I permit counsel to submit to me questions they would like me to ask, but do not generally allow counsel to ask any questions directly.	41%	46%	34%	38%
e. Other	2%	1%	2%	3%

Another question asked the judge to estimate the average time taken in questioning jurors during voir dire, broken down between time spent by counsel and by the court, and by civil and criminal cases. The average total time—court and counsel—reported was 1:12 for civil cases and 1:39 for criminal cases. The range of the responses is shown in Table 2, together with figures for a similar question asked in the Center's 1977 study.

TABLE 2

Total Average Time Spent Questioning Prospective Jurors	**Percent of Respondents** Current Study Civil	Current Study Criminal	1977 Study Civil	1977 Study Criminal
less than 30 minutes	4%	2%	33%	16%
30 min - 1 hour	25%	10%	49%	49%
1 - 2 hours	56%	55%	14%	28%
2 or more hours	15%	34%	1%	7%

Among judges who reported any time expended by counsel, the average was 31 minutes in civil cases and 40 in criminal cases. Perhaps most intriguing, however, is the absence of much relationship between total voir dire time and the judge's indication of his or her standard practice regarding attorney participation in voir dire (which is summarized above in Table 1). Table 3 shows the reported times broken down by standard voir dire practice.

TABLE 3

Standard Voir Dire Practice	Average Voir Dire Time					
	Civil			Criminal		
	Ct	Cnsl	**Tot**	Ct	Cnsl	**Tot**
a. I allow counsel to conduct most or all of voir dire. I either ask no questions or ask only very general, standard questions addressed to the entire venire (e.g., please raise your hand if you know any of the parties or attorneys).	0:13	0:55	**1:09**	0:20	1:08	**1:28**
b. I conduct an initial examination covering usual voir dire questions, and then give counsel a fairly extended opportunity to ask additional questions.	0:43	0:32	**1:15**	0:57	0:42	**1:39**
c. I conduct an initial examination covering usual voir dire questions, and then give counsel a very limited opportunity to ask additional questions.	0:54	0:20	**1:15**	1:19	0:25	**1:44**
d. I conduct the entire examination. I permit counsel to submit to me questions they would like me to ask, but do not generally allow counsel to ask any questions directly.	1:05	0:00	**1:05**	1:32	0:00	**1:32**

Effects of *Batson*

The survey also asked questions pertaining to the influence of *Batson* and its progeny (hereafter, simply "*Batson*"). When asked what percentage of their jury trials in the last year had involved a *Batson-type* objection,[3] 36% answered "none." The average percentage reported was 7%, with a median of 2%. (15% reported that such objections occurred in more than 10% of their trials).

It can be argued that *Batson* creates a need for increased attorney participation in voir dire (or at least for more probing voir dire) to afford counsel more information on which to base their exercise of peremptories. *Batson* prohibits exercise of peremptories based simply on stereotypes of certain kinds. Hence counsel may need more information to determine, for instance, if a particular prospective juror harbors the bias that counsel suspects is common among persons of that class (e.g., that race, gender). To help illuminate this issue, we asked judges how often they though the explanation for a peremptory that is offered in response to a Batson objection was an explanation based on information that would be adduced from a routine voir dire (as opposed to information obtained only from a somewhat probing voir dire). The average answer was 84%, with a median of 90% (fully 47% of responses were 95% or greater). Hence a large majority of judges think it rare that explanations for peremptories are based on information other than that "routinely elicited in voir dire or otherwise routinely available to counsel."[4]

When asked whether *Batson* "led you to alter your practice with regard to voir dire," fewer than 20% of the judges gave any affirmative response. Of those, most noted changes regarding the method of exercising peremptories. Only about 5% indicated that they had changed their

[3] See the attached survey for the definition of "*Batson-type* objection."

[4] Of course, if the only information available to counsel is that which is "routinely elicited," then the explanation can hardly be based on anything else. It that were the basis for the answers to this questions, however, one might expect to see a correlation between the answer to this question and the extent of counsel participation in voir dire reflected in questions 1 and 3. There was no significant correlation, and the only one even suggested by the data suggests that numerically larger answers to this question are most common among judges who allow counsel to conduct all or most of the voir dire.

practices regarding voir dire questioning, all but one indicating that voir dire questioning is more probing than in the past, at least in "exceptional" cases.[5]

Asked whether *Batson* had led to changes in regard to challenges for cause, 18% indicated that counsel "have increased their efforts to excuse jurors for cause," and 16% said that they "have become more willing to excuse jurors for cause." 74% of the respondents indicated that neither change had occurred.

Others Views Regarding Questioning by Counsel in Voir Dire

Question 8 asked the judges to indicate statements with which they agreed pertaining to questioning by counsel in voir dire. The statements and the percentage indicating agreement are shown in Table 4.

TABLE 4

Questioning of prospective jurors by counsel:

a. Takes too much time.	50%
b. Is less time-consuming than voir dire conducted entirely by the judge.	4%
c. Results in counsel using voir dire for inappropriate purposes (e.g. to argue their case, or simply to "befriend" jurors).	67%
d. Is an appropriate opportunity for counsel to introduce themselves to jurors.	31%
e. Is necessary to permit counsel and the parties to feel satisfied with the jury selection process, but is not otherwise worthwhile.	14%
f. Is necessary to permit counsel and the parties adequately to inform themselves of bases for challenges, whether peremptory or for cause.	32%
g. Is more effective because counsel know better what questions to ask.	17%
h. Is inappropriate; it should be the judge who solicits information about the jurors' ability to properly discharge their duties as jurors.	33%
i. Other	23%

Judges who indicated agreement with statement a in Table 4 (counsel questioning takes too much time) were asked to indicate how much more time counsel questioning would take than voir dire conducted entirely by the judge. The median response was 1.5 hours for civil cases and 2 hours for criminal cases. Compared to the total voir dire time reported by the respondents in question 2 (see tables 2 and 3 and associated text, above), these responses reflect a view that counsel questioning of jurors will more than double the time required for voir dire. This is at odds with the information presented in Table 3, above, which indicates very little difference in voir dire time regardless of whether the judges allows much, little, or no counsel questioning of jurors. The disharmony between these two aspects of the responses may also be due to either or both of two other phenomena:

1. Those judges who allow counsel questioning may manage to do so without it taking excessive time, and many of those who prohibit counsel participation may do so in part because they believe it will take too much time—a belief sometimes but not always based on personal experience.
2. At least some judges apparently interpreted the inquiry as pertaining to "unlimited" attorney voir dire (e.g. as they experienced voir dire as a state court judge), and indicated that

[5] The percentages mentioned in this paragraph pertain only to those respondents who were appointed to the bench before the *Batson* decision (86% of all respondents).

attorney participation in voir dire takes vastly more time, even though the judge routinely allows at least some questioning by counsel (the "takes too much time" response was chosen by 28% of the judges who report that they routinely allow some counsel questioning in both civil and criminal cases).

The responses to question 8 (see Table 4) can be used to gauge general attitude about counsel questioning in voir dire. Responses a, c, and h may be taken as negative views of attorney participation in voir dire, and the others (except i - other) as positive. Of those who selected any of these answers, 19% expressed only positive views, 68% expressed only negative views, and 13% expressed both positive and negative views.

Finally, we asked those judges who do allow counsel questioning to indicate how they ensure that counsel "do not use voir dire for inappropriate purposes or simply take too much time." The responses are summarized in Table 5.

TABLE 5

Response	Percent:
a. Not applicable. I do not permit counsel to ask questions of jurors during voir dire.	41%
	Percent of those answering other than a
b. I rarely find it necessary to do anything, although I may occasionally admonish an attorney to take less time or to avoid speeches or improper questions.	44%
c. I make clear to counsel at the outset that I do not tolerate inappropriate or time-consuming questioning. (By what means:)	79%
c1. oral reminder at the bench	41%
c2. standard part of pretrial order	8%
c3. other (mostly during pretrial conference)	41%
d. I generally limit the time allowed for voir dire.	50%
Average minutes per side allowed in routine case, Civil: 22, Criminal: 25	
e. Other (most referred simply to close monitoring of counsels' questions)	10%

A number of the respondents offered explanations of their approaches to conducting voir dire that are not amenable to tabulation but that may be useful in considering either questioning by counsel during voir dire or how voir dire practices might be modified in light of *Batson*. These are listed below.

Approaches to controlling attorney questioning of prospective jurors.

1. Some judges who indicated that they permit counsel to conduct all or most of the voir dire pointed out that the oral questioning was limited to follow-up questions. The initial "voir dire" is handled by a questionnaire tailored to the specific case that jurors are asked to complete before reporting to the courtroom. An example of such a questionnaire is attached as exhibit B.
2. While many judges impose time limits on counsel questioning, others constrain the questioning by limiting the scope of questioning, sometimes by an in-chambers conference where counsel explain the questions they want to ask and the judge in turn specifies what questions will be permitted.

3. Some judges will simply take over the questioning (and thus end counsel's questioning) if counsel does not comply with the judge's rules concerning proper inquiry. Other judges employ the approach of suggesting that counsel "rephrase" a question that the court finds problematic.
4. One respondent noted following the Scheherezade rule: "if they keep me interested, they can keep asking questions."
5. Another mentioned a list of restrictions, including: (a) A question may not be directed to an individual juror if it can be addressed to the panel as a whole; (b) Prohibit using voir dire to instruct jurors; and (c) A question may not seek a juror's commitment to support a given position based on hypothetical facts.

Responses to *Batson*:

1. Some judges require that peremptories be exercised first after an initial panel (e.g. 12 jurors) have passed challenges for cause, with challenged jurors then being replaced by random draw from the pool of prospective jurors, peremptories exercised only with respect to the replacements, and so on. This approach prevents counsel from knowing who might replace a challenged juror, and so makes it more difficult to pursue a strategy prohibited by *Batson* (or any other strategy).
2. Other judges, for the same purposes, allow all peremptories to be exercised after all challenges for cause, but with the parties making their choices "blind" to the choices made by opposing parties (in contrast to alternating "strikes" from a list of the names of panel members).[6]

Observations about questioning of prospective jurors by counsel.

1. A number of respondents indicated that judges should conduct voir dire, because—as every trial lawyer knows—the lawyer's objective is to obtain a biased jury. Only the judge is in a position to foster selection of unbiased jurors.
2. A number suggested that judges simply do a better job of voir dire questioning, for one or more of several reasons: (a) counsel aren't very good at it, (b) some questions are better asked by the judge (to shield counsel from adverse responses to the asking of such questions), and (c) jurors will be more candid in responding to the judge than to counsel.

[6] A more extreme approach to the same end (not mentioned by any of the respondents but practiced in some state courts) is a procedure where jurors are individually questioned and passed for both peremptory and cause challenges one at a time—juror #1 is seated before juror #2 is questioned (or perhaps even identified). This approach imposes maximum limits on counsel's ability to employ peremptories in a strategic manner.

EXHIBIT A

Questionnaire Concerning Conduct Of Voir Dire

1. What is your **standard** practice with regard to questioning jurors during voir dire–the practice you follow in routine cases? (Please check one for civil and one for criminal cases.)

Civil cases	Criminal cases	
☐	☐	a. I allow counsel to conduct most or all of voir dire. I either ask no questions or ask only very general, standard questions addressed to the entire venire (e.g., please raise your hand if you know any of the parties or attorneys).
☐	☐	b. I conduct an initial examination covering usual voir dire questions, and then give counsel a fairly extended opportunity to ask additional questions.
☐	☐	c. I conduct an initial examination covering usual voir dire questions, and then give counsel a very limited opportunity to ask additional questions.
☐	☐	d. I conduct the entire examination. I permit counsel to submit to me questions they would like me to ask, but do not generally allow counsel to ask any questions directly.
☐	☐	e. Other. Please explain: _____

2. About how much time–on average–do you think is taken in your courtroom by the questioning of potential jurors in voir dire in a routine case?

Questioning by **counsel** in:
routine civil case: _____hour(s) routine criminal case: _____hour(s)
Questioning by **court** in:
routine civil case: _____hour(s) routine criminal case: _____hour(s)

3. What is your practice in **exceptional** cases, e.g., where the case has received notable publicity or where jurors may have strong emotional responses to the subject matter? (Please check one for civil and one for criminal cases.)

Civil cases	Criminal cases	
☐	☐	a. I allow counsel to conduct most or all of voir dire. I either ask no questions or ask only very general, standard questions addressed to the entire venire (e.g., please raise your hand if you know any of the parties or attorneys).
☐	☐	b. I conduct an initial examination covering usual voir dire questions, and then give counsel a fairly extended opportunity to ask additional questions.
☐	☐	c. I conduct an initial examination covering usual voir dire questions, and then give counsel a very limited opportunity to ask additional questions.
☐	☐	d. I conduct the entire examination. I permit counsel to submit questions they would like me to ask, but do not generally allow counsel to ask questions directly.
☐	☐	e. Other. Please explain: _____

4. In approximately what percentage of jury trials you conducted in the last 12 months did counsel make a *Batson*-type objection* to opposing counsel's exercise of peremptories?

_____%

5. In your experience, when a *Batson*-type* objection is made and respondent is called upon to explain the basis for challenging jurors, about what percentage of such explanations are based on information that would be elicited routinely in voir dire or from juror information routinely provided to counsel (e.g., juror's profession, marital status, demeanor), as opposed to information gleaned only from a somewhat probing voir dire (e.g. a question designed to elicit insight about the juror's attitude toward authority, and hence toward police)?

_____ % of explanations are based on information routinely elicited in voir dire or otherwise routinely available to counsel

6. Has the advent of *Batson*-type* objections led you to alter your practice with regard to voir dire? (Please check one for civil and one for criminal cases.)

Civil cases	Criminal cases	
☐	☐	a. Not applicable. I became a judge after the *Batson* decision.
☐	☐	b. No.
☐	☐	c. Yes, my standard practice is to conduct or permit counsel to conduct a more probing voir dire now than I did before *Batson*.
☐	☐	d. Yes, in some exceptional cases I conduct or permit counsel to conduct a more probing voir dire than I did before *Batson*.
☐	☐	e. Yes, I now conduct a less-probing voir dire, or allow counsel less opportunity to conduct a probing voir dire.
☐	☐	f. Other. Please explain: _____

_____

_____

_____

7. Do you think that *Batson* and its progeny cases have resulted in an increase either in counsels' efforts to have jurors excused for cause or in your willingness to excuse jurors for cause? (You may check both yes answers, or any single answer.)

Counsel have increased their efforts to excuse jurors for cause: ☐ No. ☐ Yes.

I have become more willing to excuse jurors for cause: ☐ No. ☐ Yes.

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* A "*Batson*-type objection" means any objection to the exercise of peremptory challenges based at least in part on a claim that the peremptories were exercised due to the race, nationality, gender, or other characteristic of the challenged jurors.

8. Do you believe that allowing counsel to question potential jurors during voir dire: (check all with which you agree)

- ☐ a. Takes too much time (about how much **more** time than voir dire conducted entirely by you:
  Civil cases:_____hour(s) Criminal cases:_____hour(s))
- b. Is less time-consuming than voir dire conducted entirely by the judge.
- ☐ c. Results in counsel using voir dire for inappropriate purposes (e.g. to argue their case, or simply to "befriend" jurors).
- ☐ d. Is an appropriate opportunity for counsel to introduce themselves to jurors.
- ☐ e. Is necessary to permit counsel and the parties to feel satisfied with the jury selection process, but is not otherwise worthwhile.
- ☐ f. Is necessary to permit counsel and the parties adequately to inform themselves of bases for challenges, whether peremptory or for cause.
- ☐ g. Is more effective because counsel know better what questions to ask.
- ☐ h Is inappropriate; it should be the judge who solicits information about the jurors' ability to properly discharge their duties as jurors.
- ☐ i. Other. Please explain: _____

_____

_____

_____

9. If you allow counsel to ask questions during voir dire, how do you ensure that they do not use voir dire for inappropriate purposes or simply take too much time? (check all that apply)

- ☐ a. Not applicable. I do not permit counsel to ask questions of jurors during voir dire.
- ☐ b. I rarely find it necessary to do anything, although I may occasionally admonish an attorney to take less time or to avoid speeches or improper questions.
- ☐ c. I make clear to counsel at the outset that I do not tolerate inappropriate or time-consuming questioning. → By what means do you to this?:
  - ☐ oral reminder at the bench
  - ☐ standard part of pretrial order
  - ☐ other: _____
- ☐ d. I generally limit the time allowed for voir dire. In a routine case, I allow each side about _____ hour(s) in civil cases and _____ hour(s) in criminal cases.
- ☐ e. Other. Please explain: _____

_____

_____

_____

Thank you. Please return the survey in the accompanying envelope, or to:
The Federal Judicial Center, Research Division, One Columbus Circle, N.E.
Washington D.C. 20002-8003 ATTN: Voir Dire

EXHIBIT B

[After the prospective jurors have answered the questions set out below, the judge instructs them to indicate if they have any affirmative answers to a questions in schedule A or negative answers to questions in schedule B. Jurors who so indicate are then questioned at the sidebar, with counsel afforded an opportunity to ask questions supplemental to those asked by the judge.]

SCHEDULE A

1. The defendant in this case is John Doe.

   Q. Do you know the defendant or any members of the defendant's family.

2. The defendant John Doe is represented by Attorneys W. T. and J. W.
   The government is represented by Assistant United States Attorneys S. Y. and B. S.

   Q. Do you know any of these attorneys or any members of their families?

3. Do you know any of the partners or law associates of any of the attorneys?

4. The indictment in this case charges the defendant with conspiracy to possess with intent to distribute, and distribute, cocaine in violation of the United States Code. The indictment is merely the means by which the defendant is notified that he must stand trial for the alleged criminal conduct. Neither the indictment nor the fact of the indictment is evidence, nor should it be considered as evidence. The indictment identifies other persons who allegedly participated in the conspiracy.

   A. The persons so named are:
   [list of 10 names]

   QUERY: Do you know any of these persons or members of their families?

   B. Do you know of any reason why you would not follow the Court's instruction that the indictment is not evidence and the fact of the indictment is not evidence and neither is to be considered as any proof in this case?

   C. Have you heard on the radio or read in a newspaper anything concerning the charge of conspiracy against the defendant, Mr. Doe?

   D. Do you know anything about the subject matter of this trial?

5. Have you ever served on a Grand Jury?

6. Have you been employed by:

a. Any law enforcement agency; or
b. Any other Agency or Department of the United States of America?
c. Any branch of the military?

7. Has any member of your family or close friend been employed by:
   a. Any law enforcement agency; or
   b. Any other Agency or Department of the United States of America?

8. Have you or has any member of your household been a party, either plaintiff or defendant, in a civil case that has been filed in the course of the past ten years?

9. Have you or has any member of your family been indicted by a Grand Jury?

10. Have you or has any member of your family been convicted of any crime other than a traffic offense?
    NOTE: Driving under the influence of alcohol or drugs is not to be considered for the purpose of this question as a traffic offense.

11. Have you ever been a witness in a criminal case?

12. Have you or has any member of your family ever been the victim of a crime?

13. Have you or has any member of your family ever filed a claim against the United States?

14. Do you have a hearing or sight problem that would interfere with your ability to see the witnesses or to hear the testimony in this case?

15. Are you on any medication that would impair your ability to concentrate on the testimony, the arguments of counsel and the instruction of the Court?

16. Do you have a health problem that would impair your ability to give this case your complete attention.

17. Does any member of your immediate family have a health problem that would impair your ability to fully concentrate on the testimony of this case?

18. Would you judge the credibility of law enforcement officers or government witnesses by any different standards than you would judge the credibility of any other witnesses?

19. Do you have any beliefs, personal, moral, or religious, that are of such a nature that you would not be unable or unwilling to sit in judgment of another's guilt or innocence?

20. Have you or has your close friends or relatives ever been involved in a case or dispute with the United States Government or any agency thereof in which a claim was made against the government or in which the government has made a claim against you, a close friend, or relative?

21. It is always difficult for the Court to accurately predict the length of a trial. Obviously, those who are chosen to serve on the jury will be required to be here for the entire trial and for the jury deliberation. It is the Court's plan to run this trial all five days of this week, including the federal holiday of Thursday, the 11th of November. The Court will not be in session on Wednesday, November 17, because of other duties. It is my best estimate at this time that the service we are asking you to perform will require this week and next week. I recognize that jury service of that length will be inconvenient and, in some cases, work severe hardship. If you believe that you have a good case for being excused because of severe hardship, and wish to be excused for that reason, you should so indicate by answering this question "Yes" and bringing your answer to my attention when I speak to you at the side bar.

22. This case involves allegations of drug distribution, specifically cocaine distribution.
    A. Do you now, or have you in the past, or alternatively, does any member of your family now, or in the past, have a problem with the use of illegal substances such as marijuana, heroin, LSD, cocaine or crack cocaine that has resulted in:
        (1) hospitalization?
        (2) attendance at a drug treatment center?
        (3) addiction?
    B. Do you hold any beliefs or do you have any emotional reactions regarding the use or distribution of the narcotic drug controlled substance known as cocaine and marijuana that would interfere with your ability to fairly and impartially consider

the evidence in this case and render a verdict based on your determination of the facts?

23. The Court understands with respect to the government's case the following:

(1) The government's investigation included use of a court authorized wiretap of private citizens' phones.

(2) During the investigation of this case, the government paid money to certain cooperating witnesses for moving expenses.

(3) The government has entered into cooperation agreements with certain defendants whereby those defendants will receive consideration in the resolution of their cases in exchange for truthful testimony.

QUERY: Do you hold any beliefs or have any emotional reactions to the above described conduct on the part of the government that would interfere with your ability to fairly and impartially consider the evidence in this case and render a verdict based on your determination of the facts?

24. Do you know any reason why you would be biased or assert prejudice or sympathy in this case?

25. Are you personally acquainted with or know any relatives or close friends of any of the following named individuals who may appear as witnesses in this case:
[numbered list of 38 names]

26. Do you know of any reason why you cannot serve as a fair and impartial juror in this case?

SCHEDULE B

1. The laws of the United States guarantee to a defendant that he is presumed to be not guilty. Are you in sympathy with the rule of law that clothes the defendant with a presumption of innocence?

2. The law requires that the burden of proof shall be upon the government to convince you of each and every element of a crime beyond a reasonable doubt before you can return a verdict of guilty relative to said crime. Are you in sympathy with the rule of law that requires you as a juror to give a defendant the benefit of reasonable doubt?

3. The law does not require that a defendant prove that he is not guilty. Are you in sympathy with the rule of law that does not require a defendant to prove his innocence?

4. Are you willing to confine your deliberations to the evidence in this case as presented in the courtroom?

5. Are you willing to apply the Court's instructions as to the law and not substitute any ideas or notions of your own as to what you think the law should be?

6. Are you willing to wait until all the evidence has been presented and the court has instructed you on all the applicable law before coming to any conclusion with respect to charges contained in the indictment?

7. In your deliberations are you willing to abide by your convictions and not agree with other jurors solely for the sake being congenial, if you are convinced that the opinions of other jurors are not correct?

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Congressional Adoption of Federal Rules of Evidence 414 and 415

DATE: September 23, 1994

Congress, as part of its recent Crime Bill, adopted new Federal Rules of Evidence 414 and 415 which will become effective as passed unless the Judicial Conference proposes alternative language.

The attached materials explain the status of those rules, which includes a request for comments and suggestions from the public. Also attached is a memo prepared by Professor Berger, Reporter for the Evidence Committee, which outlines several options for that Committee's consideration.

I have also included excerpts of the Minutes of the Criminal Rules Committee Fall 1991 meeting where earlier versions of Rules 414 and 415 were considered, and opposed, by the Committee.

Although the primary jurisdiction for this matter rests with the Evidence Committee, it may be helpful for the Committee to consider the matter at its Santa Fe meeting and be prepared to state a position if requested.

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

September 9, 1994

TO THE BENCH, BAR, AND PUBLIC

The House of Representatives and the Senate have passed H.R.3355, the Violent Crime Control and Law Enforcement Act of 1994. The President is expected to sign the bill soon. Section 320935 of the Act adds three new Evidence Rules 413-415, which would make evidence of a defendant's past similar acts admissible in a civil and a criminal case involving sexual assault or child molestation offense. A copy of the rules is attached.

Under the Act, the three new evidence rules take effect 180 days after the President signs the bill, unless the Judicial Conference makes alternative recommendations to Congress within 150 days. The review procedures under the Rules Enabling Act explicitly do not apply to these rules.

The Judicial Conference's Advisory Committee on Evidence Rules will meet on October 17-18, 1994, in Washington, D.C., and it will consider Rules 413-415. In making its recommendations, the committee will benefit from public comment. To accommodate the deadlines imposed under the Act, the committee requests that all suggestions and comments, whether favorable, adverse, or otherwise, be placed in the hands of the Secretary as soon as convenient and in any event, **no later than October 11, 1994**.

All communications on these rules should be addressed to:

Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544.

Ralph K. Winter, Jr.
Chair, Advisory Committee on
Evidence Rules

SEC. 320935 ADMISSIBILITY OF EVIDENCE OF SIMILAR CRIMES IN SEX OFFENSE CASES.

(a) The Federal Rules of Evidence are amended by adding after Rule 412 the following new rules:

"Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

"(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

"(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

"(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

"(1) any conduct proscribed by chapter 109A of title 18, United States Code;

"(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

"(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

"(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

"(5) an attempt or conspiracy to engage in conduct described in paragraph (1)–(4).

"Rule 414. Evidence of Similar Crimes in Child Molestation Cases

"(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

"(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

"(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

"(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

"(2) any conduct proscribed by chapter 110 of title 18, United States Code;

Brooklyn Law School

Margaret A. Berger
Professor of Law

TO: Advisory Committee on the Federal Rules of Evidence

FROM: Margaret A. Berger, Reporter MAB

DATE: September 19, 1994

RE: Rule 413

==========

At our October 1993 meeting, the Committee evinced no interest in amending Rule 404 to allow evidence of the defendant's prior sexual acts. Nevertheless, we must recommend some version of a rule admitting prior sexual acts evidence because of the political reality that both Houses of Congress will not agree to reverse themselves totally by excluding all such evidence when offered to show action in conformity therewith. As our objective must therefore be to draft the best possible provisions that might have a chance to pass, rather than to draft the best possible rule, I have drafted a number of different versions of a Rule 413 in order to facilitate a discussion about alternatives. I have also combined the three rules in the Crime Bill into one and sought to make whatever rule we recommend more consistent with the style of the Federal Rules of Evidence.

Version 1 is the most protective of the defendant. It disallows evidence of prior sexual acts for a propensity

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inference unless there has been a conviction. To provide additional protection, a balancing test and a time limitation have also been added. As the variations at the end of this version indicate, the balancing test and/or time limitation could be eliminated or modified. If the special balancing test is eliminated, Rule 403 balancing would still apply but the opponent of the evidence would have the burden of convincing the court to exclude rather than shifting to the proponent the burden of convincing the court to admit.

Version 2 would allow some evidence of uncharged acts to be admitted. However, a "clear and convincing" finding by the court would govern rather than the usual Huddleston standard. Last May, the Committee did not believe that changing to a clear and convincing standard would make much of a difference with regard to Rule 404 in general because disputes about defendant's having committed the other crime rarely arise. In the case of uncharged sexual offenses, however, this is obviously not the case. Again, a balancing test and time limit have been proposed. The variations pose less protective alternatives, and suggest as well a balancing test that would require the court to consider particular factors. This can be coupled with the requirement of an on-the-record determination.

Rule 413

Version 1: Conviction -- plus balancing test & time limit

(a) **General rule.** -- Notwithstanding Rule 404(a), a court shall admit:

(1) evidence that a person has been convicted of an offense of sexual assault

(a) in a criminal case in which the person is charged with an offense of sexual assault, or

(b) in a civil case in which a claim for relief, predicated on an act constituting an offense of sexual assault, is asserted against the person;

(2) evidence that a person has been convicted of an offense of child molestation

(a) in a criminal case in which the person is charged with an offense of child molestation, or

(b) in a civil case in which a claim for relief, predicated on an act consituting an offense of sexual assault, is asserted against the person

if the court determines that the probative value of this evidence substantially outweighs its prejudicial effect to the person against whom the evidence is offered.

(b) **Time Limit.** -- Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed

since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

Possible variations:

Eliminate "substantially" from balancing test.

Eliminate balancing test and/or time limit.

Add balancing factors to the time limit test (see Rule 609(b).

Version 2. Uncharged acts -- plus balancing test, and clear and convincing evidence test and time limit

(a) **General rule.** -- Notwithstanding Rule 404(a), a court shall admit:

(1) evidence that a person has committed an offense of sexual assault

(a) in a criminal case in which the person is charged with an offense of sexual assault, or

(b) in a civil case in which a claim for relief, predicated on an act constituting an offense of sexual assault, is asserted against the person;

(2) evidence that a person has committed an offense of child molestation

(a) in a criminal case in which the person is charged with an offense of child molestation, or

(b) in a civil case in which a claim for relief, predicated on an act consituting an offense of sexual assault, is asserted against the person

if the court determines that the probative value of this evidence substantially outweighs its prejudicial effect to the person against whom the evidence is offered.

(b) **Limits on admissibility.** Such evidence is not admissible

(1) unless the court determines on the basis of clear

and convincing evidence that the commission of an act constituting an offense of sexual assault or child molestation actually occurred and was committed by the person against whom the evidence is offered, or

(2) if more than ten years have elapsed since the commission of an offense of sexual assault or child molestation.

Possible variations:

Eliminate one or more of limitations: balancing test, clear and convincing test or time limit

Eliminate "substantially" in balancing test in (a); add balancing test to time limit

Restrict clear and convincing evidence requirement to criminal cases

Substitute for the balancing test and the time limit, a balancing test that spells out factors to be considered:

In making its determination the court shall consider the similarity between the act which is the subject of the charge or claim and the act about which evidence is being offered, the number of provable prior instances of similar acts by the person against whom the evidence is offered, the time that has elapsed since the commission of the act or acts about which evidence is being offered, and the availability of other evidence to prove the charge or claim,

(c) **Notice.** A party who intends to offer evidence under this rule must disclose the evidence to the party against whom it will be offered, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such earlier or later time as the court may allow for good cause.

(d) **Definition of offenses.** [to be added]

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

September 23, 1994

MEMORANDUM TO ADVISORY COMMITTEE ON EVIDENCE RULES

SUBJECT: *Alternative Draft Evidence Rules 413-415 Prepared by Stephen A. Saltzburg and Gregory P. Joseph*

The following draft Evidence Rule 413 was prepared by Stephen Saltzburg and Gregory Joseph:

Evidence Rule 413

(a) In a criminal case in which the defendant is accused of sexual misconduct against another person, evidence of the defendant's commission of other criminal sexual misconduct may be admitted, provided that the court determines that the probative value of such evidence is not substantially outweighed by its prejudicial effect. In determining the probative value of the evidence, the court shall identify each purpose for which the other misconduct evidence is offered and shall compare the charged misconduct and the other misconduct with respect to

(1) proximity in time;
(2) similarity of behavior;
(3) surrounding circumstances;
(4) relevant intervening events; and
(5) other relevant similarities or differences.

(b) In a civil case in which a claim is predicated on a party's alleged commission of criminal sexual misconduct, evidence of other criminal sexual conduct may be admitted pursuant to subdivision (a).

(c) In a case in which a party intends to offer evidence under this rule, that party shall disclose the evidence to all other parties including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 14 days before the scheduled date of the trial or at such later time as the court may allow for good cause.

MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE

November 7, 1991
Tampa, Florida

The Advisory Committee on the Federal Rules of Criminal Procedure met in Tampa, Florida on November 7, 1991. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Hodges called the meeting to order at 9:00 a.m. on Thursday, November 7, 1991 at the United States Courthouse in Tampa, Florida. The following persons were present for all or a part of the Committee's meeting:

Hon. Wm. Terrell Hodges, Chairman
Hon. Sam A. Crow
Hon. James DeAnda
Hon. Robinson O. Everett
Hon. Daniel J. Huyett, III
Hon. John F. Keenan
Hon. Harvey E. Schlesinger
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. William Wilson, Standing Committee member acting as liaison to the Advisory Committee, Mr. David Adair, Ms. Ann Gardner, and Mr. John Robiej of the Administrative Office of the United States Courts, and Mr. James Eaglin from the Federal Judicial Center. Judge D. Lowell Jensen, a newly appointed member of the Committee, was not able to attend.

I. INTRODUCTIONS AND COMMENTS

Judge Hodges welcomed the attendees and noted that all of the members were present with the exception of a new member, Judge D. Lowell Jensen, who had just been appointed to the Committee but was not able to attend due to previously scheduled commitments. Judge Hodges also noted

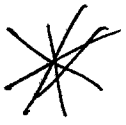
Mr. Marek expressed opposition to the concept of extending the rape shield protections any further. He noted that Rule 403 is generally adequate and that so few cases would be affected by the proposed amendment. Professor Saltzburg observed that although there may be few cases, the applicable rules of evidence have taken on great social significance.

In a discussion about what, if any, notice provisions should be included, Judge Schlesinger observed that it would beneficial to include in one rule of evidence all of the various notice provisions affecting the admissibility of evidence. Judge Keeton noted that although there seemed to be merit in such a suggestion, he believed that the various notice provisions are indeed different.

Judge Keenan indicated that he believed it would be important to act decisively in this area lest Congress enact an unworkable rule. Judge Keeton joined in that observation, noting that adoption of Professor Saltzburg's motion would do that and that it is important that any proposed amendments be processed through the Rules Enabling Act. Mr. Adair and Mr. Pauley provided a brief update on the status of the pending amendment in Congress and observed that there might be a chance that the rape shield amendments would not be considered until Spring 1992.

Judge Everett pointed out that in considering amendments to Rule 412, the Committee should give consideration to including a constitutional escape clause for opinion and reputation evidence. Mr. Wilson, however, questioned whether doing that would create an exception which would swallow the general rule of exclusion.

The motion to amend Rule 412 ultimately carried by an 8-1 vote and the Reporter was asked to give some priority to drafting appropriate language for the amendment.



b. Proposed Rules of Evidence 413, 414, and 415 (Women's Equal Opportunity Act).

Professor Saltzburg pointed out that Congress was considering adding several rules of evidence which would in effect create exceptions to Rule 404(b) by expressly permitting introduction of a person's prior sexual activity. Noting that the subcommittee was opposed to the proposed rules, he moved that the Committee oppose those amendments. Judge Keenan seconded the motion.

Mr. Pauley argued that the rules reflected studies

which show that sexual offenders and child molesters have a higher incidence of repeating their behavior and noted that this sort of evidence would probably be admissible under Rule 404(b). Judge Keeton observed that Rule 404(b) does not permit introduction of past incidents to show a defendant's propensity, whereas these proposed amendments would permit such evidence. Judge Keenan expressed concern that this type of evidence would apparently be admissible even if the defendant had been acquitted of those prior acts. Mr. Wilson also expressed concern that it appeared that the Rules would increase the likelihood that an innocent person would be convicted. But Mr. Pauley responded that the proposed rules would increase the likelihood of convicting a guilty person. Mr. Marek pointed out that the Rules would permit, or encourage, more litigation about the underlying prior acts and Judge Hodges questioned whether there was a real need for the proposed rules.

Judge Everett noted that this evidence is usually barred because it is dangerous. He noted the contrast of the proposed amendments to Rule 412, which would block the introduction of prior sexual acts of a victim, and these proposed amendments which would highlight the defendant's prior sexual acts. He also observed that although a limiting instruction may not always be effective does not mean that the rule should be effectively abandoned for certain sexual offenders.

Judge DeAnda observed that the proposed rules would not limit the prosecution to introducing this evidence in rebuttal; the defendant's past sexual acts could be introduced in the prosecution's case-in-chief.

Professor Saltzburg indicated that although this evidence would be relevant, on balance these rules should be rejected. He noted that codification of the rules of evidence makes it more difficult for counsel to argue that the courts should make common-law exceptions to the rules. Here, the proposed amendments were designed to accomplish that purpose. He added that there might be an argument that sexual offenders are different than other offenders and that the Committee should be open to considering information from the Department of Justice which indicates that indeed those offenders should be treated differently in the rules of evidence. But the information before the Committee was insufficient to support endorsement of the proposed amendments.

The Committee voted 8-1 to express opposition to the amendments.

Guilty Pleas

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

MEMORANDUM

DATE: July 24, 1992

TO: Division Managers

FROM: Operations Chief Susan

SUBJECT: **Local Rule 6.01(c)(12)**

Please see my attached memo to Magistrate Judges on this subject. I have asked Judge Hodges what procedures he anticipates the Clerk's Office will follow. Below is a summary of his reply. Unless you receive contrary instructions from the Court in your Division, please ask affected Clerk's Office staff to follow the procedures below. **Please note, however, that these instructions only apply to cases assigned to District Judges who advise you that they choose to assign Rule 11 proceedings to Magistrate Judges.**

1. Division Managers will ask each District Judge if the Judge wishes these procedures implemented in his or her cases. If any answer yes, Division Managers will notify Magistrate Judges and ask Magistrate Judges when Rule 11 proceedings should be set before them. Division Managers will then take necessary steps to implement Magistrate Judges' instructions. For example, a Magistrate Judge may choose to make a standing direction to set Rule 11 proceedings on Tuesdays at 2:00 p.m. If so, the criminal section may maintain a calendar book for listing all Rule 11 proceedings set, and the Magistrate Judge's Courtroom Deputies will routinely check the calendar book. Another possibility is that a Magistrate Judge may choose to direct Clerk's Office staff to call the Magistrate Judge's office to calendar dates and times on a case by case basis. Division Managers will also notify affected agency heads and local agency supervisors of procedures implemented which will affect their offices.

2. With respect to cases assigned to District Judges who have implemented these procedures, Docket Clerks will mail Form 1 to parties with the notice of arraignment. If no arraignment is set, Docket Clerks will mail it with the first notice of hearing sent. Docket Clerks will docket the mailing of Form 1.

3. With respect to cases assigned to District Judges who have implemented these procedures, when Docket Clerks find out that a defendant plans to enter a guilty plea, Docket Clerks will set a Rule 11 proceeding before the assigned Magistrate Judge. Docket Clerks do not need to have a Form 1 in hand before setting a Rule 11 proceeding before a Magistrate Judge. However, before setting a Rule 11 proceeding, Docket Clerks should receive the oral word of counsel or unrepresented defendant (either directly or through another Clerk's Office or Judiciary staff member) that it is okay to set the Rule 11 proceeding before a Magistrate Judge. Please ask all who customarily are notified when a defendant will enter a guilty plea to make this inquiry for Docket Clerks.

4. At a Rule 11 proceeding before a Magistrate Judge, the Magistrate Judge's Courtroom Deputy will request counsel for defendant to ask defendant to sign the Form 1 consent form if (s)he has not already done so, and prior to commencement of the proceeding, notify the Magistrate Judge whether the defendant signed Form 1.

> **If defendant does not sign Form 1,** the Courtroom Deputy will ask the Docket Clerk to coordinate with District Judge's staff to set a rearraignment before the District Judge.
> **If defendant signs Form 1,** the Magistrate Judge will conduct the Rule 11 proceeding. Prior to the proceeding, the Magistrate Judge's Courtroom Deputy will provide the Magistrate Judge with a Form 2 Consent Form. At the conclusion of the proceeding, the Magistrate Judge will ask defendant to sign Form 2. If there is a signed Form 2 Consent, the Probation Officer will commence preparation of the P.S.I. prior to adjudication of guilt.

5. After the Rule 11 proceeding, the Magistrate Judge will issue a Report and Recommendation Concerning Plea of Guilty (Form 3). Courtroom Deputies to Magistrate Judges should ask the Magistrate Judges whether they plan to assign the responsibility of preparing a draft Report and Recommendation to the Courtroom Deputies. Magistrate Judge's Courtroom Deputy should give the signed Report and Recommendation along with Form 1 and Form 2 to the Docket Clerk for filing. The Docket Clerk will distribute copies to parties, affected agencies, and to the assigned District Judge's Courtroom Deputy.

6. The Docket Clerk will file and docket these papers and follow current procedures to set a sentencing hearing before the District Judge within 60 days of the date these are filed. (See Local Rule 4.12(a)).

7. The assigned District Judge's Courtroom Deputy will monitor the ten day period for the filing of objections to the Report and Recommendation, bearing in mind the provisions of Fed. R. Crim. P. 45 regarding computation of time. (See attached Time Computation Summary.) At the expiration of the ten day period, (s)he will seek instructions from the District Judge regarding completion of Form 4. (Promptness is essential because if defendant sees the P.S.I. before acceptance of the plea, (s)he may be motivated to withdraw the plea.)

8. If the Judge advises his or her Courtroom Deputy that Form 4 will not be filed, the Courtroom Deputy should notify the Docket Clerk to cancel the sentencing hearing and set a rearraignment before the District Judge. The Docket Clerk should do so and should notify the Probation Officer so that the Officer can stop work on the P.S.I.

Please call if you have any questions about any of this.

attachments
c: Middle District Judges and Magistrate Judges
Clerk of Court
Chief Probation Officer
United States Attorney
Federal Public Defender
United States Marshal

CHAPTER SIX
UNITED STATES MAGISTRATE JUDGES

RULE 6.01 DUTIES OF UNITED STATES MAGISTRATE JUDGES

(a) In addition to the powers and duties set forth in 28 U.S.C. Section 636(a), the United States Magistrate Judges are hereby authorized, pursuant to 28 U.S.C. Section 636(b), to perform any and all additional duties, as may be assigned to them from time to time by any judge of this Court, which are not inconsistent with the Constitution and laws of the United States.

(b) The assignment of duties to United States Magistrate Judges by the judges of the Court may be made by standing order entered jointly by the resident judges in any Division of the Court; or by any individual judge, in any case or cases assigned to him, through written order or oral directive made or given with respect to such case or cases.

(c) The duties authorized to be performed by United States Magistrate Judges, when assigned to them pursuant to subsection (b) of this rule, shall include, but are not limited to:

(1) Issuance of search warrants upon a determination that probable cause exists, pursuant to Rule 41, Fed.R.Cr.P., and issuance of administrative search warrants upon proper application meeting the requirements of applicable law.

(2) Processing of complaints and issuing appropriate summonses or arrest warrants for the named defendants. (Rule 4, Fed.R.Cr.P.)

(3) Conduct of initial appearance proceedings for defendants, informing them of their rights, admitting them to bail and imposing conditions of release. (Rule 5, Fed.R.Cr.P. and 18 U.S.C. Section 3146)

(4) Appointment of counsel for indigent persons and administration of the Court's Criminal Justice Act Plan, including maintenance of a register of eligible attorneys and the approval of attorneys' compensation and expense vouchers. (18 U.S.C. Section 3006A; Rule 44, Fed.R.Cr.P.; and Rule 4.13(a) of these rules)

(5) Conduct of full preliminary examinations. (Rule 5.1, Fed.R.Cr.P. and 18 U.S.C. Section 3060)

(6) Conduct of removal hearings for defendants charged in other districts, including the issuance of warrants of removal. (Rule 40, Fed.R.Cr.P.)

(7) Issuance of writs of habeas corpus *ad testificandum* and habeas corpus *ad prosequendum*. (28 U.S.C. Section 2241(c)(5))

(8) Setting of bail for material witnesses and holding others to security of the peace and for good behavior. (18 U.S.C. Section 3149 and 18 U.S.C. Section 3043)

(9) Issuance of warrants and conduct of extradition proceedings pursuant to 18 U.S.C. Section 3184.

(10) The discharge of indigent prisoners or persons imprisoned for debt under process or execution issued by a federal court. (18 U.S.C. Section 3569 and 28 U.S.C. Section 2007)

(11) Issuance of an attachment or other orders to enforce obedience to an Internal Revenue Service summons to produce records or give testimony. (26 U.S.C. Section 7604(a) and (b))

(12) Conduct of post-indictment arraignments, acceptance of not guilty pleas, acceptance of guilty pleas in felony cases with the consent of the Defendant, and the ordering of a presentence investigation report concerning any defendant who signifies the desire to plead guilty. (Rules 10, 11(a) and 32(c), Fed.R.Cr.P.)

(13) Acceptance of the return of an indictment by the grand jury, issuance of process thereon and, on motion of the United States, ordering dismissal of an indictment or any separate count thereof. (Rules 6(f) and 48(a), Fed.R.Cr.P.)

(14) Supervision and determination of all pretrial proceedings and motions made in criminal cases through the Court's Omnibus Hearing procedure or otherwise including, without limitation, motions and orders made pursuant to Rules 12, 12.2(c), 15, 16, 17, 17.1 and 28, Fed.R.Cr.P., 18 U.S.C. Section 4244, orders determining excludable time under 18 U.S.C. Section 3161, and orders dismissing a complaint without prejudice for failure to return a timely indictment under 18 U.S.C. Section 3162; except that a magistrate judge shall not grant a motion to dismiss or quash an indictment or information made by the defendant, or a motion to suppress evidence, but may make recommendations to the Court concerning them.

(15) Conduct of hearings and issuance of orders upon motions arising out of grand jury proceedings including orders entered pursuant to 18 U.S.C. Section 6003, and orders involving enforcement or modification of subpoenas, directing or regulating lineups, photographs, handwriting exemplars, fingerprinting, palm printing, voice identification, medical examinations, and the taking of blood, urine, fingernail, hair and bodily secretion samples (with appropriate medical safeguards).

(16) Conduct of preliminary and final hearings in all probation revocation proceedings, and the preparation of a report and recommendation to the Court as to whether the petition should be granted or denied. (Rule 32.1, Fed.R.Cr.P. and 18 U.S.C. Section 3653.)

(17) Processing and review of habeas corpus petitions filed pursuant to 28 U.S.C. Section 2241, *et seq.*, those filed by state prisoners pursuant to 28 U.S.C. Section 2254, or by federal prisoners pursuant to 28 U.S.C. Section 2255, and civil suits filed by state prisoners under 42 U.S.C. Section 1983, with authority to require responses, issue orders to show cause and such other orders as are necessary to develop a complete record, including the conduct of evidentiary hearings, and the preparation of a report and recommendation to the Court as to appropriate disposition of the petitioner or claim.

(18) Supervision and determination of all pretrial proceedings and motions made in civil cases including, without limitation, rulings upon all procedural and discovery motions, and conducting pretrial conferences; except that a magistrate (absent a stipulation entered into by all affected parties) shall not appoint a receiver, issue an injunctive order pursuant to Rule 65, Fed.R.Civ.P., enter an order dismissing or permitting maintenance of a class action pursuant to Rule 23, Fed.R.Civ.P., enter any order granting judgment on the pleadings or summary judgment in whole or in part pursuant to Rules 12(c) or 56, Fed.R.Civ.P., enter an order of involuntary dismissal pursuant to Rule 41(b) or (c), Fed.R.Civ.P., or enter any other final order or judgment that would be appealable if entered by a judge of the Court, but may make recommendations to the Court concerning them.

(19) Conduct of all proceedings in civil suits, before or after judgment, incident to the issuance of writs of replevin, garnishment, attachment or execution pursuant to governing state or federal law, and the conduct of all proceedings and the entry of all necessary orders in aid of execution pursuant to Rule 69, Fed.R.Civ.P.

(20) Conduct or preside over the voir dire examination and empanelment of trial juries in civil and criminal cases.

(21) Processing and review of all suits instituted under any law of the United States providing for judicial review of final decisions of administrative officers or agencies on the basis of the record of administrative proceedings, and the preparation of a report and recommendation to the Court concerning the disposition of the case.

(22) Serving as a master for the taking of testimony and evidence and the preparation of a report and recommendation for the assessment of damages in admiralty cases, non-jury proceedings under Rule 55(b)(2), Fed.R.Civ.P., or in any other case in which a special reference is made pursuant to Rule 53, Fed.R.Civ.P.

(23) In admiralty cases, entering orders (i) appointing substitute custodians of vessels or property seized *in rem*; (ii) fixing the amount of security, pursuant to Rule E(5), Supplemental Rules for Certain Admiralty and Maritime Claims, which must be posted by the claimant of a vessel or property seized *in rem*; (iii) in limitation of liability proceedings, for monition and restraining order including approval of the *ad interim* stipulation filed with the complaint, establishment of the means of notice to potential claimants and a deadline for the filing of claims; and (iv) to restrain further proceedings against the plaintiff in limitation except by means of the filing of a claim in the limitation proceeding.

(24) Appointing persons to serve process pursuant to Rule 4(c), Fed.R.Civ.P., except that, as to *in rem* process, such appointments shall be made only when the Marshal has no deputy immediately available to execute the same and the individual appointed has been approved by the Marshal for such purpose.

(25) Processing and review of petitions in civil commitment proceedings under the Narcotic Addict Rehabilitation Act, and the preparation of a report and recommendation concerning the disposition of the petition.

(26) Conduct of proceedings and imposition of civil fines and penalties under the Federal Boat Safety Act. (46 U.S.C. Section 1484(d)).

Form 1

United States District Court

For The

Middle District Of Florida

United States of America

vs.

_____

Case No. _____

NOTICE REGARDING ENTRY OF A PLEA OF GUILTY

In the event the Defendant decides at any time before trial to enter a plea of guilty, the United States Magistrate Judge is authorized by Rule 6.01(c)(12), M. D. Fla. Rules, with the consent of the Defendant, to conduct the proceedings required by Rule 11, F. R. Cr. P. incident to the making of the plea. If, after conducting such proceedings, the Magistrate Judge recommends that the plea of guilty be accepted, a presentence investigation and report will be ordered pursuant to Rule 32, F. R. Cr. P. The assigned United States District Judge will then act on the Magistrate Judge's Report and Recommendation; and, if the plea of guilty is accepted, will adjudicate guilt and schedule a sentencing hearing at which the District Judge will decide whether to accept or reject any associated plea agreement, and will determine and impose sentence.

CONSENT

I hereby declare my intention to enter a plea of guilty in the above case, and I request and consent to the United States Magistrate Judge conducting the proceedings required by Rule 11, F. R. Cr. P., incident to the making of such plea. I understand that if my plea of guilty is then accepted by the District Judge, the District Judge will decide whether to accept or reject any plea agreement I may have with the United States, and will adjudicate guilt and impose sentence.

Date: _____

_____

Defendant

_____

Defendant's Attorney

PROB 13E
(9/87)

Form 2

UNITED STATES DISTRICT COURT

_____ DISTRICT _____

Consent to Institute a Presentence Investigation and Disclose the Report Before Conviction or Plea of Guilty

I, _____, hereby consent to a presentence investigation by the probation officers of the United States district courts. I understand and agree that the report of the investigation will be disclosed to the judge and the attorney for the government, as well as to me and my attorney, so that it may be considered by the judge in deciding whether to accept a plea agreement that I have reached with the government.

I have read, or had read to me, the foregoing consent and fully understand it.

_____ _____
(Date) (Signature of Defendant)

_____ _____
(Date) (Defendant's Attorney)

FORM 3

United States District Court

For The

Middle District Of Florida

United States of America

vs.

_____

Case No. _____

REPORT AND RECOMMENDATION CONCERNING PLEA OF GUILTY

The Defendant, by consent, has appeared before me pursuant to Rule 11, F. R. Cr. P. and Rule 6.01 (c) (12), M. D. Fla. Rules, and has entered a plea of guilty to Count (s) _____ of the indictment/information. After cautioning and examining the Defendant under oath concerning each of the subjects mentioned in Rule 11, I determined that the guilty plea(s) was/were knowledgeable and voluntary as to each count, and that the offense(s) charged is/are supported by an independent basis in fact containing each of the essential elements of such offense(s). I therefore recommend that the plea(s) of guilty be accepted and that the Defendant be adjudged guilty and have sentence imposed accordingly.

Date: _____

_____

UNITED STATES MAGISTRATE JUDGE

NOTICE

Failure to file written objections to this Report and Recommendation within ten (10) days from the date of its service shall bar an aggrieved party from attacking such Report and Recommendation before the assigned United States District Judge. 28 U.S.C. § 636(b)(1)(B), Rule 6.02, M. D. Fla. Rules.

MEMO TO: Hon. D. Lowell Jensen

FROM: Professor Dave Schlueter, Reporter

DATE: October 11, 1994

RE: Advisory Committee's Discussion of Federal Rules of Evidence 413-415

At its meeting in Santa Fe, New Mexico, on October 6 and 7, 1994, the Advisory Committee on the Criminal Rules of Procedure discussed recent Congressional promulgation of Federal Rules of Evidence 413, 414, and 415 which address the admissibility of propensity character evidence. Those evidence rules are being considered by the Evidence Advisory Committee at an upcoming meeting. This memo summarizes the discussion of the Criminal Rules Committee.

The Criminal Rules Committee had before it the rules promulgated by Congress as part of the Crime Bill, and memos from Professors Margaret Berger and Steve Saltzburg concerning possible changes to Congress' version of the rules. Instead of endorsing any particular language or draft, the Committee opted to address specific policy issues and transmit its views to the Evidence Committee and indicate a willingness to assist that Committee in any way it felt appropriate.

A. Rules Enabling Act Process.

Before addressing the specifics of the evidence rules, the Committee noted its deep concern over the last minute addition of key evidence rules which will in effect drastically change the rules governing the admissibility of other offense, or extrinsic act, evidence -- a controversial and complicated topic in its own right. There was a general consensus that the Congress should be apprised of that concern and the need for initial input from the Judicial Conference before such rules are promulgated. The Committee is convinced that the Rules Enabling Act process is sound and that it insures that a broad cross-section of view points and suggestions will be heard on proposed amendments.

B. The Need for Rules Governing Propensity Evidence.

The Committee also expressed the view that Rule of Evidence 404(b) provides an adequate vehicle for introducing other offense evidence against a criminal defendant. Given the sensitive nature of this evidence, and the special dangers attending such information in a criminal trial, the Committee seriously questioned whether Rules 413-

415 are worth the danger of convicting a defendant for his past, as opposed to charged, behavior. Similar rules were before Congress in 1991 and at that time the Criminal Rules Committee voted by a margin of 8 to 1 to oppose such amendments. At its meeting in Santa Fe, the Committee again voted 8 to 1 to oppose the adoption of rules of evidence which would require the admission of evidence of other sexual offenses by the defendant to prove the defendant's propensity to commit such acts.

C. The Need for Three Separate Rules; Cross-Over Evidence.

The Committee voted 8 to 0, with one abstention, to recommend that the three other offense evidence rules adopted by Congress be combined into one rule which would be applicable in both civil and criminal cases. The Committee believed that so combining the rules would make it easier for practitioners and courts to locate and apply the applicable provision or rule. It was also suggested that because the rules deal with the admissibilty of other offenses or extrinsic acts, it might be advisable to include the new provisions in Rule 404, which already deals with that topic, as exceptions to the general rule that extrinsic act evidence is not admissible to prove circumstantially that a person acted in conformity with those previous acts and thus committed the charged offense.

In addressing the question of whether the three rules should be combined, the Committee also noted some ambiguity on whether there could be any cross-over of other offense evidence from sexual assault cases to child molestation cases. That is, could the prosecution in a rape case offer evidence that on prior occasions the defendant had committed acts of child molestation or vice versa? The Committee expressed doubt whether there is justification for any cross-over offense propensity evidence and recommended that that particular issue should be addressed in any proposed alternatives to the Congressional versions of the rules.

E. Balancing Test.

The Committee voted 7 to 2 to recommend that no new balancing test be adopted for other offense evidence regarding sexual propensities. During the discussion, it was suggested that perhaps the evidence should be admissible only if the probative value of the evidence outweighed the prejudicial dangers. Although the Committee was concerned about the special dangers presented by the evidence, in the end it concluded that the balancing test in Rule 403 would suffice. In this regard, the Committee noted that any redraft should make it clear that the admissibility of any proferred evidence under the new rule must be subject to Rule 403 analysis by the court.

F. Burden of Proof.

The Committee next considered the question of whether any particular or different balancing test should be placed on the admissibility of a defendant's prior acts of sexual misconduct where there has been no conviction. Following a discussion of the current rules applicable to admitting a defendant's prior acts under Rule 404(b), the Committee voted (6-3) to recommend that the prosecution be required to prove by clear and convincing evidence in a Rule 104 proceeding that the alleged act occurred before the evidence could be submitted to the jury.

G. Notice Provision.

The Congressional version of Rules 413-415 include notice provisions which require the prosecution to inform the defense of its intent to introduce extrinsic act evidence. During the discussion, the Committee considered the issue of whether such notice should be dovetailed with Rule of Criminal Procedure 16 or adopt the more generalized notice provision in Rule 404(b). The Committee rejected the suggestion that the Rule 404(b) notice provision be adopted and ultimately voted 8 to 0, with one abstention, to recommend that the notice provisions, as presented in the Congressional version, be retained.

H. Requirement that Sexual Act Resulted in a Conviction.

The suggestion was made during the Committee's discussion that to be admissible under the proposed rules, the defendant's prior sexual conduct must have resulted in a conviction. Comparing such evidence to that already permitted under Rule 404(b), which does not require a conviction, the Committee recommended that a conviction not be required.

I. Timing Requirement.

Finally, the Committee discussed the question of whether any particular provision should be made for remote sexual conduct, in a manner currently noted in Rule of Evidence 609 for remote convictions. The Committee believed that the balancing test in Rule 403 would adequately cover the court's consideration of prior sexual misconduct.

Research Division
202-273-4070

memorandum

DATE: 9/26/94
TO: Advisory Committee on Civil Rules
FROM: John Shapard, Molly Johnson
SUBJECT: Survey Concerning Voir Dire

At the request of the Chairman of your Committee, the Center initiated a survey of active district judges concerning certain of their practices in conducting voir dire, as well as their opinions about counsel participation in voir dire and their impressions of the effect on voir dire of the line of cases beginning with *Batson v Kentucky*, 476 U.S. 79. A copy of the questionnaire is attached as exhibit A. This memorandum explains the results of the survey, and provides in a few instances comparisons to the results of a similar survey conducted by the Judicial Center in 1977.[1]

The survey was mailed to a randomly selected sample of 150 active district judges, with the sampling designed to achieve proportional representation of districts, chief judges, and time since appointment to the district bench. 124 Judges (83%) completed and returned the questionnaire. Because the information provided here is based on a sample, the results must be understood as estimates. The fact, for example, that 59% of respondents indicated that they ordinarily allowed counsel to ask questions during civil voir dire does not necessarily mean that 59% of all district judges allow some counsel questioning. There is a margin of error of roughly plus or minus 8% (hence somewhere between 51% and 67% of all district judges allow counsel questioning).[2]

Extent of Counsels' Participation in Voir Dire

One focus of the survey was the extent to which judges permit counsel to address prospective jurors directly—as opposed to the court asking all questions—in the course of voir dire. Asked about their "standard" practice, 59% indicated that they allowed at least some direct attorney participation in voir dire of civil trial juries, and 54% so indicated with regard to criminal juries. In the Center's 1977 study, less than 30% of district judges reported allowing any questioning by counsel during voir dire in "typical" civil or criminal cases. There was no marked difference in responses to a second question asking about practices in "exceptional" cases, the percentages being 67% (civil) and 51% (criminal). The extent of permitted counsel participation was indicated by three different responses, distinguished by unavoidably subjective terms. One response indicated that the judge allows counsel to "conduct most or all of voir dire," another

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[1] See Bermant, The Conduct of Voir Dire Examination: Practices and Opinions of Federal District Judges, Federal Judicial Center, 1977.

[2] To be a bit more specific, the plus-or-minus 8% figure is the size of the 95% confidence interval, which means that with random sampling from the population of active district judges, there is at most a 5% chance that the percentage given for the sample (here 59%) would occur if in fact the percentage for the entire population of active district judges was more than 8% different (i.e., below 43% or greater than 59%).

indicated that the judge conducts a preliminary examination and then gives " counsel a fairly extended opportunity to ask additional questions", and the third indicated that after the judge's examination, counsel were given "a very limited opportunity to ask additional questions." The percentages of these answers selected by the respondents are shown in Table 1.

TABLE 1

RESPONSE	"Standard Practice" Civil	"Standard Practice" Criminal	"Exceptional Cases" Civil	"Exceptional Cases" Criminal
a. I allow counsel to conduct most or all of voir dire. I either ask no questions or ask only very general, standard questions addressed to the entire venire (e.g., please raise your hand if you know any of the parties or attorneys).	9%	7%	8%	6%
b. I conduct an initial examination covering usual voir dire questions, and then give counsel a fairly extended opportunity to ask additional questions.	18%	18%	27%	26%
c. I conduct an initial examination covering usual voir dire questions, and then give counsel a very limited opportunity to ask additional questions.	33%	29%	29%	28%
d. I conduct the entire examination. I permit counsel to submit to me questions they would like me to ask, but do not generally allow counsel to ask any questions directly.	41%	46%	34%	38%
e. Other	2%	1%	2%	3%

Another question asked the judge to estimate the average time taken in questioning jurors during voir dire, broken down between time spent by counsel and by the court, and by civil and criminal cases. The average total time—court and counsel—reported was 1:12 for civil cases and 1:39 for criminal cases. The range of the responses is shown in Table 2, together with figures for a similar question asked in the Center's 1977 study.

TABLE 2

Total Average Time Spent Questioning Prospective Jurors	**Percent of Respondents** Current Study Civil	Current Study Criminal	1977 Study Civil	1977 Study Criminal
less than 30 minutes	4%	2%	33%	16%
30 min - 1 hour	25%	10%	49%	49%
1 - 2 hours	56%	55%	14%	28%
2 or more hours	15%	34%	1%	7%

Among judges who reported any time expended by counsel, the average was 31 minutes in civil cases and 40 in criminal cases. Perhaps most intriguing, however, is the absence of much relationship between total voir dire time and the judge's indication of his or her standard practice regarding attorney participation in voir dire (which is summarized above in Table 1). Table 3 shows the reported times broken down by standard voir dire practice.

TABLE 3

Standard Voir Dire Practice	Average Voir Dire Time					
	Civil			Criminal		
	Ct	Cnsl	**Tot**	Ct	Cnsl	**Tot**
a. I allow counsel to conduct most or all of voir dire. I either ask no questions or ask only very general, standard questions addressed to the entire venire (e.g., please raise your hand if you know any of the parties or attorneys).	0:13	0:55	**1:09**	0:20	1:08	**1:28**
b. I conduct an initial examination covering usual voir dire questions, and then give counsel a fairly extended opportunity to ask additional questions.	0:43	0:32	**1:15**	0:57	0:42	**1:39**
c. I conduct an initial examination covering usual voir dire questions, and then give counsel a very limited opportunity to ask additional questions.	0:54	0:20	**1:15**	1:19	0:25	**1:44**
d. I conduct the entire examination. I permit counsel to submit to me questions they would like me to ask, but do not generally allow counsel to ask any questions directly.	1:05	0:00	**1:05**	1:32	0:00	**1:32**

Effects of *Batson*

The survey also asked questions pertaining to the influence of *Batson* and its progeny (hereafter, simply "*Batson*"). When asked what percentage of their jury trials in the last year had involved a *Batson-type* objection,[3] 36% answered "none." The average percentage reported was 7%, with a median of 2%. (15% reported that such objections occurred in more than 10% of their trials).

It can be argued that *Batson* creates a need for increased attorney participation in voir dire (or at least for more probing voir dire) to afford counsel more information on which to base their exercise of peremptories. *Batson* prohibits exercise of peremptories based simply on stereotypes of certain kinds. Hence counsel may need more information to determine, for instance, if a particular prospective juror harbors the bias that counsel suspects is common among persons of that class (e.g., that race, gender). To help illuminate this issue, we asked judges how often they though the explanation for a peremptory that is offered in response to a Batson objection was an explanation based on information that would be adduced from a routine voir dire (as opposed to information obtained only from a somewhat probing voir dire). The average answer was 84%, with a median of 90% (fully 47% of responses were 95% or greater). Hence a large majority of judges think it rare that explanations for peremptories are based on information other than that "routinely elicited in voir dire or otherwise routinely available to counsel."[4]

When asked whether *Batson* "led you to alter your practice with regard to voir dire," fewer than 20% of the judges gave any affirmative response. Of those, most noted changes regarding the method of exercising peremptories. Only about 5% indicated that they had changed their

[3] See the attached survey for the definition of "*Batson-type* objection."

[4] Of course, if the only information available to counsel is that which is "routinely elicited," then the explanation can hardly be based on anything else. It that were the basis for the answers to this questions, however, one might expect to see a correlation between the answer to this question and the extent of counsel participation in voir dire reflected in questions 1 and 3. There was no significant correlation, and the only one even suggested by the data suggests that numerically larger answers to this question are most common among judges who allow counsel to conduct all or most of the voir dire.

practices regarding voir dire questioning, all but one indicating that voir dire questioning is more probing than in the past, at least in "exceptional" cases.[5]

Asked whether *Batson* had led to changes in regard to challenges for cause, 18% indicated that counsel "have increased their efforts to excuse jurors for cause," and 16% said that they "have become more willing to excuse jurors for cause." 74% of the respondents indicated that neither change had occurred.

Others Views Regarding Questioning by Counsel in Voir Dire

Question 8 asked the judges to indicate statements with which they agreed pertaining to questioning by counsel in voir dire. The statements and the percentage indicating agreement are shown in Table 4.

TABLE 4

Questioning of prospective jurors by counsel:

a. Takes too much time.	50%
b. Is less time-consuming than voir dire conducted entirely by the judge.	4%
c. Results in counsel using voir dire for inappropriate purposes (e.g. to argue their case, or simply to "befriend" jurors).	67%
d. Is an appropriate opportunity for counsel to introduce themselves to jurors.	31%
e. Is necessary to permit counsel and the parties to feel satisfied with the jury selection process, but is not otherwise worthwhile.	14%
f. Is necessary to permit counsel and the parties adequately to inform themselves of bases for challenges, whether peremptory or for cause.	32%
g. Is more effective because counsel know better what questions to ask.	17%
h. Is inappropriate; it should be the judge who solicits information about the jurors' ability to properly discharge their duties as jurors.	33%
i. Other	23%

Judges who indicated agreement with statement a in Table 4 (counsel questioning takes too much time) were asked to indicate how much more time counsel questioning would take than voir dire conducted entirely by the judge. The median response was 1.5 hours for civil cases and 2 hours for criminal cases. Compared to the total voir dire time reported by the respondents in question 2 (see tables 2 and 3 and associated text, above), these responses reflect a view that counsel questioning of jurors will more than double the time required for voir dire. This is at odds with the information presented in Table 3, above, which indicates very little difference in voir dire time regardless of whether the judges allows much, little, or no counsel questioning of jurors. The disharmony between these two aspects of the responses may also be due to either or both of two other phenomena:

1. Those judges who allow counsel questioning may manage to do so without it taking excessive time, and many of those who prohibit counsel participation may do so in part because they believe it will take too much time—a belief sometimes but not always based on personal experience.
2. At least some judges apparently interpreted the inquiry as pertaining to "unlimited" attorney voir dire (e.g. as they experienced voir dire as a state court judge), and indicated that

[5] The percentages mentioned in this paragraph pertain only to those respondents who were appointed to the bench before the *Batson* decision (86% of all respondents).

attorney participation in voir dire takes vastly more time, even though the judge routinely allows at least some questioning by counsel (the "takes too much time" response was chosen by 28% of the judges who report that they routinely allow some counsel questioning in both civil and criminal cases).

The responses to question 8 (see Table 4) can be used to gauge general attitude about counsel questioning in voir dire. Responses a, c, and h may be taken as negative views of attorney participation in voir dire, and the others (except i - other) as positive. Of those who selected any of these answers, 19% expressed only positive views, 68% expressed only negative views, and 13% expressed both positive and negative views.

Finally, we asked those judges who do allow counsel questioning to indicate how they ensure that counsel "do not use voir dire for inappropriate purposes or simply take too much time." The responses are summarized in Table 5.

TABLE 5

Response	Percent:
a. Not applicable. I do not permit counsel to ask questions of jurors during voir dire.	41%
	Percent of those answering other than a
b. I rarely find it necessary to do anything, although I may occasionally admonish an attorney to take less time or to avoid speeches or improper questions.	44%
c. I make clear to counsel at the outset that I do not tolerate inappropriate or time-consuming questioning. (By what means:)	79%
c1. oral reminder at the bench	41%
c2. standard part of pretrial order	8%
c3. other (mostly during pretrial conference)	41%
d. I generally limit the time allowed for voir dire.	50%
Average minutes per side allowed in routine case, Civil: 22, Criminal: 25	
e. Other (most referred simply to close monitoring of counsels' questions)	10%

A number of the respondents offered explanations of their approaches to conducting voir dire that are not amenable to tabulation but that may be useful in considering either questioning by counsel during voir dire or how voir dire practices might be modified in light of *Batson*. These are listed below.

Approaches to controlling attorney questioning of prospective jurors.

1. Some judges who indicated that they permit counsel to conduct all or most of the voir dire pointed out that the oral questioning was limited to follow-up questions. The initial "voir dire" is handled by a questionnaire tailored to the specific case that jurors are asked to complete before reporting to the courtroom. An example of such a questionnaire is attached as exhibit B.
2. While many judges impose time limits on counsel questioning, others constrain the questioning by limiting the scope of questioning, sometimes by an in-chambers conference where counsel explain the questions they want to ask and the judge in turn specifies what questions will be permitted.

3. Some judges will simply take over the questioning (and thus end counsel's questioning) if counsel does not comply with the judge's rules concerning proper inquiry. Other judges employ the approach of suggesting that counsel "rephrase" a question that the court finds problematic.
4. One respondent noted following the Scheherezade rule: "if they keep me interested, they can keep asking questions."
5. Another mentioned a list of restrictions, including: (a) A question may not be directed to an individual juror if it can be addressed to the panel as a whole; (b) Prohibit using voir dire to instruct jurors; and (c) A question may not seek a juror's commitment to support a given position based on hypothetical facts.

Responses to *Batson*:

1. Some judges require that peremptories be exercised first after an initial panel (e.g. 12 jurors) have passed challenges for cause, with challenged jurors then being replaced by random draw from the pool of prospective jurors, peremptories exercised only with respect to the replacements, and so on. This approach prevents counsel from knowing who might replace a challenged juror, and so makes it more difficult to pursue a strategy prohibited by *Batson* (or any other strategy).
2. Other judges, for the same purposes, allow all peremptories to be exercised after all challenges for cause, but with the parties making their choices "blind" to the choices made by opposing parties (in contrast to alternating "strikes" from a list of the names of panel members).[6]

Observations about questioning of prospective jurors by counsel.

1. A number of respondents indicated that judges should conduct voir dire, because—as every trial lawyer knows—the lawyer's objective is to obtain a biased jury. Only the judge is in a position to foster selection of unbiased jurors.
2. A number suggested that judges simply do a better job of voir dire questioning, for one or more of several reasons: (a) counsel aren't very good at it, (b) some questions are better asked by the judge (to shield counsel from adverse responses to the asking of such questions), and (c) jurors will be more candid in responding to the judge than to counsel.

[6] A more extreme approach to the same end (not mentioned by any of the respondents but practiced in some state courts) is a procedure where jurors are individually questioned and passed for both peremptory and cause challenges one at a time—juror #1 is seated before juror #2 is questioned (or perhaps even identified). This approach imposes maximum limits on counsel's ability to employ peremptories in a strategic manner.

EXHIBIT A

Questionnaire Concerning Conduct Of Voir Dire

1. What is your **standard** practice with regard to questioning jurors during voir dire–the practice you follow in routine cases? (Please check one for civil and one for criminal cases.)

Civil cases	Criminal cases	
☐	☐	a. I allow counsel to conduct most or all of voir dire. I either ask no questions or ask only very general, standard questions addressed to the entire venire (e.g., please raise your hand if you know any of the parties or attorneys).
☐	☐	b. I conduct an initial examination covering usual voir dire questions, and then give counsel a fairly extended opportunity to ask additional questions.
☐	☐	c. I conduct an initial examination covering usual voir dire questions, and then give counsel a very limited opportunity to ask additional questions.
☐	☐	d. I conduct the entire examination. I permit counsel to submit to me questions they would like me to ask, but do not generally allow counsel to ask any questions directly.
☐	☐	e. Other. Please explain: _____

2. About how much time–on average–do you think is taken in your courtroom by the questioning of potential jurors in voir dire in a routine case?

Questioning by **counsel** in:
routine civil case: _____hour(s) routine criminal case: _____hour(s)
Questioning by **court** in:
routine civil case: _____hour(s) routine criminal case: _____hour(s)

3. What is your practice in **exceptional** cases, e.g., where the case has received notable publicity or where jurors may have strong emotional responses to the subject matter? (Please check one for civil and one for criminal cases.)

Civil cases	Criminal cases	
☐	☐	a. I allow counsel to conduct most or all of voir dire. I either ask no questions or ask only very general, standard questions addressed to the entire venire (e.g., please raise your hand if you know any of the parties or attorneys).
☐	☐	b. I conduct an initial examination covering usual voir dire questions, and then give counsel a fairly extended opportunity to ask additional questions.
☐	☐	c. I conduct an initial examination covering usual voir dire questions, and then give counsel a very limited opportunity to ask additional questions.
☐	☐	d. I conduct the entire examination. I permit counsel to submit questions they would like me to ask, but do not generally allow counsel to ask questions directly.
☐	☐	e. Other. Please explain: _____

4. In approximately what percentage of jury trials you conducted in the last 12 months did counsel make a *Batson*-type objection* to opposing counsel's exercise of peremptories?

_____%

5. In your experience, when a *Batson*-type* objection is made and respondent is called upon to explain the basis for challenging jurors, about what percentage of such explanations are based on information that would be elicited routinely in voir dire or from juror information routinely provided to counsel (e.g., juror's profession, marital status, demeanor), as opposed to information gleaned only from a somewhat probing voir dire (e.g. a question designed to elicit insight about the juror's attitude toward authority, and hence toward police)?

_____ % of explanations are based on information routinely elicited in voir dire or otherwise routinely available to counsel

6. Has the advent of *Batson*-type* objections led you to alter your practice with regard to voir dire? (Please check one for civil and one for criminal cases.)

Civil cases	Criminal cases	
☐	☐	a. Not applicable. I became a judge after the *Batson* decision.
☐	☐	b. No.
☐	☐	c. Yes, my standard practice is to conduct or permit counsel to conduct a more probing voir dire now than I did before *Batson*.
☐	☐	d. Yes, in some exceptional cases I conduct or permit counsel to conduct a more probing voir dire than I did before *Batson*.
☐	☐	e. Yes, I now conduct a less-probing voir dire, or allow counsel less opportunity to conduct a probing voir dire.
☐	☐	f. Other. Please explain: _____

_____

_____

_____

7. Do you think that *Batson* and its progeny cases have resulted in an increase either in counsels' efforts to have jurors excused for cause or in your willingness to excuse jurors for cause? (You may check both yes answers, or any single answer.)

Counsel have increased their efforts to excuse jurors for cause: ☐ No. ☐ Yes.

I have become more willing to excuse jurors for cause: ☐ No. ☐ Yes.

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* A "*Batson*-type objection" means any objection to the exercise of peremptory challenges based at least in part on a claim that the peremptories were exercised due to the race, nationality, gender, or other characteristic of the challenged jurors.

8. Do you believe that allowing counsel to question potential jurors during voir dire: (check all with which you agree)

- ☐ a. Takes too much time (about how much **more** time than voir dire conducted entirely by you:
  Civil cases:_____hour(s) Criminal cases:_____hour(s))
  b. Is less time-consuming than voir dire conducted entirely by the judge.
- ☐ c. Results in counsel using voir dire for inappropriate purposes (e.g. to argue their case, or simply to "befriend" jurors).
- ☐ d. Is an appropriate opportunity for counsel to introduce themselves to jurors.
- ☐ e. Is necessary to permit counsel and the parties to feel satisfied with the jury selection process, but is not otherwise worthwhile.
- ☐ f. Is necessary to permit counsel and the parties adequately to inform themselves of bases for challenges, whether peremptory or for cause.
- ☐ g. Is more effective because counsel know better what questions to ask.
- ☐ h Is inappropriate; it should be the judge who solicits information about the jurors' ability to properly discharge their duties as jurors.
- ☐ i. Other. Please explain: _____
  _____
  _____
  _____

9. If you allow counsel to ask questions during voir dire, how do you ensure that they do not use voir dire for inappropriate purposes or simply take too much time? (check all that apply)

- ☐ a. Not applicable. I do not permit counsel to ask questions of jurors during voir dire.
- ☐ b. I rarely find it necessary to do anything, although I may occasionally admonish an attorney to take less time or to avoid speeches or improper questions.
- ☐ c. I make clear to counsel at the outset that I do not tolerate inappropriate or time-consuming questioning. → By what means do you to this?:
  - ☐ oral reminder at the bench
  - ☐ standard part of pretrial order
  - ☐ other: _____
- ☐ d. I generally limit the time allowed for voir dire. In a routine case, I allow each side about _____ hour(s) in civil cases and _____ hour(s) in criminal cases.
- ☐ e. Other. Please explain: _____
  _____
  _____
  _____

Thank you. Please return the survey in the accompanying envelope, or to:
The Federal Judicial Center, Research Division, One Columbus Circle, N.E.
Washington D.C. 20002-8003 ATTN: Voir Dire

EXHIBIT B

[After the prospective jurors have answered the questions set out below, the judge instructs them to indicate if they have any affirmative answers to a questions in schedule A or negative answers to questions in schedule B. Jurors who so indicate are then questioned at the sidebar, with counsel afforded an opportunity to ask questions supplemental to those asked by the judge.]

SCHEDULE A

1. The defendant in this case is John Doe.

   Q. Do you know the defendant or any members of the defendant's family.

2. The defendant John Doe is represented by Attorneys W. T. and J. W.
   The government is represented by Assistant United States Attorneys S. Y. and B. S.

   Q. Do you know any of these attorneys or any members of their families?

3. Do you know any of the partners or law associates of any of the attorneys?

4. The indictment in this case charges the defendant with conspiracy to possess with intent to distribute, and distribute, cocaine in violation of the United States Code. The indictment is merely the means by which the defendant is notified that he must stand trial for the alleged criminal conduct. Neither the indictment nor the fact of the indictment is evidence, nor should it be considered as evidence. The indictment identifies other persons who allegedly participated in the conspiracy.

   A. The persons so named are:
   [list of 10 names]

   QUERY: Do you know any of these persons or members of their families?

   B. Do you know of any reason why you would not follow the Court's instruction that the indictment is not evidence and the fact of the indictment is not evidence and neither is to be considered as any proof in this case?

   C. Have you heard on the radio or read in a newspaper anything concerning the charge of conspiracy against the defendant, Mr. Doe?

   D. Do you know anything about the subject matter of this trial?

5. Have you ever served on a Grand Jury?

6. Have you been employed by:

a. Any law enforcement agency; or
b. Any other Agency or Department of the United States of America?
c. Any branch of the military?

7. Has any member of your family or close friend been employed by:
   a. Any law enforcement agency; or
   b. Any other Agency or Department of the United States of America?

8. Have you or has any member of your household been a party, either plaintiff or defendant, in a civil case that has been filed in the course of the past ten years?

9. Have you or has any member of your family been indicted by a Grand Jury?

10. Have you or has any member of your family been convicted of any crime other than a traffic offense?
    NOTE: Driving under the influence of alcohol or drugs is not to be considered for the purpose of this question as a traffic offense.

11. Have you ever been a witness in a criminal case?

12. Have you or has any member of your family ever been the victim of a crime?

13. Have you or has any member of your family ever filed a claim against the United States?

14. Do you have a hearing or sight problem that would interfere with your ability to see the witnesses or to hear the testimony in this case?

15. Are you on any medication that would impair your ability to concentrate on the testimony, the arguments of counsel and the instruction of the Court?

16. Do you have a health problem that would impair your ability to give this case your complete attention.

17. Does any member of your immediate family have a health problem that would impair your ability to fully concentrate on the testimony of this case?

18. Would you judge the credibility of law enforcement officers or government witnesses by any different standards than you would judge the credibility of any other witnesses?

19. Do you have any beliefs, personal, moral, or religious, that are of such a nature that you would not be unable or unwilling to sit in judgment of another's guilt or innocence?

20. Have you or has your close friends or relatives ever been involved in a case or dispute with the United States Government or any agency thereof in which a claim was made against the government or in which the government has made a claim against you, a close friend, or relative?

21. It is always difficult for the Court to accurately predict the length of a trial. Obviously, those who are chosen to serve on the jury will be required to be here for the entire trial and for the jury deliberation. It is the Court's plan to run this trial all five days of this week, including the federal holiday of Thursday, the 11th of November. The Court will not be in session on Wednesday, November 17, because of other duties. It is my best estimate at this time that the service we are asking you to perform will require this week and next week. I recognize that jury service of that length will be inconvenient and, in some cases, work severe hardship. If you believe that you have a good case for being excused because of severe hardship, and wish to be excused for that reason, you should so indicate by answering this question "Yes" and bringing your answer to my attention when I speak to you at the side bar.

22. This case involves allegations of drug distribution, specifically cocaine distribution.

A. Do you now, or have you in the past, or alternatively, does any member of your family now, or in the past, have a problem with the use of illegal substances such as marijuana, heroin, LSD, cocaine or crack cocaine that has resulted in:

(1) hospitalization?

(2) attendance at a drug treatment center?

(3) addiction?

B. Do you hold any beliefs or do you have any emotional reactions regarding the use or distribution of the narcotic drug controlled substance known as cocaine and marijuana that would interfere with your ability to fairly and impartially consider

the evidence in this case and render a verdict based on your determination of the facts?

23. The Court understands with respect to the government's case the following:

(1) The government's investigation included use of a court authorized wiretap of private citizens' phones.

(2) During the investigation of this case, the government paid money to certain cooperating witnesses for moving expenses.

(3) The government has entered into cooperation agreements with certain defendants whereby those defendants will receive consideration in the resolution of their cases in exchange for truthful testimony.

QUERY: Do you hold any beliefs or have any emotional reactions to the above described conduct on the part of the government that would interfere with your ability to fairly and impartially consider the evidence in this case and render a verdict based on your determination of the facts?

24. Do you know any reason why you would be biased or assert prejudice or sympathy in this case?

25. Are you personally acquainted with or know any relatives or close friends of any of the following named individuals who may appear as witnesses in this case:
[numbered list of 38 names]

26. Do you know of any reason why you cannot serve as a fair and impartial juror in this case?

SCHEDULE B

1. The laws of the United States guarantee to a defendant that he is presumed to be not guilty. Are you in sympathy with the rule of law that clothes the defendant with a presumption of innocence?

2. The law requires that the burden of proof shall be upon the government to convince you of each and every element of a crime beyond a reasonable doubt before you can return a verdict of guilty relative to said crime. Are you in sympathy with the rule of law that requires you as a juror to give a defendant the benefit of reasonable doubt?

3. The law does not require that a defendant prove that he is not guilty. Are you in sympathy with the rule of law that does not require a defendant to prove his innocence?

4. Are you willing to confine your deliberations to the evidence in this case as presented in the courtroom?

5. Are you willing to apply the Court's instructions as to the law and not substitute any ideas or notions of your own as to what you think the law should be?

6. Are you willing to wait until all the evidence has been presented and the court has instructed you on all the applicable law before coming to any conclusion with respect to charges contained in the indictment?

7. In your deliberations are you willing to abide by your convictions and not agree with other jurors solely for the sake being congenial, if you are convinced that the opinions of other jurors are not correct?