ADVISORY COMMITTEE ON CRIMINAL RULES

File Copy

Monterey, California
October 13-14, 1997

CRIMINAL RULES COMMITTEE MEETING

October 13-14, 1997
Monterrey, California

I. PRELIMINARY MATTERS

A. Opening Remarks and Administrative Announcements by the Chair

B. Approval of Minutes of April 1997, Meeting in Washington, D.C.

C. Draft Minutes of Standing Committee Meeting, June 1997.

D. Criminal Rules Agenda Docketing.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Rules Published for Public Comment & Pending Further Review by Advisory Committee. (Memo):

1. Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment)
2. Rule 11. Pleas (Acceptance of Pleas and Agreements, etc).
3. Rule 24(c). Alternate Jurors (Retention During Deliberations).
4. Rule 30. Instructions (Submission of Requests for Instructions).
5. Rule 32.2. Forfeiture Procedures.
6. Rule 54. Application and Exception.

B. Rules Approved by Standing Committee and Pending Before Judicial Conference (No Memo).

1. Rule 5.1. Preliminary Examination; Production of Witness Statements.
2. Rule 26.2. Production of Witness Statements, Applicability to Rule 5.1 Proceedings.
3. Rule 31. Verdict; Individual Polling of Jury.

4. Rule 33. New Trial; Time for Filing Motion.

5. Rule 35(b). Correction or Reduction of Sentence; Changed Circumstances.

6. Rule 43. Presence of Defendant; Presence at Reduction or Correction of Sentence.

C. Rule Approved by Supreme Court and Pending Before Congress (No Memo)

1. Rule 58, Procedure for Misdemeanors and Other Petty Offenses.

D. Report of Subcommittee on Victim Allocution Legislation; Possible Amendments to Rules 11, 32, and 32.1 (Memo).

E. Proposed Amendments to Rules of Criminal Procedure

1. **Rule 5(c). Initial Appearance Before the Magistrate Judge.** Proposed Amendment (Memo).

2. **Rule 6. The Grand Jury.** Legislative Proposal to Reduce Size of Grand Jury. (Memo)

3. **Rule 11. Pleas.** Proposed Amendments re Notice to Defendant of Relevant Sentencing Information (Memo).

4. **Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition.** Proposed Amendment Re Ordering Of Mental Examination For Defendant. (Memo).

5. **Rule 23. Trial by Jury or by the Court**. Discussion re Possible Reduction of Size of Jury. (Memo).

6. **Rule 24. Trial Jurors.**

   a. Discussion re Possible Amendments re Number of Peremptory Challenges. (Memo).

b. Proposed Amendments re Randomly Selected Petit and Venire Juries and Deletion of Provision for Peremptory Challenges. (Memo).

7. **Rule 26. Taking of Testimony.** Report by Subcommittee re Taking of Testimony from Remote Location. (Memo).

8. **Rule 32. Sentence and Judgment.** Proposal to Provide for Mental Examination of Defendant. (Memo).

9. **Rule 43. Presence of the Defendant**. Proposal to Permit Defendant to be Absent During Arraignment. (Memo)

10. **Rules Governing Habeas Corpus Proceedings. (Memo)**

    a.. Rule 8. Proposed Change.

    b. Rule 4. Conflict in Deadlines.

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

1. Status Report on Legislation Affecting Federal Rules of Criminal Procedure (No Memo).

2. Status Report on Restyling the Appellate Rules of Procedure.(No Memo).

3. Status Report on Electronic Filing in the Courts (Memo)

4. Other Oral Reports (No Memo).

III. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

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September 16, 1997
Doc. No. 1651

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Agenda Item I A-B

MINUTES [DRAFT]
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

April 7, 1997
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. on April 7, 1997. These minutes reflect the actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Jensen, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, April 7, 1997. 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. Edward E. Carnes
Hon. George M. Marovich
Hon. David D. Dowd, Jr.
Hon. D. Brooks Smith
Hon. B. Waugh Crigler
Prof. Kate Stith
Mr. Darryl W. Jackson, Esq.
Mr. Robert C. Josefsberg, Esq.
Mr. Henry A. Martin, Esq.
Mr. Roger Pauley, Jr., designate of the Asst. Attorney General for the Criminal Division
Professor David A. Schlueter, Reporter

Also present at the meeting were: Hon. Alicemarie Stotler, Chair of the Standing Committee on Rules of Practice and Procedure; Hon William R. Wilson, Jr., a member of the Standing Committee and a liaison to the Criminal Rules Committee; Professor Daniel R. Coquillette, Reporter to the Standing Committee; Mr. Peter McCabe and Mr. John Rabiej from the Administrative Office of the United States Courts; Mr. Jim Eaglin from the Federal Judicial Center, Mr. Joseph Spaniol, Consultant to the Standing Committee, and Ms. Mary Harkenrider from the Department of Justice.

The attendees were welcomed by the chair, Judge Jensen, who indicated that the press of court business had prevented Chief Justice Daniel Wathen from attending the Committee's meeting.

II. APPROVAL OF MINUTES OF APRIL 1996 MEETING

Judge Marovich moved that the Minutes of the Committee's October 1996 meeting be approved. Following a second by Judge Smith, the motion carried by a unanimous vote.

III. RULES APPROVED BY THE STANDING COMMITTEE AND FORWARDED TO THE JUDICIAL CONFERENCE

The Reporter informed the Committee that at its January 1997 meeting, the Standing Committee had approved minor, technical amendments to Rule 58 which conformed the rule to the Federal Courts Improvement Act. That legislation had amended 18 U.S.C. § 3401(b) and (g) and 28 U.S.C. § 636(a). Those amendments removed the requirement that the defendant consent to trial before a magistrate judge in those cases where the defendant is charged with a petty offense, a class C misdemeanor, or an infraction. The amendments now also permit a defendant to consent to trial before a magistrate judge in all other cases either orally on the record or in writing. Given the fact that the amendments simply conformed Rule 58 to the new legislation, the Standing Committee approved the changes without requiring a public comment period. Mr. Rabiej indicated that the Judicial Conference had approved the changes to Rule 58 at its Spring meeting, and that they were currently pending before the Supreme Court.

IV. RULES PUBLISHED FOR PUBLIC COMMENT AND PENDING FURTHER REVIEW BY THE ADVISORY COMMITTEE

The Reporter informed the Committee that to date, 20 written comments had been received on the Committee's proposed changes to the following rules: Rule 5.1 (Preliminary Examination; Production of Witness Statements); Rule 26.2 (Production of Witness Statements; Applicability to Rule 5.1 Proceedings); Rule 31 (Verdict; Individual Polling of Jurors); Rule 33 (New Trial; Time for Filing Motion); Rule 35(b) (Correction or Reduction of Sentence; Changed Circumstances); and Rule 43 (Presence of Defendant; Presence at Reduction or Correction of Sentence). In addition, he indicated that the Style Subcommittee of the Standing Committee had reviewed the proposed changes and had submitted its suggested style changes to the Committee for its consideration.

A. Rule 5.1. Preliminary Examination

The Reporter informed the Committee that 12 written comments had been received on the proposed amendment to Rule 5.1, which would extend the Rule 26 requirement to produce statements at preliminary examinations. Only one of the commentators opposed the adoption of the amendment. He also indicated that the Style Subcommittee of the Standing Committee had proposed several changes to the rule but that as it was published for comment, the Rule mirrored almost identical language in Rules 32.1, 32, and 46. He noted that using different language in Rule 5.1 might cause confusion in applying the other rules. Following discussion concerning the pending restyling of all of the Criminal Rules, Judge Carnes moved that the proposed amendment be forwarded to the Standing Committee as published for comment. Professor Stith seconded the motion, which carried by a unanimous vote.

B. Rule 26.2. Production of Witness Statements

The Reporter informed the Committee that as of the date of the meeting, 12 written comments had been received on the proposed amendment to Rule 26.2(g) which would extend the production-of-statements requirement to preliminary examinations conducted under Rule 5.1, *supra*. The Style Subcommittee's suggested changes were discussed by the Committee, which was inclined to save the proposed changes until all of the Criminal Rules were restyled. Professor Stith moved that the proposed amendment be forwarded to the Standing Committee as published. Judge Carnes seconded the motion which carried by a unanimous vote.

C. Rule 31(d). Polling of Jury

Following a brief report from the Reporter on the written comments submitted on the proposed amendment, which would require that whenever a polling of the jurors was conducted, that each juror be polled individually. Following brief discussion of the proposed style changes, Professor Stith proposed that the proposed amendment be forwarded with those changes; Judge Davis seconded the motion. During the ensuing discussion on the motion, Judge Carnes noted that the suggestion from one of the commentators concerning the timing of the polling had merit and that perhaps the rule should be amended to reflect that polling must take place before the verdict is recorded. That in turn led to additional discussion about whether under the proposed amendment the judge had any discretion whether to conduct an individual polling. A consensus emerged that the intent of the proposed amendment was to require individual polling when a polling is requested or ordered by the court. Thereafter, Judge Smith moved to amend the motion to read that the rule be amended to reflect that the jury must be polled before it is discharged. That motion was seconded by Mr. Josefsberg and carried by a unanimous vote. The main motion to forward the proposed amendment to the Standing Committee, as amended and restyled, also carried by a unanimous vote.

D. Rule 33. New Trial

The Committee was informed that of the twelve comments received, ten were opposed to the proposed change to Rule 33. The Reporter summarized the comments received and indicated that those in opposition to the proposed amendment argued that there is no real need for the amendment and that the amendment would in effect reduce the amount of time for filing a motion for new trial. Following brief discussion concerning the suggested style changes, Judge Dowd moved that the proposed amendment to Rule 33 be changed to reflect that motions for a new trial on grounds of newly discovered evidence must be filed within three years, rather than two years, as the rule currently provides. Mr. Martin seconded the motion which carried by a unanimous vote. Thereafter, Judge Dowd moved that the proposed rule, with the style changes, be forwarded to the Standing Committee. Mr. Martin seconded the motion which also carried by a unanimous vote.

E. Rule 35(b). Reduction of Sentence

The Reporter indicated that the Committee had received eight written comments on the proposed amendment to Rule 35(b) which would permit the judge to consider both pre-sentence and post sentence assistance in determining whether a defendant had provided substantial assistance to the government. All eight comments favored the proposed amendment. Following brief discussion about the proposed restyling changes to the rule, Judge Davis moved that the amendment, as restyled, be forwarded to the Standing Committee. Judge Dowd seconded the motion, which carried by a unanimous vote.

F. Rule 43(c). Presence of Defendant Not Required

The Reporter informed the Committee that of the nine written comments received on the proposed amendment to Rule 43, seven commentators were opposed to the amendment, which would clarify the issue of when the defendant's presence is required at various post-sentencing proceedings. Following brief comments by Mr. Pauley who explained the rationale of the rule, Mr. Martin expressed deep concerns about the amendment. He noted that Rule 35(b) is the only real hope of sentence reduction and that the defendant should be present at that proceeding, especially where a different judge is involved. He recognized the problem and costs of transporting prisoners to court and noted that even where the judge has discretion as to do so, he or she may not require the defendant's presence. Following brief discussions on the proposed style changes, during which the Reporter indicated that the rule as it now appears had been restyled during a Standing Committee just several years earlier, Judge Crigler moved that the proposed amendment be forwarded as published. Judge Dowd seconded the motion, which carried by a vote of 7 to 3.

V. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

A. Rule 5(c). Proposed Change Re Authority of Magistrate Judge to Grant a Continuance

The Reporter indicated that the Committee had received a letter from Magistrate Judge Ervin Swearingen who recommended, on behalf of the Federal Magistrate Judges Association (FMJA), that Rule 5(c) be amended to permit a magistrate judge to grant a continuance for a preliminary examination even in those cases where the defendant does not consent. The current rule, which conforms to 18 U.S.C. § 3060(c), indicates that only a district judge may grant such continuances when the defendant does not consent.

The Committee's discussion of the proposed change recognized that the unless there was a change to the underlying statute the rule could not be changed. Judge Jensen suggested, however, that the Committee could discuss the merits of the proposal and that if it believed that the amendment had merit to forward it to the Standing Committee. Mr. Josefsberg moved and Judge Crigler seconded, a motion to forward the proposed amendment the Standing Committee with the recommendation to seek a legislative change to § 3060(c). The motion carried by a unanimous vote.

B. Rule 6. The Grand Jury

The Reporter indicated that the Department of Justice had proposed two amendments to Rule 6. The first related to Rule 6(d) concerning the ability of interpreters to be present during deliberations to assist a deaf juror. And the second related to who may return the indictment.

1. Rule 6(d). Who May be Present

The Reporter informed the Committee that Mr. John C. Keeney, Acting Assistant Attorney General had written to Judge Jensen suggesting a change to Rule 6(c) which would permit interpreters to accompany a deaf grand jury member into the deliberations. Judge Dowd raised the question whether the proposed amendment was necessary; he questioned whether there is now a problem with deaf persons serving on grand juries. Mr. Pauley responded that there is some concern in the Department that clerks may be eliminating deaf persons from those eligible to serve on grand juries. Judge Crigler observed that the same rationale might extend to any other jury members needing assistance during deliberations; Professor Stith noted the amendment might be a first step onto the slippery slope. Judge Jensen observed that the amendment would potentially open

the door to grand jury deliberations. Judge Carnes indicated support for the amendment, noting that deaf persons are generally excluded from the judicial process. He then moved that the words "when necessary" be changed to read "when needed," and that the amendment be forwarded to the Standing Committee for publication and public comment. Mr. Martin seconded the motion, which carried by a unanimous vote. It was suggested that the Advisory Committee Note should reflect the importance of insuring that any interpreters accompanying a deaf person into the deliberation room be reminded of the paramount need for maintaining the secrecy of the jury's discussions.

2. Rule 6(f). Finding and Return of Indictment

The Reporter indicated that Mr. Keeny's letter to Judge Jensen also included a recommendation that Rule 6(f) be amended to avoid the problem of bringing the entire grand jury to court to return an indictment. Following a brief discussion about proposed style changes to the amendment, which in the view of some members of the committee would have made substantive changes, Judge Dowd moved that proposed amendment be forwarded to the Standing Committee. Professor Stith seconded the motion which carried by a unanimous vote.

C. Rule 11. Pleas.

The Reporter indicated that several interrelated matters affecting guilty pleas and the sentencing guidelines were on the agenda for the meeting as continuation of discussions at the Committee's October 1996 meeting in Oregon.

1. Rule 11(c)(6); Advice to Defendant Regarding Waiver of Right to Appeal

The Reporter stated that at its October 1996 meeting the Committee had approved an amendment to Rule 11(c) which would require the court to discuss with the defendant any terms or provisions in a plea agreement which would waive the right to appeal or collateral attack the sentence. Judge Dowd moved that the proposed amendment be forwarded to the Standing Committee for publication and comment; Judge Davis seconded the motion which carried by a vote of 11 to 1.

3. Rule 11(e)(1)(B), (C). Rejection of Plea Agreement.

The Committee engaged in a lengthy discussion concerning several issues arising from the interplay of the sentencing guidelines, plea bargaining and the court's role in accepting or rejecting any resulting plea and plea agreement. Speaking for the Subcommittee which had been charged with addressing those issues, Judge Marovich provided a general background discussion of the issues and indicated that the

subcommittee had addressed three primary areas. First, with regard to the ability of the court to accept a plea agreement which is outside the sentencing guidelines; although at least one court has held that the parties are free to reach a sentence agreement which is outside the guidelines, Judge Marovich indicated that for now the subcommittee believed it better not to amend the rule to address that issue. Second, he addressed the issues raised by the decisions in *United States v. Harris*, 70 F.3d 1001 (8th Cir. 1995) and *United States v. Hyde*, 82 F.3d 319 (;9th Cir. 1996). The Committee, he noted had already addressed the *Harris* decision by considering changes to Rule 11(e)(1)(B) and (C) to make it clear that an plea agreement under Rule 11(e)(1)(B) is not binding while a (e)(1)(C) agreement is binding. With regard to the *Hyde*, he indicated that regardless of what the Supreme Court decides in *Hyde*, the Court will probably not address the issue of what a defendant is to do if he or she discovers that they have not received the sentence they thought they had agreed to. Finally, Judge Marovich indicated that the Subcommittee had considered the question of providing notice to the defendant and that Professor Stith had provided some suggestions.

Professor Stith noted that she generally agreed with Judge Marovich's assessment of the current problems involving the sentencing guidelines and plea bargaining. She noted that a real problem exists with regard to providing sufficient notice to the defendant of what sentencing factors might be considered by the court. She noted that after talking with a number of prosecutors that there were two possible avenues. First, a rule could be devised which would permit a defendant to withdraw a plea of guilty if non-noticed sentencing factors were considered by the court in sentencing. Or, she said, a rule could be drafted to indicate that a judge could not make any use of non-noticed sentencing factors.
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Mr. Martin noted that he generally agreed with Judge Marovich's description of the problems but added that it would be beneficial if the Committee could devise solutions to the problems of providing fair notice regarding the role of various sentencing factors.

Mr. Pauley indicated that the Department of Justice was also concerned about fairness and that under § 3553(b) the courts are required to impose sentences which comply with the Sentencing Guidelines. Regarding the issue of notice to the defendant of what sentencing factors might come into play, he noted that under the old laws, the defendant generally had no idea what sentence might be imposed. Under the Sentencing Guidelines, the defendant now at least has some idea of what will happen at sentencing. In his view, it is not the responsibility of the prosecutor to inform the defendant of what sentencing factors might be binding on the court.

Judge Jensen provided a brief overview of the possible amendments to Rule 11 and that the Sentencing Commission had sent a letter which suggested some minor changes in the Committee's proposed language in Rule 11(e)(1)(B) and (C). The Committee agreed with the suggested changes; Judge Dowd moved that the proposed changes to Rule 11(e) be approved and forwarded to the Standing Committee. Judge Marovich seconded the motion which carried by a unanimous vote.

During a brief discussion of the *Hyde* case pending before the Supreme Court--in which the Ninth Circuit had held that a plea of guilty was not finally accepted until the plea agreement was also accepted--a consensus emerged that any possible amendments to Rule 11 to address that problem should wait until the Supreme Court had decided the case.

The Reporter indicated that Mr. Pauley had suggested a change in Rule 11(a)(1) which would change the term "defendant corporation" to "defendant organization as defined in 18 U.S.C. § 18." Judge Carnes moved proposed amendment to Rule 11(a) be approved and forwarded to the Standing Committee. Judge Dowd seconded the motion, which carried by a unanimous vote.

Judge Jensen thanked the Subcommittee's for its work, which he believed had been very helpful to the Committee, and asked them to continue their study of Rule 11 issues.

D. Rule 24(c). Retention of Alternate Jurors During Deliberations

The Reporter indicated that as a result of the Committee's action at its October 1996 meeting, he had drafted proposed changes to Rule 24(c) which would permit the court to retain alternate jurors--who do not replace jurors--during the deliberations. The suggested changes, he noted, had resulted from *United States v. Houlihan*, 92 F.3d 1271 (1st Cir. 1996) where the First Circuit concluded that the trial judge committed harmless error in not discharging the alternate jurors. Mr. Pauley suggested that the Committee Note recognize more clearly the potential tension that may exist between Rule 23(b), which permits a verdict of less than 12 jurors, and the proposed change, which would permit the judge to substitute a juror who could not continue to serve during the deliberations. He suggested that in that case the preferred method would be to continue with only 11 jurors. It was also suggested that the Committee Note reflect that it is assumed that courts will instruct the alternates not to discuss the case amongst themselves and that it might be helpful to explain in the Note what the term "retain" means in the Rule. Finally, the Committee discussed the proposed style changes from the Style Subcommittee of the Standing Committee.

Judge Carnes moved that the proposed amendment to Rule 24(c), as restyled, be approved and forwarded to the Standing Committee. Judge Smith seconded the motion which carried by a unanimous vote.

D. Rule 26. Taking of Testimony

The Reporter informed the Committee that he had drafted a proposed amendment to Rule 26 to reflect the Committee's action at the October 1996 meeting, which would

conform that rule to Civil Rule 43. The latter rule permits the taking of testimony through means other than simply oral testimony in court, e.g., through the use of sign language and transmission of testimony from outside the courtroom. Judge Dowd moved that the proposed amendment to Rule 26 be forwarded to the Standing Committee, Mr. Josefsberg seconded the motion, which carried by a unanimous vote. Several Committee members, however, noted that as drafted, the proposed amendment to Rule 23 only covered the issue of "oral" testimony in the courtroom and the important issue of transmission of testimony into the courtroom. The proposed amendment was thereafter withdrawn from the list of those being forwarded to the Standing Committee with the understanding that the issue would be on the Committee's agenda for the Fall 1997 meeting. Judge Jensen indicated that he would appoint a subcommittee to study the question in preparation for that meeting.

E. Rule 30. Instructions

The Reporter informed the Committee that Judge Stotler had suggested a possible change to Rule 30 concerning the timing of submitting requested instructions. She had noted that a number of courts are inclined to require, or permit, counsel to file their requests pretrial and although the Committee had earlier rejected a proposed change which would have provided a uniform rule requiring early filing, she recommended that the rule be changed to permit courts to require early filing of requests. The Committee briefly discussed the Reporter's draft changes and the Style Subcommittee's suggested changes. Ultimately, Judge Dowd moved that the amendment be forwarded, as restyled, to the Standing Committee for publication and comment. Judge Smith seconded the motion which carried by a unanimous vote.

F. Rule 32.2. Forfeiture Procedures

The Reporter provided a brief review of the Committee's previous consideration of the Department of Justice's proposed new rule on forfeiture procedures--Rule 32.2-- which would replace several existing rule provisions and provide a more detailed guide on forfeitures. He noted that as a result of the Committee's discussion at its October 1996 meeting the Department had redrafted the rule and that the Style Subcommittee had recommended a number of changes to the draft.

Mr. Pauley briefly explained the redrafted rule and noted that the Department was satisfied that the new rule would not violate the Seventh Amendment rights of any third persons whose property might be forfeited. He also noted that under the proposed rule the jury would not have a role in decisions regarding forfeiture, just as the jury is currently not involved in other sentencing issues. Drawing the Committee's attention to subdivision (b) of the new rule, he noted that the Department had presented alternative provisions dealing with the situation if no third party filed a petition claiming an interest in the property to be

forfeited. The first alternative, he explained, would provide that if no third party petition was filed that it would be presumed to be the property of the defendant(s) and would be forfeited in its entirety. The second alternative would provide that if no third party files a petition, the property may be forfeited in it entirety only if the court finds that the defendant had possessory or legal interest in the property. Following brief discussion, Judge Carnes moved that the Committee adopt the second alternative. Judge Crigler seconded the motion, which carried by a majority vote.

Mr. Pauley and Mr. Stefan Cassella, also of the Department of Justice, addressed the proposed style changes section by section, noting that some of the proposed changes would make substantive changes in the rule. During that discussion, a number of minor changes were made to the draft rule.

A number of the Committee's members observed that the proposed new rule would dramatically change the procedures for dealing with forfeitures in criminal trials but believed that the rule should be forwarded for publication. Ultimately, Judge Marovich moved that the rule as modified and restyled be forwarded to the Standing Committee. Judge Davis seconded the motion which carried by a unanimous vote.

G. Rule 54(a). Application of Criminal Rules

The Reporter informed the Committee that Mr. Pauley had recommended that Rule 54(a) be amended to delete the reference in the rule to the District Court in the Canal Zone, which no longer exists. Following brief discussion about whether the references to the Courts of Appeals and the Supreme Court should be deleted (which was ultimately rejected), Judge Davis moved that the amendment be forwarded to the Standing Committee. Judge Crigler seconded the motion which carried by a unanimous vote.

VI. ORAL REPORTS; MISCELLANEOUS

A. Status Report on Crime Control Act

Mr. Rabiej informed the Committee that a proposal in the Crime Control Act would provide for six-person juries in criminal trials. A number of members were of the view that any changes to the size of juries should be first addressed under the provisions of the Rules Enabling Act and that the matter should be added to the Committee's Fall 1997 meeting. There was also discussion concerning changing the number of peremptory challenges available to the prosecution and the defense. Ultimately, Judge Dowd moved that those two issues be added to the Fall 1996 agenda. Mr. Josefsberg seconded the motion which carried by a unanimous vote.

There was also some brief discussion about legislative proposals which would reduce the size of grand juries. That item will also be added to the October 1997 agenda.

B. Status Report of Proposed Changes to the Rules of Evidence

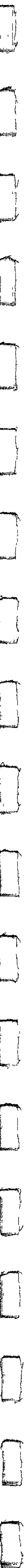
Judge Dowd, as the Committee's liaison to the Evidence Committee, reported that the Committee was considering a number of possible changes to the Rules of Evidence and that he would keep the Committee apprised of further developments.

VIII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee decided to hold its next meeting in Monterey, California on October 13 and 14, 1997.

Respectfully submitted

David A. Schlueter
Professor of Law
Reporter



Agenda Item I-C

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Draft Minutes of the Meeting of June 19-20, 1997
Washington, D.C.

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Thursday and Friday, June 19-20, 1997. The following members were present:

Judge Alicemarie H. Stotler, Chair
Judge Frank W. Bullock, Jr.
Judge Frank H. Easterbrook
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Judge James A. Parker
Alan W. Perry, Esquire
Sol Schreiber, Esquire
Judge Morey L. Sear
Chief Justice E. Norman Veasey
Acting Deputy Attorney General Seth P. Waxman
Judge William R. Wilson

Alan C. Sundberg, Esquire was unable to be present. Mr. Waxman was able to attend the meeting only on June 19. Ian H. Gershengorn, Esquire and Roger A. Pauley, Esquire represented the Department of Justice on June 20.

Supporting the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts: Mark D. Shapiro, senior attorney in that office: and Patricia S. Channon, senior attorney in the Bankruptcy Judges Division of the Administrative Office.

Representing the advisory committees at the meeting were:

Advisory Committee on Appellate Rules -
Judge James K. Logan, Chair
Professor Carol Ann Mooney, Reporter
Advisory Committee on Bankruptcy Rules -
Judge Adrian G. Duplantier, Chair
Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules
Judge Paul V. Niemeyer, Chair
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules
Judge D. Lowell Jensen, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules
Professor Daniel J. Capra, Reporter

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan A. Garner, consultants to the committee; Mary P. Squiers, project director of the local rules project; and James B. Eaglin, acting director of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Stotler reported that the Judicial Conference had submitted its final report to the Congress on the Civil Justice Reform Act. She stated that the committee at its January 1997 meeting had been presented with a proposed draft of the Conference's report, prepared by a subcommittee of the Court Administration and Case Management Committee (CACM). The members had expressed a number of serious concerns with the document, which were later conveyed informally to the Administrative Office and CACM. As a result, the final Judicial Conference report was adjusted in several respects. Judge Stotler pointed out that the report included a number of specific recommendations concerning the Federal Rules of Civil Procedure.

Judge Stotler reported that the Judicial Conference at its March 1997 session had approved the committee's recommended changes in the civil and criminal rules to conform them to recent statutory amendments to the Federal Magistrates Act. The changes had been sent to the Supreme Court for action on an expedited basis.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 9-10, 1997.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej presented the report of the Administrative Office (AO), which consisted of: (1) a description of recent legislative activity; and (2) an update on various administrative steps that had been taken to enhance support services to the rules committees. (Agenda Item 3)

He reported that many bills had been introduced in the Congress that would amend the federal rules directly or have a substantial impact on them. He described several of the bills,

covering such diverse matters as grand jury size, scientific evidence, composition of the rules committees, offers of judgment, protective orders, cameras in the courtroom, forfeiture proceedings, and interlocutory appeals of class certification decisions.

Judge Stotler pointed out that Mr. Rabiej and the rules office had prepared written responses to the Congress setting forth the Judiciary's positions on these various legislative initiatives. She emphasized that the AO had prepared the responses in close coordination with the chairs and reporters of the Standing Committee and advisory committees. All the letters had been carefully written and approved, and the judiciary's positions had been formulated under very tight deadlines.

One of the members suggested that it might be productive for individual members of the rules committees to contact their congressional representatives on some of the legislative proposals. Judge Stotler responded that she would be pleased to take advantage of the services of the members.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Eaglin presented an update on the Federal Judicial Center's recent publications, educational programs, and research projects. (Agenda Item 4) Among other things, he reported that the Center was in the process of updating the manual on scientific evidence and hoped to have a new edition ready by the middle of 1998. He also pointed out that the Center was in the process of conducting a detailed survey of 2,000 attorneys to elicit their experiences with discovery practices in the federal courts. The results would be presented to the Advisory Committee on Civil Rules at the committee's September 1997 meeting.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Logan presented the report of the advisory committee, as set forth in his memorandum and attachments of May 27, 1997, and his memorandum of June 10, 1997 (Agenda Item 8).

He reported that the advisory committee had completed its style revision project to clarify and improve the language of the entire body of Federal Rules of Appellate Procedure. It now sought Judicial Conference approval of a package of proposed style and format revisions embracing all 48 appellate rules and Form 4. The comprehensive package had been developed by the committee in accordance with the *Guidelines for Drafting and Editing Court Rules* and with the assistance of the Standing Committee's Style Subcommittee and its style consultant, Bryan A. Garner.

Judge Logan stated that the public comments received in response to the package had not been very numerous, but they were very favorable to the revisions. He noted that judges and legal writing teachers had expressed great praise for the results of the project, and many judges had also commented orally that the revised rules were outstanding. Only one negative comment had been received during the publication period.

Rules With Substantive Changes

FED. R. APP. P. 5 and 5.1

Judge Logan reported that the Standing Committee had tentatively approved proposed consolidation of Rule 5 and Rule 5.1 and revisions to Form 4 at its June 1996 meeting, after the package of rules revisions had been published. Accordingly, these additional changes were published separately in August 1996.

Judge Logan pointed out that Rule 5 governs interlocutory appeals under 28 U.S.C. § 1292(b), while Rule 5.1 governs discretionary appeals from decisions of magistrate judges under authority of 28 U.S.C. § 636(c). The advisory committee had not contemplated making substantive changes in either of these two rules. But when the Advisory Committee on Civil Rules proposed publication of a new Civil Rule 23(f), authorizing discretionary appeals of class certification decisions, the appellate committee concluded that a conforming change needed to be made in the appellate rules. It decided that the best way to amend the rules was to consolidate rules 5 and 5.1 into a single, generic Rule 5 that would govern all present, and all future, categories of discretionary appeals. In late 1996, the Congress enacted the Federal Courts Improvements Act of 1996, which eliminated appeals from magistrate judges to district judges in § 636(c) cases and made Rule 5.1 obsolete.

Judge Logan said that following publication the advisory committee added language to paragraph (a)(3) to specify that the district court may amend its order to permit an appeal "either on its own or in response to a party's motion." It also added the term "oral argument" to the caption of subdivision (b), made other language changes, and included a reference in the committee note to the Federal Court Improvements Act of 1996.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP .P. 22

Judge Logan reported that the Anti-Terrorism and Effective Death Penalty Act of 1996 had amended Rule 22 directly. It also created two statutory inconsistencies. First, it extended the statutory habeas corpus requirements, including the requirement of a certificate of appealability, to proceedings under 28 U.S.C. § 2255. Accordingly, the caption to Rule 22, as

enacted by the statute, was amended to refer to 28 U.S.C. § 2255 proceedings. But the text of the rule made no reference to 28 U.S.C. § 2255. Second, the statute created an inconsistency between 28 U.S.C. § 2253, which provides that a certificate of appealability may be issued by "a circuit justice or judge," and Rule 22(b), which provides that the certificate may be issued by "a district or circuit judge." It was therefore unclear whether the statute authorizes a district judge to issue a certificate of appealability.

Judge Logan said that he had made telephone calls and had sent letters to the Congress when the legislation was pending, pointing to these drafting problems and offering assistance in correcting them. The Congress, however, had not shown interest in correcting the inconsistencies. Following enactment of the statute, additional attempts had been made to ascertain how the Congress would like to have the ambiguities resolved. Again, no direction was received, other than a suggestion that the problem should be resolved by the courts. Through case law development, three circuits have construed the reference in 28 U.S.C. § 2253 to a "circuit justice or judge" to include a district judge. The advisory committee followed that case law in revising the rule.

Judge Logan stated that the advisory committee had worked from the text of Rule 22, as enacted by the Congress, and had made several style improvements in it. It also recommended three substantive changes in subdivision (b) to eliminate the statutory inconsistencies.

1. The rule would be made explicitly applicable to 28 U.S.C. § 2255 proceedings.

2. The rule would allow a certificate of appealability to be issued by "a circuit justice or a circuit or district judge."

3. Since the rule would now govern 28 U.S.C. § 2255 proceedings, the waiver of the need for a certificate of appealability would apply not only when a state or its representative appeals, but also when the United States or its representative appeals.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 26.1

Judge Logan said that Rule 26.1, governing corporate disclosure statements, had been amended only slightly after publication. The advisory committee, for example, substituted the Arabic number "3" for the word "three." The proposal had been coordinated with the Committee on Codes of Conduct.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 27

Judge Logan stated that after publication the advisory committee had made a substantive change in Rule 27, dealing with motion practice. In paragraph (a)(3)(A), the committee provided that "[a] motion authorized by rules 8, 9, 18, or 41 may be granted before the 10-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner." The committee was of the view that if a court acts on these motions, it should so notify the parties.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 28

Judge Logan stated that the advisory committee had made no changes in the rule, dealing with briefs, after publication.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 29

Judge Logan reported that the only significant change made in Rule 29 (brief of an amicus curiae) following publication was to add the requirement that an amicus brief must include the source of authority for filing the brief.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 32

Judge Logan said that following publication the advisory committee had made a few changes in Rule 32, governing the form of briefs.

The committee decided to retain 14-point typeface as the minimum national standard for briefs that are proportionally spaced. It had received many comments from appellate judges that the rule should require the largest typeface possible. But it then ameliorated the rule by giving individual courts the option of accepting briefs with smaller type fonts.

One of the members pointed out that the object of the advisory committee was to have a rule that governed all courts, making it clear that a brief meeting national standards must be accepted in every court of appeals. There was, however, substantial disagreement as to what the specific national standards should be. The compromise selected by the advisory committee was to set forth the minimum standard of 14-point typeface—meeting the needs of judges who want large type—but allowing individual courts to permit the filing of briefs with smaller type if they so chose.

Judge Logan pointed out that the advisory committee had eliminated the typeface distinction between text and footnotes and the specific limitation on the use of boldface. He added that the rule as published had included a limit of 90,000 characters for a brief. The advisory committee discovered, however, that some word processing programs counted spaces as characters, while others did not. Accordingly, the committee eliminated character count in favor of a limit of 14,000 words or 1,300 monofaced lines of text. He pointed out that a 50-page brief would include about 14,000 words.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 35

Judge Logan reported that the advisory committee had made post-publication changes in subdivision (f), dealing with a court's vote to hear a case en banc. He explained that the advisory committee had considered adopting a uniform national rule on voting, but the chief judges of the courts of appeals expressed opposition. There are different local rules in the courts of appeals on such issues as quorum requirements and whether senior judges may vote. The advisory committee decided, accordingly, to let the individual courts of appeals handle their own voting procedures.

Judge Stotler expressed concern about the special committee note to the rule. It would "urge" the Supreme Court to delete the last sentence of the Court's Rule 13.3 (which provides that a suggestion made to a court of appeals for a rehearing en banc is not a petition for rehearing within the meaning of that rule unless so treated by the court of appeals). She said that the note was designed to help practitioners avoid a trap in the rules, but suggested that it might be phrased simply to point out that the last sentence of the Supreme Court's rule might not be needed. Judge Logan responded that it would be better simply to delete the special note.

Judge Stotler also expressed concern that there might be debate or controversy in the Judicial Conference or the Supreme Court over the change in terminology from "in banc" to "en banc." Judge Logan replied that the advisory committee proposed including a special paragraph in the cover letters or memoranda to the Conference and the Court explaining the reasons for the change. He noted, for example, that the committee's research had shown that the Supreme Court

itself had used the term "en banc" 12 times as often in its opinions as it had used "in banc." Similarly, a review of the decisions of the courts of appeals also showed an overwhelming preference for "en banc." He added that the committee believed strongly that the rules revision package should not be held up over this usage and would urge that the package of revisions be approved, regardless of whether the Conference and the Court preferred "en banc" or "in banc."

Judge Logan added that a similar explanation was needed in the cover letters to explain the committee's use of "must," rather than "shall." The advisory committee would elaborate in the letters why it was preferable to follow that style convention, but it would also advise the Conference and the Court not to hold up the package of revisions over this particular usage.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 41

The amended rule provides that the filing of either a petition for rehearing en banc or a motion for a stay of mandate pending petition to the Supreme Court will delay the issuance of the mandate until the court disposes of the petition or motion. Judge Logan reported that the only change made by the advisory committee after publication was to provide that a stay may not exceed 90 days unless the party who obtained the stay files a petition for a writ of certiorari and notifies the clerk of the court of appeals in writing of the filing of the petition.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FORM 4

Judge Logan reported that the proposed revision of Form 4 (in forma pauperis affidavit) had been initiated at the request of the clerk of the Supreme Court, who had commented that the current form did not contain sufficient financial information to meet the needs of the Court. Shortly thereafter, the Congress enacted the Prison Litigation Reform Act of 1996, requiring prisoners filing civil appeals to provide more detailed information for the court to assess their eligibility to proceed in forma pauperis.

Judge Logan stated that the revised form was based in large part on the form used in the in forma pauperis pilot program in the bankruptcy courts. After publication, the advisory committee made two changes: (1) requiring the petitioner to provide employment history only for the last two years; and (2) making the form applicable to appeals of judgments in civil cases.

The committee voted without objection to approve the revised form and send it to the Judicial Conference.

Rules With Style Changes Only

Judge Logan reported that the advisory committee had made no post-publication changes in FED. R. APP. P. 1, 7, 12, 13, 14, 15.1, 16, 17, 19, 20, 33, 37, 38, 42, and 44.

He said that tiny grammatical changes had been made post-publication in FED. R. APP. P. 2, 6, 8, 10, 11, 15, 18, 23, 24, 36, 40, 43, 45, and 48. He also directed the committee's attention to minor changes made in FED. R. APP. P. 3, 4, 9, 21, 25, 26, 30, 31, 34, 39, 46, and 47, and to rule 3.1, which would be abrogated because of recent legislation..

Professor Mooney presented a number of minor style changes suggested by Mr. Spaniol to FED. R. APP. P. 3, 4, 10, 25, and the caption to title IV of the appellate rules.

Mr. Spaniol added that Form 4 was the only form being revised. He suggested that the committee might wish to state expressly in its report that no changes were being made in the other appellate forms (1, 2, 3, and 5). Alternatively, the committee might include the text of these unchanged forms in the package of revisions in the interest of having a complete package of all 48 rules and all five forms. Judge Logan agreed to the latter suggestion. He also agreed with Mr. Spaniol's suggestion that a table of contents be included in the package.

The committee voted without objection to approve the proposed amendments above and send them to the Judicial Conference.

Cover Memorandum

Judge Logan volunteered to prepare a draft communication for the Standing Committee to submit to the Judicial Conference explaining the style revision project and the style conventions followed by the advisory committee. He said that he would include in the communication a discussion of the committee's decisions to use:

1. "en banc" rather than "in banc";

2. "must" rather than "shall";

3. indentations and other format techniques to improve readability; and

4. a side-by-side format to compare the existing rules with the revised rules.

Judge Stotler inquired whether it would be advisable to send an advance copy of the style revision package to the Executive Committee of the Judicial Conference. One of the members responded that the Executive Committee might be asked to place the package on the consent calendar of the Conference.

Judge Stotler also stated that it was important to present the package of revisions to the Supreme Court and the Congress in the side-by-side format. She pointed out that the physical layout of the rules, including indentations, was an integral part of the package. She asked whether the Government Printing Office would print the material in that format. Mr. Rabiej replied that GPO would print the rules in whatever format the Supreme Court approved.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier and Professor Resnick presented the report of the advisory committee, as set forth in Judge Duplantier's memorandum and attachments of May 12, 1997. (Agenda Item 10)

Revised Official Forms for Judicial Conference Approval

Judge Duplantier reported that the advisory committee's project to revise the official bankruptcy forms had been initiated in large part in response to comments from bankruptcy clerks of court that some of the existing forms were difficult for the public to understand and had generated numerous inquiries and requests for assistance. The advisory committee's subcommittee on forms worked on the revisions for about two years, and the package of revised forms attracted more than 200 comments during the publication period. The subcommittee and the full advisory committee made a number of additional changes in the forms as a result of the comments.

Judge Duplantier explained that the main purposes of the advisory committee were to make the forms clearer for the general public and to provide more complete and accurate descriptions of parties' rights and responsibilities. To that end, he said, the committee had to enlarge the typeface and expand the text of certain forms. As a result, some of the forms—such as the various versions of Form 9—will now have to be printed on both back and front sides, adding some cost for processing. The advisory committee, however, was satisfied that the marginal cost resulting from expansion of the forms would be more than offset by reductions in the number of inquiries made to clerks' offices and reductions in the number of documents that contain errors.

Judge Duplantier said that it would be advisable to specify a date for the revised forms to take effect. He pointed out that the revisions in bankruptcy forms normally take effect upon approval by the Judicial Conference. Several persons, however, had suggested to the committee that additional time was needed to phase in the new forms, to print them, to stock them, and to make needed changes in computer programs. Therefore, the advisory committee recommended that the revised forms take effect immediately on approval by the Judicial Conference in September 1997, but that use of them be mandated only on or after March 1, 1998.

FORM 1

Professor Resnick reported that Form 1 (voluntary petition) had been reformatted based on suggestions received during the public comment period. No substantive changes had been made by the advisory committee following publication.

FORM 3

Professor Resnick pointed out that the advisory committee had to make a policy decision with regard to Form 3 (application and order to pay a filing fee in installments). The current form, and rule 1006(b), on which it is based, provide that a debtor who has paid a fee to a lawyer is not eligible to pay the filing fee in installments. Neither the form nor the rule, however, prohibits the debtor from applying for installment payments if fees have been paid to a non-attorney bankruptcy petition preparer.

The advisory committee had received comments during the publication period that the disqualification from paying the filing fee in installments should apply if a debtor has made payments either to an attorney or to a bankruptcy petition preparer. Professor Resnick pointed out, though, that most debtors who apply for installment payments proceed pro se and may be unaware of the disqualification rule. The fiduciary responsibility that an attorney has to advise a debtor about the right to pay the filing fee in installments is not present when a non-attorney preparer assists the debtor.

Therefore, the advisory committee concluded that payment of a fee to a non-attorney bankruptcy petition preparer before commencement of the case should not disqualify a debtor from paying the filing fee in installments. Nevertheless, the bankruptcy petition preparer may not accept any fee *after* the petition is filed until the filing fee is paid in full.

FORM 6

Professor Resnick stated that the advisory committee had made only a technical change in Form 6, Schedule F (creditors holding unsecured nonpriority claims).

FORM 8

Professor Resnick said that no substantive changes had been made after publication in Form 8, the chapter 7 individual debtor's statement of intention regarding the disposition of secured property. He noted that the form had been revised to track the language of the Bankruptcy Code more closely and to clarify that debtors may not be limited to the options listed on the form.

FORM 9

Professor Resnick explained that Form 9 (notice of commencement of case under the Bankruptcy Code, meeting of creditors, and fixing of dates) was used in great numbers in the bankruptcy courts. He pointed out that the advisory committee made a number of changes following publication to refine and clarify the instructions for creditors and to conform them more closely to the provisions of the Bankruptcy Code. He added that the form had been redesigned by a graphics expert and expanded to two pages to make it easier to read.

FORM 10

Professor Resnick said that Form 10 (proof of claim) had been reformatted by a graphics expert. The advisory committee had made additional changes after publication to make the form clearer and more accurate. The revisions make it easier for a claimant to specify the total amount of a claim, the amount of the claim secured by collateral, and the amount entitled to statutory priority.

FORM 14

Professor Resnick said that no substantive changes had been made following publication in Form 14 (ballot for accepting or rejecting [a chapter 11] plan).

FORM 17

Professor Resnick pointed out that revised Form 17 (notice of appeal under § 158(a) or (b) from a judgment, order, or decree of a bankruptcy judge) took account of a 1994 statutory change providing that appeals from rulings by bankruptcy judges are heard by a bankruptcy appellate panel, if one has been established, unless a party elects to have the appeal heard by the district court. He noted that revised Form 17, as published, had included a statement informing the appellant how to exercise the right to have the case heard by a district judge, rather than a bankruptcy appellate panel. Following publication, the advisory committee expanded the statement to inform other parties that they also had the right to have the appeal heard by the district court.

FORM 18

Professor Resnick said that Form 18 (discharge of debtor) had been revised after publication to provide greater clarity. He noted that the instructions, which consist of a plain English explanation of the discharge and its effect, had been moved to the reverse side of the form.

FORMS 20A and 20B

Professor Resnick said that Forms 20A (notice of motion or objection) and 20B (notice of objection to claim) were new. He explained that many parties in bankruptcy cases do not have lawyers. They do not readily understand the nature of the legal documents they receive, such as motion papers and objections to claims. Thus, they do not know what they have to do to protect their rights. The new forms provide plain-English, user-friendly explanations to parties regarding the procedures they must follow to respond to certain motions and objections.

One of the members inquired as to the significance of the dates printed at the top of the forms. Judge Duplantier recommended that the date shown on each form should be the date on which it is approved by the Judicial Conference.

The committee voted without objection to approve all the proposed revisions in the forms and send them to the Judicial Conference, with a recommendation that they become effective immediately, but that use of the amended forms become mandatory only on March 1, 1988.

Rules Amendments for Publication

Judge Duplantier reported that the advisory committee had deferred going forward with minor changes in the rules in order to present the Standing Committee with a single package of proposed amendments. He pointed out that the package included amendments to 16 rules, seven of which dealt with a single situation (FED. R. BANKR. P. 7062, 9014, 3020, 3021, 4001, 6004, and 6006).

FED. R. BANKR. P. 7062, 9014, 3020, 3021, 4001, 6004, and 6006

FED. R. BANKR. P. 7062 incorporates FED. R. CIV. P. 62, which provides that no execution may issue on a judgment until 10 days after its entry. Rule 7062 applies on its face to adversary proceedings, but it is also made applicable to contested matters through Rule 9014.

Professor Resnick explained that Rule 7062 had been amended over the years to make exceptions to the 10-day stay rule for certain categories of contested matters, i.e., those involving time-sensitive situations when prevailing parties have a need for prompt execution of judgments. The advisory committee had pending before it requests for additional exceptions.

The committee decided that it was not appropriate to have a long, and expanding, laundry list of exceptions for contested matters in a rule designed to address adversary proceedings. It decided, instead, to conduct a comprehensive review of all types of contested matters and determine which should be subject to the 10-day stay, taking into account such factors as the need for speed and whether appeals would be effectively mooted unless the order is stayed. As a

result of the review, the advisory committee concluded as a matter of policy that the 10-day stay should *not* apply to contested matters generally, unless a court rules otherwise in a specific case.

Accordingly, the advisory committee decided: (1) to delete the language in Rule 9014 that makes Rule 7062 applicable to contested matters; and (2) to delete the list of specific categories of contested matters in Rule 7062. Thus, as amended, Rule 7062 would apply in adversary proceedings, but not in contested matters.

Professor Resnick added that the advisory committee had decided that there should be four specific exceptions to the general rule against stay of judgments in contested matters. The exceptions should be set forth, not in Rules 7062 or 9014, but in the substantive rules that govern each pertinent category of contested matter. Accordingly, the advisory committee recommended that the following categories of orders be stayed for a 10-day period, unless a court orders otherwise:

1. FED. R. BANKR. P. 3020(e) and 3021 - an order confirming a plan;

2. FED. R. BANKR. P. 4001 - an order granting a motion for relief from the automatic stay under Rule 4001(a)(1);

3. FED. R. BANKR. P. 6004 - an order authorizing the use, sale, or lease of property other than cash collateral; and

4. FED. R. BANKR. P. 6006 - an order authorizing a trustee to assign an executory contract or unexpired lease under 11 U.S.C. § 365(f).

The committee voted without objection to approve the proposed amendments for publication.

FED. R. BANKR. P. 1017

Professor Resnick stated that Rule 1017, governing dismissal or conversion of a case, currently provides that all parties are entitled to notice of a motion by a United States trustee to dismiss a chapter 7 case for failure to file schedules. The advisory committee would revise the rule to provide that only the debtor, the trustee, and other parties specified by the court are entitled to notice. He pointed out that the revision would avoid the expense of sending notices to all creditors.

FED .R. BANKR. P. 1019

Professor Resnick reported that several changes were being proposed in Rule 1019, governing conversion of a case to chapter 7. He said that the revised rule would clarify that a

motion for an extension of time to file a statement of intention regarding collateral must be filed or made orally before the time expires. The amendments would also clarify ambiguities in the rule regarding the method of obtaining payment of claims for administrative expenses. The rule would specify that a holder of such claims must file a timely request for payment under § 503(a) of the Code, rather than a proof of claim, and would set a deadline for doing so. The committee would conform the rule to recent statutory amendments and provide the government a period of 180 days to file a claim.

FED. R. BANKR. P. 2002

Professor Resnick stated that the proposed revisions to Rule 2002(a)(4) would save noticing costs. Under the current rule, notice of a hearing on dismissal of a case for failure of the debtor to file schedules must be sent to every creditor. The rule would be amended to conform with the revised Rule 1017 requiring that notice be sent only to certain parties. The same revision would be made with regard to providing notice of dismissal of a case because of the debtor's failure to pay the prescribed filing fee.

FED. R. BANKR. P. 2003

Professor Resnick noted that Rule 2003(d)(3) governs the election of a chapter 7 trustee. It requires the United States trustee to mail a copy of a report of a disputed election to any party in interest that has requested it. The revised rule would give a party 10 days from the date the United States trustee files the report—rather than 10 days from the date of the meeting of creditors—to file a motion to resolve the dispute.

Professor Resnick pointed out that the Congress had amended the Bankruptcy Code in 1994 to authorize creditors to elect a trustee in a chapter 11 case. The advisory committee then amended Rule 2007.1 to provide procedures for electing and appointing a trustee. The revised rule—scheduled to take effect on December 1, 1997—provides that the election of a chapter 11 trustee is to be conducted in the manner provided in Rule 2003(b)(3) for electing a chapter 7 trustee. The proposed revisions to Rule 2003(d), governing the report of a trustee's election and the resolution of a disputed election, are patterned after newly-revised Rule 2007.1(b)(3).

FED. R. BANKR. P. 4004 and 4007

Professor Resnick said that the advisory committee made companion changes in Rule 4004, governing objections to discharge of the debtor, and Rule 4007, governing complaints to determine the dischargeability of a particular debt. The advisory committee proposed amending these rules to clarify that the deadline for filing a complaint objecting to discharge or dischargeability is 60 days after the first date set for the meeting of creditors, whether or not the meeting is actually held on that date. The committee would also revise both rules to provide that a motion for an extension of time to file a complaint must be filed before the time has expired.

FED. R. BANKR. P. 7001

Professor Resnick explained that Rule 7001, which defines adversary proceedings, would be amended to provide that an adversary proceeding is not necessary to obtain injunctive or other equitable relief if that relief is provided for in a reorganization plan.

FED. R. BANKR. P. 7004

Professor Resnick noted that Rule 7004(e), governing service, provides that service of a summons (which may be by mail) must be made within 10 days of issuance. The proposed revision would carve out an exception by providing that the 10-day limit does not apply if the summons is served in a foreign country.

FED. R. BANKR. P. 9006

Professor Resnick noted that Rule 9006(c)((2), as amended, would prohibit any reduction of the time fixed for filing a request for payment of an administrative expense incurred after commencement of a case and before conversion of the case to chapter 7.

The committee voted without objection to approve all the proposed amendments above for publication.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Niemeyer presented the report of the advisory committee, as set forth in his memorandum of May 21, 1997 (Agenda Item 5).

Amendments for Judicial Conference Approval

FED. R. CIV. P. 23

Judge Niemeyer reported that the advisory committee had studied class actions and mass tort litigation in depth for nearly six years. During the course of that study, it had actively solicited the views of lawyers, judges, and others on every aspect of class litigation. The advisory committee, he said, had concluded that most of the perceived problems affecting class litigation and mass torts simply could not be resolved through the federal rulemaking process. After intense investigation and discussion, the advisory committee published the following five relatively modest proposals to amend Rule 23:

1. Expanding the list of factors that a judge must consider undr Rule 23(b)(3) in determining whether common questions of law or fact predominate over questions

affecting only individual class members and whether a class action is superior to other available methods for adjudicating the controversy;

2. Providing explicit authorization for a judge to certify a settlement class;

3. Requiring a judge to conduct a hearing before approving a settlement;

4. Requiring a judge to make a determination as to class certification "when practicable," rather than "as soon as practicable"; and

5. Authorizing a discretionary, interlocutory appeal of a class certification decision.

Judge Niemeyer stated that the advisory committee had received an enormous volume of responses on the proposed changes to Rule 23 and had conducted three public hearings . He stated that the comments had been very thoughtful and informative, and the debate had been conducted on the highest intellectual and practical level. Following the publication period and the hearings, the committee asked the Administrative Office to collect and publish the statements of lawyers, academics, and others for consideration by the Standing Committee and the advisory committees.

Judge Niemeyer reported that excellent points had been made by commentators on each side of each proposal. In the end, however, it was clear to the advisory committee that there are deep philosophical divisions of opinion on many of the issues. Moreover, the advisory committee had decided that it would have to defer further consideration of settlement class issues until the Supreme Court rendered a decision in *Amchem Products, Inc. v. Windsor.*

He stated that the advisory committee at this time was seeking Judicial Conference approval of only two proposed changes in Rule 23:

1. a new subdivision (f) that would authorize interlocutory appeals, and

2. an amendment to paragraph (c)(1) that would require a court to make a class certification decision "when practicable."

He added that the other proposed changes in the rule had either been withdrawn by the advisory committee or were being deferred for further study.

<u>Rule 23(f) - Interlocutory Appeal</u>

Judge Niemeyer stated that there was a strong consensus within the advisory committee and among the commentators in favor of permitting a court of appeals—in its sole discretion—to take an appeal from a district court order granting or denying class action certification. The

proposal would enable the courts of appeals to develop the law. This change alone, he said, might well prove to be the most effective solution to many of the problems with class actions. He emphasized that the advisory committee believed that appellate review of class action determinations was very beneficial and should not be impeded by the restraints imposed by mandamus and 28 U.S.C. § 1292(b). He added that the appellate review provision was not philosophically connected to any of the other proposed changes in Rule 23. Therefore, it should be separated from the other proposed changes and approved by the Judicial Conference immediately.

Several members pointed out that it was generally not appropriate to proceed with piecemeal changes in a rule, especially when additional changes in a rule are anticipated in the next year or two. But the consensus of the committee was that the proposed interlocutory appeal provision of Rule 23(f) was sufficiently distinct from the other changes in the rule under consideration and of sufficient benefit that it justified an exception to the normal rule.

One of the members said that the change might result in thousands of additional cases in the courts of appeals and add substantial costs to litigants, especially in civil rights cases. But many of the members of the committee, including its appellate judges, stated that the courts of appeals make prompt decisions—usually within a matter of days—on whether to accept an interlocutory appeal. And once they accept an interlocutory appeal, they normally decide it on the merits with dispatch. Several members emphasized that the courts of appeals simply will not take cases that do not appear to have merit. Some judges added that class action decisions were an important area of jurisprudence that could be helped by having more appellate decisions, especially at early stages of litigation before the parties incur great costs and delays.

The committee voted without objection to approve the proposed new Rule 23(f) and send it to the Judicial Conference.

Rule 23(c)(1) - "When practicable"

Some members observed that changing the time frame for the court to make a class action determination from "as soon as practicable" to "when practicable" merely conforms the rule to current practice in the federal courts. They argued that the amendment provides a district judge with needed flexibility to deal with the various categories and conditions of class actions in the district courts. Judge Niemeyer pointed out that district judges already exercise that flexibility without negative consequence, and no adverse comments had been received on the proposal during the public comment period.

Others argued, though, that the proposed amendment would make a significant change in the rule because it could result in district judges delaying their certification decisions. They pointed out that in 1966 the drafters of Rule 23 had made a conscious decision to require the court to make a prompt class certification decision, leaving substantive decisions to be made later

in the case when they would be binding on all parties. It was suggested, too, that the impact of the class certification decision on absentees was a very serious question that needed to be addressed further.

Some members suggested that the proposed amendment be deferred for further consideration by the advisory committee and included eventually with the package of other proposed amendments to Rule 23.

The motion to approve the amendment to Rule 23(c)(1) and send it to the Judicial Conference failed by a voice vote.

Other proposed amendments to Rule 23

Judge Niemeyer reported that the advisory committee had decided not to proceed with proposed new subparagraph (b)(3)(A). It would havé added as an additional matter pertinent to the court's findings of commonality and superiority "the practical ability of individual class members to pursue their claims without class certification." He explained that the advisory committee had decided that the benefits to be derived from the change were outweighed by the risk of introducing changes in the rule. The committee also abandoned further action on the proposed amendment to subparagraph (b)(3)(B), which slightly clarified the existing subparagraph (A).

Judge Niemeyer said that the advisory committee had decided to conduct further study on the proposed amendment to subparagraph (b)(3)(C). It would authorize the court to consider the maturity of related litigation involving class members in making its commonality and superiority findings. He pointed out that as a result of public comments, the committee had improved the language of the amendment to read as follows: "the extent and nature of any related litigation and the maturity of the issues involved in the controversy."

Judge Niemeyer advised that the proposed subparagraph (b)(3)(F) would add to the list of matters pertinent to the court's findings "whether the probable relief to individual class members justifies the costs and burdens of class litigation." He said that it had attracted an enormous amount of public comment, and articulate views had been expressed both in favor of and against the proposed amendment. He pointed out that the debate over the amendment had disclosed competing economic interests and basic philosophical differences as to the very purposes of Rule 23 and class actions.

He reported that the advisory committee had not made a final decision as to whether to proceed with the amended Rule 23(b)(3)(F). It would continue to study the matter further and consider five possible options at its next meeting.

He added that the advisory committee had also deferred action on the proposed new paragraph (b)(4), regarding settlement classes, until after Supreme Court action in *Amchem Products, Inc. v. Windsor.*

Judge Niemeyer reported that the advisory committee would consider all remaining class action proposals as part of a package at its October 1997 meeting. He reemphasized that the class action debate had evoked substantial public interest and had disclosed deep philosophical divisions. On the one hand, there had been a great deal of support for amending the rule to eliminate cited abuses in current practices, particularly class actions resulting in insignificant awards for individual, largely uninterested, class members and large fees for attorneys. On the other hand, many commentators argued that class actions, regardless of the monetary value of individual awards, serve vital social purposes.

He added that sentiment had also been expressed in favor of making no additional changes in the rule because: (1) resolution of the perceived problems may well lie beyond the jurisdiction of the rules committees to correct; and (2) the courts of appeals may resolve many of the problems through the development of case law.

Informational Items

Judge Niemeyer reported that the advisory committee was making good progress in its comprehensive study of discovery. It was evaluating the role of discovery in civil litigation, its cost, and its relation to the dispute-resolution process. As part of the review, the committee would consider whether any changes could be made to lessen the cost of discovery while retaining the value of the information obtained.

In addition, he pointed out that both the Civil Justice Reform Act of 1990 and the 1993 amendments to the Federal Rules of Civil Procedure had authorized substantial local court variations in pretrial procedures. He stated that the advisory committee would like to return to greater national uniformity in civil practice as a matter of policy, but it realized the difficulty of gaining acceptance of uniform national rules after several years of local variations.

Judge Niemeyer stated that the advisory committee had planned a major symposium on discovery, to be held in September 1997 at Boston College Law School. Knowledgeable members of the bar and the academic community had been invited to identify and explore issues and make recommendations to the committee. He invited the members of the Standing Committee to attend and participate in the conference.

He reported that the advisory committee had appointed an ad hoc subcommittee to review proposed changes in the admiralty rules. The subcommittee was working closely with the admiralty bar and the Department of Justice. He pointed out that the provisions in the admiralty rules dealing with forfeiture of assets were particularly important since the admiralty rules

govern, by reference, many categories of non-admiralty forfeiture proceedings As part of its drafting process, the subcommittee had concluded that the time limits set forth in the rules for regular admiralty cases should be different from those for other categories of forfeiture cases.

Judge Niemeyer expressed concern that several bills had been introduced in the Congress to legislate forfeiture proceedings. The drafters had not had the benefit of the broad input that the advisory committee and its subcommittee had received from the bar and others. As a result, the bills, among other things, overlooked important distinctions between admiralty proceedings and other types of forfeiture proceedings.

Judge Niemeyer reported that the Civil Rules Committee was studying the inconsistent and misleading provisions governing the timing of the answer to a writ of habeas corpus under Civil Rule 81(a)(2) and Rule 4 of the § 2254 Rules, which was adopted after Rule 81(a)(2) was last amended. Correcting Rule 81 would be directly affected by and dependent on any change in the rules governing § 2254 proceedings involving the timing of the habeas corpus answer. Accordingly, Judge Niemeyer recommended that this topic should be initially addressed by the Criminal Rules Committee. Judge Jensen and Professor Schlueter, chair and reporter, respectively of the Criminal Rules committee agreed to have their committee study the issue.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Jensen presented the report of the advisory committee, as set forth in his memorandum of May 21, 1997 (Agenda Item 6).

Amendments for Judicial Conference Approval

FED. R. CRIM. P. 5.1 AND 26.2

Judge Jensen pointed out that the amendments to Rules 5.1 and 26.2 were companion amendments. Rule 26.2 governs the production of prior statements of a witness once the witness has testified on direct examination. It has been amended several times in recent years to expand its scope to other categories of criminal proceedings besides trials, such as sentencing hearings, detention hearings, and probation revocation hearings. The proposed amendments would extend the rule's application to preliminary examinations conducted under Rule 5.1.

One member raised the possibility that the rule might be read as encompassing a witness at a preliminary examination who has testified previously at a grand jury proceeding. Some members responded that the situation was at most a theoretical possibility, since preliminary examinations are not conducted once a grand jury returns an indictment.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. CRIM. P. 31

Judge Jensen explained that the proposed amendments to Rule 31 would require that polling of a jury be conducted individually. He added, though, that the rule did not require individual polling as to each count.

The chair noticed that the text of the amended rule used "must," rather than "shall." She suggested that the use of "shall" might be more prudent in light of the Supreme Court's concern over making style changes in the rules on a piecemeal basis. Judge Jensen and Professor Schlueter concurred and said that the advisory committee would continue to use "shall" until it was ready to send forward a complete style revision of the entire body of criminal rules.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference

FED. R. CRIM. P. 33

Judge Jensen stated that under the current rule, a motion for a new trial based on newly-discovered evidence must be made within two years after the "final judgment." The proposed amendment, as published, would have established a time period of two years from "the verdict or finding of guilty." During the public comment period, the committee received comments that the proposal would seriously reduce the amount of time available to file a motion for a new trial under some circumstances. Accordingly, the advisory committee decided that an additional year was appropriate, and it set the deadline at three years from the verdict of finding of guilty.

One of the members questioned the use of the word "must" on lines 9 and 12. Following discussion, the consensus of the committee was that the use of "may" in the text of the existing rule should be retained.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference

FED. R. CRIM. P. 35

Judge Jensen pointed out that the proposed amendments to Rule 35(b) would allow a court to aggregate a defendant's pre-sentencing and post-sentencing assistance in determining whether to reduce a sentence to reflect the defendant's "substantial assistance" to the government.

Judge Jensen agreed to a suggestion to delete the comma in line of the text. He did not agree to change the words "subsequent assistance" to "later assistance," because the words "subsequent assistance" are contained in the pertinent statute and have been used in the case law.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference

FED. R. CRIM. P. 43

Judge Jensen explained that the proposed amendment to the rule was intended to provide consistency in the situations when the defendant's presence is required at a resentencing proceeding.

Judge Jensen noted that Rule 35(a) deals with a situation when the sentence has been reversed on appeal and the case remanded for resentencing. This involves a "correction" of the sentence, and the defendant should be present for the resentencing. But a court should be permitted to reduce or correct a sentence under Rule 35(b) or (c) without the defendant being present. Rule 35(b) deals with reduction of a sentence for substantial assistance. Rule 35(c) gives the trial court seven days to correct a sentence for arithmetical, technical, or other clear error. There was also no need to require the presence of the defendant at resentencing hearings conducted under 18 U.S.C. § 3582(c). That statute governs resentencing conducted as a result of retroactive changes in the sentencing guidelines or a motion by the Bureau of Prisons to reduce a sentence based on "extraordinary and compelling reasons." Judge Jensen emphasized, however, that the court retains discretion to require or permit a defendant to attend any of these resentencing proceedings.

The committee voted without objection to approve the proposed amendment and send it to the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 6

Judge Jensen reported that the proposed amendments to the rule addressed two issues. First, under the present rule, necessary interpreters are authorized to be present during grand jury sessions, but not during grand jury deliberations. The proposed amendment would allow an interpreter for a deaf juror to be present while the grand jury is deliberating or voting.

Second, under the present rule, the entire grand jury must be present in the courtroom when an indictment is returned. The proposed amendment would authorize the foreperson or deputy foreperson to return the indictment in open court on behalf of the jury. The amendment would save time, expense, and inconvenience by not requiring the whole grand jury to be transported to the courtroom.

In addition, Judge Jensen reported that legislation had just been introduced in the Congress by Representative Goodlatte, H.R. 1536, that would reduce the size of a grand jury to nine persons, with a minimum of seven needed to return an indictment. He pointed out that the advisory committee had not had the legislation on the agenda of its last meeting. Accordingly, it had not taken a position on its merits. Historically, however, the advisory committee from 1974 to 1977 favored a reduction in the size of the grand jury.

Judge Jensen said that the current legislation had been referred for response to the Judicial Conference's Court Administration and Case Management Committee and Criminal Law Committee. Both committees had considered the measure at their recent meetings and decided to recommend referring the matter to the Advisory Committee on Criminal Rules.

The members agreed that the proposal to reduce the size of grand juries should proceed through the normal Rules Enabling Act process, even though the process takes considerable time and the Congress might resolve the matter sooner by legislation. One member suggested, however, that the issue was potentially controversial and might not be enacted by the Congress. Judge Jensen stated that the advisory committee would consider the matter at its October 1997 meeting, and any proposed amendments to Rule 6 would proceed through the normal public comment process.

Judge Jensen argued that the two changes in Rule 6 recommended by the advisory committee should proceed to immediate publication without awaiting action regarding the size of grand juries. Several members concurred and urged publication of the current amendments.

Some members, however, questioned why the proposed amendment should be limited to interpreters for deaf jurors. And one member questioned the use of the word "deaf," favoring "hearing impaired" as the more appropriate characterization.

Judge Easterbrook moved to strike the word "deaf" from the amendment. The committee approved the motion on a voice vote, with four members opposed.

Judge Jensen and Professor Schlueter responded that the advisory committee was very reluctant to open up the exception by allowing all potential types of interpreters into the grand jury deliberations. Accordingly, it had specifically limited the amendment to interpreters for deaf jurors. One participant suggested that the advisory committee explicitly solicit public comments on whether the proposal should be broadened to cover other groups.

Judge Sear moved for reconsideration of Judge Easterbrook's amendment to strike the word "deaf" from the amendment. The committee approved the motion by voice vote.

On reconsideration, the committee approved Judge Easterbrook's motion by a 6-5 vote. Then it approved without objection the amendments to Rule 5 for publication.

One of the members suggested that the committee note to the rule was inconsistent with the text. He recommended that the advisory committee rewrite the note to Rule 6(d) to notify the public that it was seeking input on the issue of how broad the exception for interpreters should be.

FED. R. CRIM. P. 11

Judge Jensen reported that the first proposed amendment in Rule 11 would merely update the rule by changing the term "defendant corporation" to "defendant organization, as defined in 18 U.S.C. § 18."

The committee voted without objection to approve the proposed amendment for publication.

The second amendment, referred to the advisory committee by the Criminal Law Committee, would add to the Rule 11(c) colloquy a requirement that the court inform the defendant of the terms of any provision in a plea agreement waiving the defendant's right to appeal or collaterally attack the sentence. He said that it was increasingly common for plea agreements to include an agreement by the defendant not to appeal. But the current rule does not require the court to inquire into the waiver of appeal. He suggested that the amendment would provide greater certainty as to the plea the defendant enters.

The committee voted without objection to approve the proposed amendment for publication.

Judge Jensen said that the final proposed changes to the rule govern plea agreements and plea agreement procedures under Rule 11(e). They had been coordinated with the United States Sentencing Commission and the Criminal Law Committee.

He explained that the rule had never been modified to take into account the impact of the sentencing guidelines, which have enlarged the very concept of a sentence and the procedures for reaching a sentence. A court, for example, now must determine whether a particular provision of the guidelines, a policy statement of the commission, or a sentencing factor is applicable in a case. Accordingly, the amendments to Rule 11(e) would recognize that a plea agreement may address not only a particular sentence but also the applicability of a specific sentencing guideline, sentencing factor, or Commission policy statement.

A member suggested that the proposed style change in lines 18-19—from "engage in discussions with a view toward reaching an agreement" to "discuss an agreement"—was inappropriate. He recommended that the language be amended to read "agree that."

Several members expressed concern that the proposed amendment to Rule 11(e)(1)(C) would authorize the defendant and the United States attorney to agree to "facts" that are not established facts. They argued that it would further remove the judge as a check on the integrity of the sentencing process and as a guardian in assuring equal treatment for all defendants. Judge Jensen acknowledged the concern and said that the Sentencing Commission also was aware of potential problems with inappropriate agreements. Nevertheless, the advisory committee and the Commission urged publication and public comment on the matter. Mr. Pauley added that Department of Justice's internal guidelines prohibit prosecutors from agreeing to unestablished facts. It was also pointed out by several members that the ultimate bulwark against abuse is the district judge's authority to reject the plea agreement.

The committee voted without objection to approve the proposed amendments for publication.

FED. R. CRIM. P. 24

Judge Jensen explained that under the present rule, alternate jurors must be discharged when the jury retires to deliberate. The proposed amendments would eliminate this requirement, thereby giving the trial court discretion either to retain or discharge the alternate jurors.

The committee voted without objection to approve the proposed amendments for publication.

FED. R. CRIM. P. 30

Judge Jensen stated that the proposed amendments would permit the trial court, in its discretion, to require or permit the parties to file any proposed instructions before trial.

The committee voted without objection to approve the proposed amendments for publication.

FED. R. CRIM. P. 32.2

Judge Jensen reported that the proposed new Rule 32.2 would consolidate several procedural rules governing the forfeiture of assets in a criminal case. The changes had been motivated in large measure by the Supreme Court's decision in *Libretti v. United States*, 116 S. Ct. 356 (1995), which made it clear that forfeiture is a part of the sentence. The proposed new rule, accordingly, would incorporate forfeiture into the sentencing process. He pointed out that

the rule addressed the problem of third parties whose property rights needed to be protected. It also recognized that forfeiture proceedings are akin to a civil case and, therefore, provided for appropriate discovery.

Judge Jensen said that competing bills had been introduced in the Congress dealing with forfeiture of assets. Judge Stotler added that the bills were replete with references to the federal rules. She said that she had been struck by the fact that the Congress apparently wanted to move quickly on forfeiture legislation, but the subject matter was very complex and not well understood by lawyers and judges. There were already more than 100 forfeiture statutes on the books, and the outcome of the various forfeiture bills in the Congress was uncertain. Judge Stotler pointed out that the rules committees had attempted to deal only with a small part of the forfeiture problem, and she suggested that it would be preferable if the Congress enacted a uniform forfeiture code or simply referred all procedural issues to the rules process.

Judge Jensen responded that the advisory committee's proposal dealt only with criminal forfeiture as a part of sentencing. Mr. Waxman added that it would be desirable to have a concordance between the various statutes and rules and between civil and criminal forfeiture. Nevertheless, he urged that the proposed new Rule 32.2 be published for comment. He stated that forfeiture was a controversial subject, and the Department of Justice preferred to have criminal forfeiture procedures enacted carefully through the Rules Enabling Act process, rather than by legislative happenstance in the Congress.

Some of the members expressed concern over the complexity of the proposed rule and its blending of civil and criminal concepts. They suggested that consideration might be given to drafting a simple rule declaring that the pertinent property was forfeited to the government. Interested third parties, accordingly, would have to file a civil suit to assert their property rights.

The committee voted without objection to approve the proposed new rule for publication.

FED. R. CRIM. P. 54

Judge Jensen explained that the proposed amendment to the rule was technical. It would merely eliminate the reference to the United States District Court for the District of the Canal Zone, which no longer exists.

The committee voted without objection to approve the proposed amendment for publication.

Informational Items

Judge Jensen reported that the advisory committee had received a recommendation from the Federal Magistrate Judges Association that Rule 5(c) be amended to delete its restriction on a magistrate judge continuing a preliminary examination. He said that the advisory committee had concurred with the association on the merits of the proposal, but it concluded that the restriction emanated from the underlying statute, 18 U.S.C. § 3060, on which the rule is based. Therefore, the committee recommended that the Standing Committee ask the Judicial Conference to seek legislation to amend the statute.

Mr. McCabe added that the recommendation of the advisory committee had just been endorsed by the Magistrate Judges Committee of the Judicial Conference.

Judge Easterbrook moved to reject the recommendation seeking amendment of 18 U.S.C. § 3060(c) on the grounds that the proposed change should be enacted through the Rules Enabling Act process, relying eventually on operation of the supersession clause. He pointed out that the Supreme Court recently had voided the service provisions in the Suits in Admiralty Act on supersession clause grounds. *Henderson v. United States,* 116 S. Ct. 1638 (1996)

The committee voted without objection to approve the motion.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Professor Capra presented the report of the advisory committee, as set forth in Judge Fern M. Smith's memorandum of May 1, 1997 (Agenda Item 9).

Amendments for Judicial Conference Approval

FED. R. EVID. 615

Professor Capra stated that the proposed amendment to the rule took account of recent statutory changes giving crime victims the right not to be excluded from criminal trials.

Judge Easterbrook expressed concern over incorporating references to specific statutes in the rules. He pointed out that statutes are frequently amended or superseded. Therefore, he argued for a generic reference to categories of persons who may not be excluded from proceedings. **He moved that the following language be added to the end of Rule 615: "(4) a person authorized by statute to be present."** Professor Capra responded that the advisory committee had included a specific statutory reference because it believed that a generic reference might not be strong enough in light of the Congress' express interest and recent actions regarding victims' rights.

The motion was approved by voice vote without objection.

Professor Capra requested that the amendment be approved without publishing for public comment, since it was merely a conforming amendment. One of the members concurred and emphasized that it was very important to move quickly on the proposal because of congressional interest and policy in expanding victims' rights.

The committee voted by voice vote without objection that the proposed amendment was conforming and approved the rule without publication for public comment.

Amendments for Publication

FED. R. EVID. 103

Professor Capra explained that proposed new subdivision (e) addressed the issue of when a party must renew at trial an in limine objection decided adversely to the party. He noted that a version of the proposal had been published once before, but later withdrawn by the advisory committee after public comments had revealed the text to be unclear. The advisory committee then redrafted the rule, patterning it in large part on a Kentucky state court rule. He pointed out that the third sentence of the new subdivision was intended to codify *Luce v. United States,* 469 U.S. 38 (1984), which held that a criminal defendant must testify at trial in order to preserve an objection to the trial court's decision admitting the defendant's prior convictions for purposes of impeachment.

In response to a question from one of the members, Professor Capra stated that the advisory committee had deliberately limited the sentence's application to criminal cases, believing that its extension to civil cases might cause problems.

Judge Easterbrook expressed several objections to the new subdivision and moved to send it back to the advisory committee for further drafting. He argued that, as formulated, the third sentence of the proposed text would apply only when the court's ruling is conditioned on "the testimony of a witness," rather than on the introduction of evidence. He pointed out that, although the *Luce* case involved testimony, the principle on which it rested is not limited to testimony. In other words, there is no logical distinction between testimony and documentary evidence. Therefore, the court's ruling should be conditioned on admissibility, rather than on testimony. In addition, the text of the third sentence implied that the court's ruling itself was conditional. In reality, it is merely dependent on a party's decision to introduce evidence.

He also questioned the formulation of the second sentence of the subdivision, which states that a motion for an advance ruling, when definitively resolved on the record, is sufficient to "preserve error" for appellate review. The implication of the text, he said, was that the movant may preserve the claim for review, but not the opponent. He added that use of the words

"preserve error" was inappropriate, since there is no intent to preserve error. Rather, the language should be recast to state that a party need not make an exception to a particular ruling in order to preserve the right to appeal. Moreover, it is the court's definitive ruling against a party that preserves the right to appeal, not "a motion for an advance ruling."

Several members expressed support for the substance of the proposal. One lawyer-member emphasized that it represented a significant improvement over the earlier draft. **The consensus of the committee, however, was that the subdivision should be returned to the advisory committee for redrafting in light of the comments made during the discussion.**

Informational Items

Professor Capra pointed out that the committee notes to several of the Federal Rules of Evidence contained inaccuracies. The notes had been prepared to support and explain the advisory committee's draft of the rules. But the rules ultimately enacted by the Congress differed in several respects from the committee's version.

He reported, for example, that the advisory committee had reviewed the notes recently and had discovered that references in 21 notes to rules that were not in fact approved by the Congress. In some instances the committee notes were directly contrary to the positions eventually taken by the Congress. Accordingly, the committee notes were a potential trap for unwary attorneys.

He stated that the advisory committee was considering preparing a short list of editorial comments pointing out the discrepancies between the notes and the rules and asking law book publishers to include the comments in their publications of the rules. He explained that the proposed comments would consist of short bullets set forth at each troublesome section of the rules. The members were asked for their initial views of this proposed course of action.

A couple of participants suggested that it might be preferable to inform law book publishers that the committee notes are not meaningful and should no longer be included in their publications. Other participants, however, responded that the notes were a part of the legislative history of the rules and should continue to be made available. Some members suggested that any action that would help clarify the matter for users should be encouraged. Professor Coquillette added that the reporters had agreed to discuss the matter at their working luncheon.

STATUS REPORT ON THE ATTORNEY CONDUCT STUDY

Professor Coquillette reported that he had completed work on the several background studies of attorney conduct that the committee had requested of him. He pointed out that the last two studies—analyzing the case law under FED. R. APP. P. 46 and bankruptcy cases involving

attorney conduct rules—were set forth as Agenda Item 7. He thanked the Federal Judicial Center in general, and Marie Leary in particular, for invaluable assistance in conducting the studies, especially the survey of existing district court practices and preferences. He also thanked Judge Logan and Professor Mooney for their help in compiling the appellate court study and Patricia Channon for her help on the bankruptcy study. He concluded that the committee had now studied attorney conduct in the federal courts in every meaningful way.

Potential Courses of Action

Professor Coquillette suggested that the committee might wish to consider four possible courses of action regarding attorney conduct:

1. Do nothing.

2. Draft a model local rule on attorney conduct that could be adopted voluntarily by the district courts, and possibly by the courts of appeals.

3. Draft a small number of national rules to govern attorney conduct in the areas of primary concern to bench and bar.

4. Draft both a model local rule and uniform national rules.

He stated that the committee had conducted two special conferences on attorney conduct with knowledgeable lawyers, professors, and state bar officials. At the conferences, the participants had expressed a wide range of diverging views on how best to address attorney conduct issues. There was no clear consensus among the participants as to whether conduct matters should be governed by uniform national rules or by local court rules. Nevertheless, the one thing that all the participants agreed upon was that the present system was deficient in several respects and that the rules committees should take some kind of action.

He pointed out that the principal advantage of national rules is that they would set forth a uniform, national standard applicable in all federal courts. National rules, moreover, would have the benefit of public comment and national debate under the Rules Enabling Act process. On the other hand, a model local rule could be adopted more expeditiously and would not have to be submitted to the Congress. He noted that the recent Federal Judicial Center survey had shown that 30% of the courts favored national rules on attorney conduct, while 62% favored a local-rule approach. He added that, to guide the committee's deliberations, he had included in the agenda materials samples of: (1) a model local rule for the courts of appeals; (2) an amended version of FED. R. APP. P. 46; and (3) uniform federal rules of attorney conduct.

The members discussed generally the advantages and disadvantages of each approach. Several members emphasized that all attorneys as a matter of policy should be governed by the

conduct rules of the states in which they are licensed to practice. They added, however, that it might be appropriate to carve out a very limited number of exceptions for federal lawyers that would govern areas where there were overriding federal interests.

Concerns of Federal Lawyers

Mr. Waxman pointed out that federal lawyers face uncertainty in their practice and need, as a minimum, a clear federal law to govern conflicts between jurisdictions. He added that federal law was needed in certain limited situations that impacted on the work of federal attorneys. Chief Justice Veasey responded that the Department of Justice's interest in uniformity was understandable. Nevertheless, state bars also want uniformity for all lawyers in the state. There should not be one set of conduct standards in the state courts and a different standard for the federal courts of that state.

Mr. Waxman was asked which conduct issues were of particular concern to the Department of Justice and federal lawyers. He responded that there were no problems with the rules governing attorney conduct within a court setting. Rather, the Department's concern was limited to areas where state ethical rules reach, or purport to reach, conduct by federal prosecutors and other attorneys conducting investigations outside the court. These include such matters as contacts with represented parties, subpoenas directed to attorneys, and the presentation of exculpatory evidence to grand juries.

Concerns in Bankruptcy Cases

Professor Coquillette explained that attorney conduct in the bankruptcy courts raised certain unique problems. The local rules of the bankruptcy courts generally adopt the rules of the district courts. Nevertheless, actual practice in the bankruptcy courts is very different from that in the district courts. Bankruptcy judges usually look for guidance on matters of attorney conduct to the Bankruptcy Code and to the common law of bankruptcy. There are, he said, serious differences among the bankruptcy courts in applying these laws and a lack of clear and specific conduct case law and guidelines. He recommended that further research be conducted on attorney conduct issues and practices in the bankruptcy courts.

Judge Duplantier reported that the Advisory Committee on Bankruptcy Rules had a subcommittee in place that was considering attorney conduct issues in bankruptcy cases. Professor Resnick stated that contemporary bankruptcy practice—with thousands of creditors and claimants in an individual case—raises a number of specialized conduct issues that may not be addressed adequately by existing state rules or by model local court rules. He pointed out, for example, that the Bankruptcy Code itself defines a "disinterested person," and it requires court approval of certain appointments. The statutory definition, he said, was troublesome and had been interpreted in different ways by the various courts of appeals. He also noted that the advisory committee was considering potential amendments to FED. R. BANKR. P. 2014, which

requires an attorney, or other professional person, to disclose certain information to the court as part of the appointment process.

Committee Action

Professor Hazard moved that the committee begin drafting rules, identifying the problems, and eliciting discussion.

Judge Stotler concluded that there was a consensus among the committee members that work should begin on drafting a set of national rules providing that state law governs attorney conduct in the federal courts except in a few limited areas, such as certain investigatory functions and certain aspects of bankruptcy practice. She asked Professor Coquillette to continue with the work of drafting potential rules and making presentations on attorney conduct issues to the advisory committees.

POSTING LOCAL RULES AND OFFICIAL BANKRUPTCY FORMS ON THE INTERNET

Mr. Rabiej reported that courts are required by statute and rule to send copies of their local rules to the Administrative Office. The AO maintains the rules in loose-leaf binders in its library. They are not readily available to the public.

He stated that the rules office intends to begin posting the local rules on the Internet as a service to public. He added that the office had also proposed posting the official bankruptcy forms on the Internet.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker, chair of the subcommittee, reported that the subcommittee had met with Professor Coquillette and had drafted a short set of proposed guidelines designed to expedite the process of reviewing proposed amendments for style. He pointed out that the advisory committees and their reporters faced extremely short deadlines for completing drafts of proposed amendments and committee notes.

Judge Parker said that the guidelines recommended that drafts be submitted by the respective reporters to the rules office in the AO at least 30 days in advance of an advisory committee meeting. The rules office immediately would send copies to the advisory committee, the style subcommittee, and Mr. Garner, the style consultant. Mr. Garner would then coordinate and consolidate the comments of the style subcommittee within 10 days and return them to the advisory committee reporter.

The reporter would then have 10 days to consider the comments of the style subcommittee, incorporate those he or she deemed appropriate, and return a revised draft to the rules office for transmission to the advisory committee members. Accordingly, the advisory committee members would have the original draft and the suggested style changes at least one week before the committee meeting. After the advisory committee meeting, the reporter would have one week to send a copy of the text and note, as approved by the committee, to the rules office. This would allow the style subcommittee sufficient time before the Standing Committee meeting to make any necessary last-minute changes.

COMMITTEE PRACTICES AND PROCEDURES

Judge Stotler reported that the Executive Committee of the Judicial Conference had requested the committee's views on certain Conference committee practices and procedures. She said that she had responded to an earlier inquiry by stating that there was no need for the rules committees to have liaison members to each of the circuits. Members of the rules committees should represent the system nationally, rather than circuit interests. She added that she proposed to have the committee stand on its previous position.

On the other hand, she emphasized that the use of liaisons between committees of the Judicial Conference had been very useful. She pointed out, for example, that members of the Court Administration and Case Management Committee and the Federal-State Jurisdiction Committee had been invited to attend rules committee meetings and that Judge Easterbrook had been in contact with the chair of the Court Administration and Case Management Committee on matters involving the Civil Justice Reform Act. She stated that the use of liaisons had opened up communications with other committees, and she asked for the committee's endorsement of the increased use of liaisons with other committees.

Mr. Rabiej added that the Executive Committee had asked for the committee's views on the use of subcommittees and the need for face-to-face subcommittee meetings. He pointed out that there was an attempt to reduce the number of subcommittees generally and to restrict their meetings to telephone conferences. He reported that it was the view of the advisory committees that the use of subcommittees was very beneficial and that there was a need for certain in-person subcommittee meetings. Other participants noted that much of the subcommittees' work is conducted by telephone, correspondence, and telefax. They argued strongly, however, that it was essential for the committees to have the flexibility to conduct face-to-face meetings when needed.

REPORT ON MEETING OF LONG RANGE PLANNING LIAISONS

Judge Niemeyer reported that he and Judge Stotler had participated in the meeting of long-range planning liaisons from 13 Judicial Conference committees on May 15, 1997. He

pointed out, among other things, that the liaisons had been asked to consider whether an ad hoc committee of the Conference should be appointed to consider mass tort litigation. Judge Stotler stated that Judge Niemeyer had made an impressive presentation on the extensive work of the Advisory Committee on Civil Rules over the past six years in studying mass torts in the context of class actions. Judges Stotler and Niemeyer added that the liaisons concluded that no new committee was needed, and that if any committee of the Conference were to consider mass torts, it should be the Advisory Committee on Civil Rules.

REPORT ON UNIFORM NUMBERING OF LOCAL RULES OF COURT

Professor Squiers reported that the Judicial Conference had approved the requirement that courts renumber their local rules of court by April 15, 1997, to conform with the numbering of the national rules. She stated that half the district courts had completed their renumbering, and the remaining courts were in the process of fulfilling the requirement.

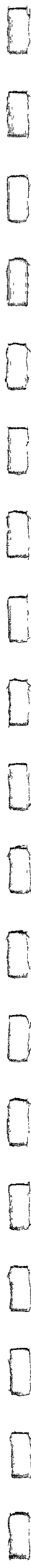
FUTURE COMMITTEE MEETINGS

Judge Stotler reported that the winter meeting of the committee would be held on January 8-9, 1998. She invited the members to select the location for the meeting, and they expressed a preference for Marina del Rey, California, if hotel space were available at a reasonable rate.

Judge Stotler reported further that the mid-year 1998 meeting would be held on either June 11-12, 1998, or June 18-19, 1998.

Respectfully submitted,

Peter G. McCabe,
Secretary



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 1-48 and to Form 4 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. 2-9

2. Approve the proposed revisions to Official Bankruptcy Forms 1, 3, 6F, 8, 9A-9I, 10, 14, 17, 18, and new Forms 20A and 20B .... pp. 9-12

3. Promulgate the proposed revisions to the Official Bankruptcy Forms to take effect immediately, but permit the superseded forms to also be used until March 1, 1998 .... pp. 12

4. Approve the proposed new Civil Rule 23(f) and transmit it to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law .... pp. 16-20

5. Approve the proposed amendments to Criminal Rules 5.1, 26.2, 31, 33, 35, and 43 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. 21-23

6. Approve the proposed amendment to Evidence Rule 615 and transmit it to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law .... pp. 26-27

NOTICE
NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE JUDICIAL CONFERENCE ITSELF.

The remainder of the report is submitted for the record, and includes the following items for the information of the Conference:

- Study of rules governing attorney conduct .... pp. 28
- Status report on uniform numbering systems for local rules of court .... pp. 28-29
- Meeting of long-range planning liaisons .... pp. 28
- Local rules and Official Bankruptcy Forms on Internet.......................... pp. 30
- Report to the Chief Justice on proposed select new rules or rules amendments generating controversy .... pp. 30
- Status of proposed rules amendments .... pp. 30

Agenda F-18
Rules
September 1997

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure met on June 19-20, 1997. All the members attended the meeting, except Alan C. Sundberg. Acting Deputy Attorney General Seth P. Waxman attended on June 19. The Department of Justice was represented on June 20 by Ian H. Gershengorn and Roger A. Pauley.

Representing the advisory committees were: Judge James K. Logan, chair, and Professor Carol Ann Mooney, reporter, of the Advisory Committee on Appellate Rules; Judge Adrian G. Duplantier, chair, and Professor Alan N. Resnick, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Paul V. Niemeyer, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge D. Lowell Jensen, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules. Judge Fern M. Smith, chair of the Evidence Rules Committee, was unable to be present.

Participating in the meeting were Peter G. McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief, and Mark D. Shapiro,

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attorney, of the Administrative Office's Rules Committee Support Office; Patricia S. Channon of the Bankruptcy Judges Division; James B. Eaglin of the Federal Judicial Center; Professor Mary P. Squiers, Director of the Local Rules Project; and Bryan A. Garner and Joseph F. Spaniol, consultants to the Committee.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules completed its style revision project to clarify and simplify the language of the appellate rules. It submitted revisions of all forty-eight Rules of Appellate Procedure and a revision of Form 4 (no changes were made in Forms 1, 2, 3, and 5), together with Committee Notes explaining their purpose and intent. The comprehensive style revision was published for public comment in April 1996 with an extended comment period expiring December 31, 1996. Public hearings were scheduled but canceled, because no witness requested to testify.

The style revision has taken up most of the advisory committee's work during the past four years. The style changes were designed to be nonsubstantive, except with respect to those rules outlined below, which were under study when the style project commenced. A few additional substantive changes have been made necessary by legislative enactments or other recent developments. Almost all comments received from the bench, bar, and law professors teaching procedure and legal writing were quite favorable to the restyled rules. Only one negative comment was received—that to the effect "why change a system that has worked?"

The advisory committee recommended, and the Standing Rules Committee agreed, that the submission to the Judicial Conference and its recommendation for submission to the Supreme Court, if the changes are approved, should be in a different format from the usual

submission. Instead of striking through language being eliminated and underlining proposed new language, the changes made by the restylization project can best be perceived by a side-by-side comparison of the existing rule (in the left-hand column) with the proposed rule (in the right-hand column). Commentary on changes that could be considered more than stylistic—generally resolving inherent ambiguities—are discussed in the Committee Notes. A major component of the restylization has been to reformat the rules with appropriate indentations. Your Committee concurs with the recommendation of the advisory committee that the physical layout of the rules should be an integral part of any official version—and of any published version that is intended to reflect the official version.

In connection with the restylization project, the advisory committee and the Standing Rules Committee bring to the attention of the Judicial Conference two changes in the restyled rules—the use of "en banc" instead of "in banc" and the use of "must" in place of "shall." Although 28 U.S.C. § 46 has used "in banc" since 1948, a later law, Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1633, used "en banc" when authorizing a court of appeals having more than fifteen active judges to perform its "en banc" functions with some subset of the court's members. Also the Supreme Court uses "en banc" in its own rules. *See* S. Ct. R. 13.3. The "en banc" spelling is overwhelmingly favored by courts, as demonstrated by a computer search conducted in 1996 that found that more than 40,000 circuit cases have used the term "en banc" and just under 5,000 cases (11%) have used the term "in banc." When the search was confined to cases decided after 1990, the pattern remained the same—12,600 cases using "en banc" compared to 1,600 (11%) using "in banc." The advisory committee decided to follow the most commonly used "en banc" spelling. This is a matter of choice, of course, but both committees recommend the more prevalent use to the Judicial Conference.

The advisory committee adopted the use of "must" to mean "is required to" instead of using the traditional "shall." This is in accord with Bryan A. Garner, *Guidelines for Drafting and Editing Court Rules* § 4.2 at 29 (1996). The advisory committee is aware that the Supreme Court changed the word "must" to "shall" in some of the amendments of individual rules previously submitted to the Court. In doing so, the Supreme Court indicated a desire not to have inconsistent usages in the rules, and concluded "that terminology changes in the Federal Rules be implemented in a thoroughgoing, rather than piecemeal, way." The instant submission is a comprehensive revision of all the appellate rules. Because of the potentially different constructions of "shall," *see* Garner, *A Dictionary of Modern Legal Usage* 939-42 (2d ed. 1995), the advisory committee eliminated all uses of "shall" in favor of "must" when "is required to" is meant. Both the advisory committee and the Standing Rules Committee recognized room for differences of opinion and do not want the restylization work rejected due to the use of this word.

Included in this submission are some rules that have substantive amendments, all of which have been published for public comment at least once except the proposed abrogation of Rule 3.1 and the proposed amendments to Rule 22. Both of the latter changes are responsive to recent legislation. The changes to Rules 26.1, 29, 35, and 41 were approved for circulation to the bench and bar for comment in September 1995. They were resubmitted for public comment in April 1996 as a part of the comprehensive style revision. After considering suggestions received during these two comment periods, they were approved with minor changes along with the restylized version of the rules. Revised Rules 27, 28, and 32 were approved for circulation for public comment in April 1996 along with the restylized rules—with special notations to the bench and bar that these three rules underwent substantive changes. Rules 5, 5.1 (the latter of which is proposed to be abrogated), and Form 4 were sent out for comment separately, after the

restylization package. Rules 5 and 5.1 were revised because of recent legislative changes and a proposed new Fed. R. Civ. P. 23(f); Form 4 was revised because of recent legislative changes and a request by the Supreme Court Clerk for a more comprehensive form. The substantive changes are summarized below, rule-by-rule in numerical order.

Rule 3.1 (Appeal from a Judgment of a Magistrate Judge in a Civil Case) would be abrogated under the proposed revision because it is no longer needed. The primary purpose for the existence of Rule 3.1 was to govern an appeal to the court of appeals following an appeal to the district court from a magistrate judge's decision. The Federal Courts Improvement Act of 1996, Pub. L. 104-317, repealed paragraphs (4) and (5) of 28 U.S.C. § 636(c) and eliminated the option to appeal to the district court. An appeal from a judgment by a magistrate judge now lies directly to the court of appeals.

The proposed consolidation of Rule 5 (Appeal by Permission Under 28 U.S.C. § 1292(b)) and Rule 5.1 (Appeal by Permission Under 28 U.S.C. § 636(c)(5)) would govern all discretionary appeals from a district or magistrate judge order, judgment, or decree. In 1992, Congress added subsection (e) to 28 U.S.C. § 1292 giving the Supreme Court power to prescribe rules that "provide for an appeal of an interlocutory decision to the Court of Appeals that is not otherwise provided for" in § 1292. The advisory committee believed the amendment of Rule 5 was desirable because of the possibility of new statutes or rules authorizing discretionary interlocutory appeals, and the desirability of having one rule that governs all such appeals. One possible new application appears contemporaneously in the proposed new Fed. R. Civ. P. 23(f) to allow the interlocutory appeal of a class certification order. Present Rule 5.1 applies only to appeals by leave from a district court's judgment entered after an appeal to the district court from

a magistrate judge's decision. The Federal Courts Improvement Act of 1996 abolished all appeals by permission that were covered by this rule, making Rule 5.1 obsolete.

The proposed amendments to Rule 22 (Habeas Corpus and Section 2255 Proceedings) conform to recent legislation. First, the rule is made applicable to 28 U.S.C. § 2255 proceedings. This brings the rule into conformity with 28 U.S.C. § 2253 as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132. Second, the amended rule states that a certificate of appealability may be issued by a "circuit justice or a circuit or district judge." Amended § 2253 requires a certificate of appealability issued by a "circuit justice or judge" in order to bring an appeal from denial of an application for the writ. The proposed amendment removes the ambiguity created by the statute and is consistent with the decisions in all circuits that have addressed the issue.

The proposed amendment of Rule 26.1 (Corporate Disclosure Statement) would eliminate the requirement that corporate subsidiaries and affiliates be listed in a corporate disclosure statement. Instead, the rule requires that a corporate party disclose all of its parent corporations and any publicly held company owning ten percent or more of its stock. The changes eliminate the ambiguity inherent in the word "affiliates" and identify all of those entities which might possibly result in a judge's recusal. The revised rule was submitted to the Committee on Codes of Conduct, which found it to be satisfactory in its revised form.

The proposed amendment of Rule 27 (Motions) would treat comprehensively, for the first time, motion practice in the courts of appeals. The rule is entirely rewritten to provide that any legal argument necessary to support a motion must be contained in the motion itself, not in a separate brief. It expands the time for responding to a motion from seven to ten days and permits a reply to a response—without prohibiting the court from shortening the time requirements or

deciding a motion before receiving a reply. It establishes length limitations for motions and responses, and states that a motion will be decided without oral argument unless the court orders otherwise.

The proposed amendment of Rule 28 (Briefs) is necessary to conform it to the proposed amendments to Rule 32. Page limitations for a brief are deleted from Rule 28(g), because they are treated in Rule 32.

Rule 29 (Brief of an Amicus Curiae) would be amended to establish limitations on the length of an amicus curiae brief. It adds the District of Columbia to those governments that may file without consent of the parties or leave of court. The amended rule generally makes the form and timing requirements more specific, and states that the amicus curiae may participate in oral argument only with the court's permission.

Rule 32 (Form of Briefs, Appendices, and Other Papers) would be rewritten comprehensively with a principal aim of curbing cheating on the traditional fifty-page limitation on the length of a principal brief. New computer software programs make it possible to use type styles and sizes, proportional spacing, and sometimes footnotes, to create briefs that comply with a limitation stated in a number of pages, but that contain up to 40% more material than a normal brief and are difficult for judges to read. The rule was amended in several significant ways. A brief may be on "light" paper, not just "white," making it acceptable to file a brief on recycled paper. Provisions for pamphlet-sized briefs and carbon copies have been deleted because of their very infrequent use. The amended rule permits use of either monospaced or proportional typeface. It establishes length limitations of 14,000 words or 1,300 lines of monospaced typeface (which equates roughly to the traditional fifty pages) and requires a certificate of compliance unless the brief utilizes the "safe harbor" limits of thirty pages for a principal brief and fifteen

pages for a reply brief. Requirements are included for double spacing and margins; type faces are to be fourteen-point or larger type if proportionally spaced and limited to 10½ characters per inch if monospaced. Treatment of the appendix is in its own subdivision. A brief that complies with the national rule must be accepted by every court; local rules may not impose form requirements that are not in the national rule. Local rules may, however, move in the other direction; they can authorize noncompliance with certain of the national norms. Thus, for example, a particular court may choose to accept pamphlet briefs or briefs with smaller typeface than those set forth in the national rules.

Rule 35 (En Banc Determination) would be amended to treat a request for rehearing en banc like a petition for panel rehearing, so that a request for rehearing en banc will suspend the finality of the district court's judgment and extend the period for filing a petition for a writ of certiorari. Therefore, a "request" for rehearing en banc is changed to a "petition" for rehearing en banc. The amendments also require each petition for en banc consideration to begin with a statement demonstrating that the cause meets the criteria for en banc consideration. An intercircuit conflict is cited as an example of a proceeding that might involve a question of "exceptional importance"—one of the traditional criteria for granting an en banc hearing.

Rule 41 (Mandate; Contents; Issuance and Effective Date; Stay) would be amended to provide that filing of a petition for rehearing en banc or a motion for stay of mandate pending petition to the Supreme Court for a writ of certiorari both delay the issuance of the mandate until disposition of the petition or motion. The amended rule also makes it clear that a mandate is effective when issued. The presumptive period of a stay of mandate pending petition for a writ of certiorari is extended to ninety days, to accord with the Supreme Court's time period.

Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis) would be substantially revised. The Clerk of the Supreme Court asked the advisory committee to devise a new, more comprehensive form of affidavit in support of an application to proceed in forma pauperis. A single form is used by both the Supreme Court and the courts of appeals. In addition, the Prison Litigation Reform Act of 1996 prescribed new requirements governing in forma pauperis proceedings by prisoners, including requiring submission of an affidavit that includes a statement of all assets the prisoner possesses. Form 4 was amended to require a great deal more information than specified in the current form, including all the information required by the recent enactment.

The Standing Rules Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Appellate Procedure, as recommended by your Committee, are in Appendix A with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 1-48 and to Form 4 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.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Official Bankruptcy Forms Submitted for Approval

The Advisory Committee on Bankruptcy Rules submitted proposed revisions to Official Bankruptcy Forms 1, 3, 6F, 8, 9A-9I, 10, 14, 17, 18, and new Forms 20A and 20B. The proposed revisions mainly clarify or simplify existing forms. Several of the most heavily used forms were redesigned by a graphics expert, and instructions contained in forms often used by petitioners in bankruptcy or creditors were rewritten using plain English.

Official Form 1 (Voluntary Petition) would be amended to simplify the form and make it easier to complete. In particular, the amendments reduce the amount of information requested, add new statistical ranges for reporting assets and liabilities, and delete the request for information regarding the filing of a plan.

Official Form 3 (Application and Order to Pay Filing Fee in Installments) would be amended to include an acknowledgment by the debtor that the case may be dismissed if the debtor fails to pay a filing fee installment. It would also clarify that a debtor is not disqualified under Rule 1006 from paying the fee in installments solely because the debtor paid a bankruptcy petition preparer.

Official Form 6 (Schedule F) would be amended by adding to the schedule (which lists creditors holding an unsecured nonpriority claim) a reference to community liability for claims.

Official Form 8 (Chapter 7 Individual Debtor's Statement of Intention) would be amended to make it more consistent with the language of the Bankruptcy Code. Language would also be deleted from the present form that may imply that a debtor is limited to options contained on the form.

Official Form 9 (Notice of Commencement of Case Under the Bankruptcy Code, Meeting of Creditors and Fixing of Dates) includes eleven alternatives. Each form is designed for a particular type of debtor (individual, partnership, or corporation), the particular chapter of the Bankruptcy Code in which the case is pending, and the nature of the estate (asset or no asset). The forms are used in virtually all bankruptcy cases.

Form 9 and its Alternatives would be expanded to two pages to make them easier to read, and the explanatory material is rewritten in plain English. Several clerks of court expressed concern that the existing forms' instructions were difficult to understand, which resulted in many

questions from the public that consumed considerable staff resources. The advisory committee agreed that the existing instructions were inadequate. At the same time, it recognized that there would be added printing expense incurred in expanding the instructions. The advisory committee believed that better instructions were essential, and the savings realized from the expected reduction in calls to the clerks' offices asking for assistance probably would offset some of the added printing expenses. In addition, the advisory committee noted that the $30 administrative fee assessed against a debtor filing a chapter 7 or chapter 13 bankruptcy case was intended to pay for the cost of noticing. The fee would easily cover the added expense in expanding the form to two pages. On balance, the advisory committee concluded that the benefits to the public substantially outweighed the added expense.

Official Form 10 (Proof of Claim) would be amended to provide instructions and definitions for completing the form. The form also is reformatted to eliminate redundancies in the information request. Creditors are advised not to submit original documents in support of the claim.

Official Form 14 (Ballot for Accepting or Rejecting the Plan) would be amended to simplify its format and make it easier to complete.

Official Form 17 (Notice of Appeal from a Judgment, Order, or Decree of a Bankruptcy Court) would be amended to direct the appellant to provide the addresses and telephone numbers of the attorneys for all parties to the judgment, order, or decree appealed from, as required by Bankruptcy Rule 8001(a). It also informs other parties—in addition to the appellant—that they may elect to have the appeal heard by the district court, rather than by a bankruptcy appellate panel.

Official Form 18 (Discharge of Debtor) would be amended to simplify the form and clarify the effects of a discharge. A comprehensive explanation, in plain English, is added to the back of the form to assist both debtors and creditors to understand bankruptcy discharge.

Official Form 20A (Notice of Motion or Objection) and Form 20B (Notice of Objection to Claim) would be added to provide uniform, simplified explanations on how to respond to motions and/or objections that are frequently filed in a bankruptcy case.

The proposed revisions and additions to the Official Bankruptcy Forms, as recommended by your Committee, are in Appendix B together with an excerpt from the advisory committee's report.

> **Recommendation:** That the Judicial Conference approve the proposed revisions to Official Bankruptcy Forms 1, 3, 6F, 8, 9A-9I, 10, 14, 17, 18, and new Forms 20A and 20B.

Most debtors and creditors participating in bankruptcy rely on the private sector for copies of the Official Forms. There is usually a significant lag time between the promulgation of a form revision and the date when the private sector publishes the revised new forms. In addition, some of the amended forms are notices and orders generated by the courts' automated systems and the Bankruptcy Noticing Center. Court staff and the Noticing Center will need adequate time to implement the revisions to the forms. The advisory committee recommended that a reasonable transition of about five months be authorized during which continued use of superseded forms would be permitted.

> **Recommendation:** That the Judicial Conference promulgate the proposed revisions to the Official Bankruptcy Forms to take effect immediately, but permit the superseded forms to also be used until March 1, 1998.

Rules Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted to your Committee proposed amendments to Bankruptcy Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014 and recommended that they be published for public comment.

The proposed amendments to Rule 1017 (Dismissal or Conversion of Case; Suspension) would specify the parties who are entitled to a notice of a United States trustee's motion to dismiss a voluntary chapter 7 or chapter 13 case based on the debtor's failure to file a list of creditors, schedules, or statement of financial affairs. Instead of sending a notice of a hearing in a chapter 7 case to all creditors, as presently required, the notice would only be sent to the debtor, the trustee, and any other person or entity specified by the court.

The proposed amendments to Rule 1019 (Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to Chapter 7 Liquidation Case) would: (1) clarify that a motion for an extension of time to file a statement of intention regarding collateral must be filed or made orally before the time specified in the rule expires; (2) provide that the holder of a postpetition, preconversion administrative expense claim is required to file within a specified time period a request for payment under § 503(a) of the Code, rather than a proof of claim under § 501 of the Code or Rules 3001(a)-(d) and 3002; and (3) conform the rule to the 1994 amendments to § 502(b)(9) of the Code and to the 1996 amendments to Rule 3002(c)(1) regarding the 180-day period for filing a claim by a governmental unit.

Rule 2002(a)(4) (Notices to Creditors, Equity Security Holders, United States, and United States Trustee) would be amended to delete the requirement that notice of a hearing on dismissal

of a chapter 7 case based on the debtor's failure to file required lists, schedules, or statements must be sent to all creditors. The amendment conforms with the proposed amendment to Rule 1017, which requires that the notice be sent only to certain parties.

The proposed amendments to Rule 2003 (Meeting of Creditors or Equity Security Holders) would require the United States to mail a copy of the report of a disputed election for a chapter 7 trustee to any party in interest that has requested a copy of it. The amendment gives a party in interest ten days from the filing of the report—rather than from the date of the meeting of creditors—to file a motion to resolve the dispute.

The proposed amendments to Rule 3020(e) (Deposit; Confirmation of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case) would automatically stay for ten days an order confirming a chapter 9 or chapter 11 plan so that parties will have sufficient time to request a stay pending appeal.

Rule 3021 (Distribution under Plan) would be amended to conform to the amendments to Rule 3020 regarding the 10-day stay of an order confirming a plan in a chapter 9 or chapter 11 case.

A new subdivision (a)(3) would be added to Rule 4001 (Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements) that would automatically stay for ten days an order granting relief from an automatic stay so that parties will have sufficient time to request a stay pending appeal.

The proposed amendments to Rule 4004(a) (Grant or Denial of Discharge) would clarify that the deadline for filing a complaint objecting to discharge under § 727(a) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is actually held on that date. Rule 4004(b) is amended to clarify that a motion for an extension of time for

filing a complaint objecting to a discharge must be filed before the time specified in the rule has expired.

Rule 4007 (Determination of Dischargeability of a Debt) would be amended to clarify that the deadline for filing a complaint to determine dischargeability of a debt under § 523(c) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is actually held on that date. The rule is also amended to clarify that a motion for an extension of time for filing a complaint must be filed before the time specified in the rule has expired.

Rule 6004(g) (Use, Sale, or Lease of Property) is added to automatically stay for ten days an order authorizing the use, sale, or lease of property, other than cash collateral, so that parties will have sufficient time to request a stay pending appeal.

A new subdivision (d) would be added to Rule 6006 (Assumption, Rejection and Assignment of Executory Contracts and Unexpired Leases) that would automatically stay for ten days an order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) of the Code so that a party will have sufficient time to request a stay pending appeal.

The proposed amendments to Rule 7001 (Scope of Rules of Part VII) would recognize that an adversary proceeding is not necessary to obtain injunctive relief when the relief is provided for in a chapter 9, chapter 11, chapter 12, or chapter 13 plan.

The proposed amendments to Rule 7004(e) (Process; Service of Summons, Complaint) would provide that the 10-day time limit for service of a summons does not apply if the summons is served in a foreign country.

The proposed amendments to Rule 7062 (Stay of Proceedings to Enforce a Judgment) would delete the references to the additional exceptions to Rule 62(a) of the Federal Rules of Civil Procedure. The deletion of these exceptions, which are orders in a contested matter rather

than in an adversary proceeding, is consistent with amendments to Rule 9014 that render Rule 7062 inapplicable to a contested matter.

Rule 9006(c)(2) (Time) would be amended to prohibit the reduction of time fixed under Rule 1019(6) for filing a request for payment of an administrative expense incurred after the commencement of a case and before conversion of the case under chapter 7.

Rule 9014 (Contested Matters) would be amended to delete the reference to Rule 7062 from the list of Part VII rules that automatically apply in a contested matter.

The Committee voted to circulate the proposed amendments to the bench and bar for comment.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rule 23(c)(1) and Rule 23(f) on class actions, together with Committee Notes explaining their purpose and intent. The proposed amendments were part of a larger package of proposed revisions to Rule 23 circulated to the bench and bar for comment in August 1996. Public hearings on the proposed amendments were held in Philadelphia, Dallas, and San Francisco. The Standing Rules Committee approved new subdivision (f), but recommitted the proposed amendments to (c)(1) to the advisory committee.

The advisory committee's work on these proposed amendments began in 1991, when it was asked by the Judicial Conference to act on the recommendation of the Ad Hoc Committee on Asbestos Litigation to study whether Rule 23 should be amended to facilitate mass tort litigation. To understand the full scope and depth of the problems, the advisory committee sponsored or participated in a series of major conferences at the University of Pennsylvania, New York

University, Southern Methodist University, and the University of Alabama, as well as studied the issues at regularly scheduled meetings elsewhere. During these conferences, the advisory committee heard from experienced practitioners, judges, academics, and others. To shore up the minimal empirical data on current class action practices, the Federal Judicial Center, at the request of the advisory committee, completed a study of the use of class actions terminated within a two-year period in four large districts.

In the course of its six-year study, the advisory committee considered a wide array of procedural changes, including proposals to consolidate (b)(1), (b)(2), and (b)(3) class actions, to add opt-in and opt-out flexibility, to enhance notice, to define the fiduciary responsibility of class representativeness and counsel, and to regulate attorney fees. In the end, with the intent of stepping cautiously, the committee opted for what it believed were five modest changes which were published for comment in August 1996.

During the six-month commentary period, the advisory committee received hundreds of pages of written comments and testimony from some 90 witnesses at the public hearings. Comments and testimony were received from the entire spectrum of experienced users of Rule 23, including plaintiffs' class action lawyers, plaintiffs' lawyers who prefer not to use the class action device, defendants' lawyers, corporate counsel, judges, academics, journalists, and litigants who had been class members. The work of the advisory committee and the information considered by it, including all the written statements and comments and transcripts of witnesses' testimony, filled a four-volume, 3,000 page compendium of the committee's working papers published in May 1997.

Although five general changes were published for comment, the advisory committee decided to proceed with only the proposed amendments to Rule 23(c)(1) and (f) at this time. The

change to Rule 23(c)(1) would clarify the timing of the court's certification decision to reflect present practice. New subdivision (f) would authorize a permissive interlocutory appeal, in the sole discretion of the court of appeals, from an order granting or denying class certification. The remaining proposed changes either were abandoned or deferred by the advisory committee after further reflection, or set aside in anticipation of the Supreme Court's decision in *Amchem Products, Inc. v. Windsor*, No. 96-270 (decided June 25, 1997) — a Third Circuit case holding invalid a settlement of a class action that potentially consisted of tens of thousands of asbestos claimants. The advisory committee carefully considered whether to delay proceeding on the proposed amendments to Rule 23 (c)(1) and (f) and wait until action on the remaining proposed amendments to Rule 23 was completed. But it concluded unanimously that the changes to (c)(1) and (f) were important and distinct from the remaining proposed changes and needed to be acted on expeditiously. In particular, the proposed change to Rule 23(f) could have immediate and substantial beneficial impact on class action practice.

New subdivision (f) would create an opportunity for interlocutory appeal from an order granting or denying class action certification. The decision whether to permit appeal is in the sole discretion of the court of appeals. Application for appeal must be made within ten days after entry of the order. District court proceedings would be stayed only if the district judge or the court of appeals ordered a stay. Authority to adopt an interlocutory appeal provision was conferred by 28 U.S.C. § 1292(e).

The advisory committee concluded that the class action certification decision warranted special interlocutory appeal treatment. A certification decision is often decisive as a practical matter. Denial of certification can toll the death knell in actions that seek to vindicate large numbers of individual claims. Alternatively, certification can exert enormous pressure to settle.

Because of the difficulties and uncertainties that attend some certification decisions—those that do not fall within the boundaries of well-established practice—the need for immediate appellate review may be greater than the need for appellate review of many routine civil judgments. Under present appeal statutes, however, it is difficult to win interlocutory review of orders granting or denying certification that present important and difficult issues. Many such orders fail to win district court certification for interlocutory appeal under 28 U.S.C. § 1292(b), in part because some courts take strict views of the requirements for certification. Resort has been had to mandamus, with some success, but review may strain ordinary mandamus principles.

The lack of ready appellate review has made it difficult to develop a body of uniform national class-action principles. Many commentators and witnesses advised the advisory committee that district courts often give different answers to important class-action questions, and that these differences encourage forum shopping. The commentators and witnesses who testified on proposed Rule 23(f) provided strong, although not universal, support for its adoption.

The main ground for opposing the proposed amendment was that applications for permission to appeal would become a routine strategy of defendants to increase cost and delay. The advisory committee recognized that there might be strong temptations to seek permission to appeal, particularly during the early days of Rule 23(f). It hoped that lawyers would soon recognize that appeal would be granted only in cases that present truly important and difficult issues, and that the potential for many ill-founded appeal petitions would quickly dissipate. In any event, it relied on the advice of many circuit judges that applications for permission to appeal under 28 U.S.C. § 1292(b) are quickly processed, adding little to the costs and delay experienced by the parties and trial courts, and imposing little burden on the courts of appeals. The committee was confident that, as with § 1292(b) appeals, Rule 23(f) petitions would be quickly

resolved on motion. The advisory committee concluded that the benefits of the proposal greatly outweighed the small additional workload burden.

The Standing Rules Committee concurred with the advisory committee's recommendation to add a new Rule 23(f). The proposed amendments to the Federal Rules of Civil Procedure, as recommended by your Committee, are in Appendix C with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed new Civil Rule 23(f) and transmit it to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

In many class action cases, the decision to certify is the single most important judicial event, which often sets into motion a series of actions inexorably leading to settlement. The advisory committee heard much testimony about the intense pressure placed on the defendant to settle once a class action had been certified, rather than risk any chance of losing. The proposed amendment of Rule 23(c)(1) would amend the requirement that the class action certification determination be made "as soon as practicable." The advisory committee's proposed change to "when practicable" was designed to confirm present practice, which permits a ruling on a motion to dismiss or for summary judgment before addressing certification questions.

The Standing Rules Committee recognized that in most class action cases a judge needs sufficient information, which often requires adequate time for discovery, before making the critical class action certification decision. But concern was expressed that a delay in the certification decision might as a practical matter eliminate any real relief to some injured parties under certain circumstances, particularly when their claims may become moot if not acted on expeditiously. In addition, the advisory committee continues to study proposed revisions to other parts of the rule and could further consider the change to (c)(1) at the same time. Accordingly,

your Committee voted to recommit the proposed amendments to Rule 23(c)(1) to the advisory committee for further consideration.

Scope and Nature of Discovery

With the goal of reducing cost and delay in litigation, the advisory committee has embarked on a major review of the general scope and nature of discovery. As part of this overall discovery project, the advisory committee will address the discovery-related recommendations contained in the Judicial Conference's report to Congress on RAND's Civil Justice Reform Act study, including the need to revisit the "opt-in" "opt-out" mandatory disclosure provisions.

A subcommittee was appointed to explore discovery issues. It convened a conference of about 30 prominent attorneys and academics to discuss discovery problems. Building on that meeting, the advisory committee, along with the Boston College School of Law, is sponsoring a symposium on discovery in September 1997. Academics will present papers that will later be published by the school's law review. Several panels of experienced practitioners and judges will also address distinct discovery issues at the conference. The advisory committee plans to meet in October to decide which specific discovery issues discussed at the symposium it will pursue.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Federal Rules of Criminal Procedure 5.1, 26.2, 31, 33, 35, and 43 together with Committee Notes explaining their purpose and intent. The proposed amendments had been circulated to the bench and bar for comment in August 1996. A public hearing was scheduled for Oakland, California, but no witnesses requested to testify.

The proposed amendments to Rule 5.1 (Preliminary Examination) would require production of a witness statement after the witness has testified at a preliminary examination hearing. The proposal is similar to current provisions in other rules that require production of a witness statement at other pretrial proceedings.

Rule 26.2 (Production of Witness Statements) would be amended to include a cross-reference to the proposed amendment to Rule 5.1, extending the requirement to produce a witness statement to a preliminary examination.

The proposed amendment to Rule 31 (Verdict) would require individual polling of jurors when polling occurs after the verdict, either at a party's request or on the court's own motion. The amendment confirms the existing practice of most courts.

Rule 33 (New Trial) would be amended to require that a motion for a new trial based on newly discovered evidence be filed within three years after the date of the "verdict or finding of guilty." The current rule uses "final judgment" as the triggering event, but courts have reached different conclusions on when a final judgment is entered. As a result of the disparate practices, the time to file the motion has varied among the districts. The published version of the proposed amendment fixed a clear starting point to begin the time period and set two years as the outside limit. The advisory committee was persuaded by the public comment, however, that an additional year was necessary. Defense attorneys often concentrate their available time and resources prosecuting an appeal immediately after the verdict or finding of guilty and only begin considering filing a motion for a new trial when they have completed the appeal.

Rule 35 (Correction or Reduction of Sentence) would be amended to permit a court to aggregate a defendant's assistance in the prosecution or investigation of another offense rendered

before and after sentencing in determining whether a defendant's assistance is "substantial" as required under Rule 35(b). The proposed amendment is intended to recognize a defendant's significant assistance rendered before and after sentencing, either of which viewed alone would be insufficient to meet the "substantial" level.

The proposed amendment to Rule 43 (Presence of the Defendant) would clarify that a defendant need not be present: (1) at a Rule 35(b) reduction of sentence proceeding for substantial assistance rendered by the defendant; (2) at a Rule 35(c) correction of sentence proceeding for a technical, arithmetical, or other clear error; or (3) at a 18 U.S.C. § 3582(c) resentencing modifying an imposed term of imprisonment. In virtually all these proceedings, the modification of a sentence can only inure to the benefit of the defendant, and the defendant's attendance is not necessary. The court does, however, retain the power to require or permit a defendant to attend any of these proceedings in its discretion. A defendant's presence would still be required at a resentencing to correct an invalid sentence following a remand under Rule 35(a).

The Standing Rules Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Criminal Procedure, as recommended by your Committee, are in Appendix D with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rules 5.1, 26.2, 31, 33, 35, and 43 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.

Rules Approved for Publication and Comment

The Advisory Committee on Criminal Rules submitted proposed amendments to Criminal Rules 6, 11, 24, 30, and 54, abrogation of Rules 7(c)(2), 31(e), 32(d)(2), and 38(e), and a new Rule 32.2 with a recommendation that they be published for public comment.

Rule 6 (The Grand Jury) would be amended to permit the grand jury foreperson or deputy foreperson to return an indictment in open court without requiring the presence of the entire grand jury as mandated under present procedures. The amendment would be particularly helpful when the grand jury meets in places other than in the courthouse and needs to be transported to discharge a ministerial function. The second proposed amendment would allow the presence of an interpreter who is necessary to assist a juror in taking part in the grand jury deliberations. The advisory committee recommended that the exception be limited solely to interpreters assisting the hearing impaired. But the Standing Rules Committee concluded that it would be more helpful to obtain public comment on an expanded exception to the rule that would allow any interpreter found to be necessary to assist a grand juror.

The proposed amendment of Rule 11 (Pleas) would require the court to determine whether the defendant understands any provision in a plea agreement that waives the right to appeal or to collaterally attack the sentence. The advisory committee first considered the proposed amendment at the request of the Committee on Criminal Law. The amendment also conforms Rule 11 to current practices under sentencing guidelines and makes it clear that a plea agreement may include an agreement as to a sentencing range, sentencing guideline, sentencing factor, or policy statement. It also distinguishes plea agreements made under Rule 11(e)(1)(B), which are not binding on the court, and agreements under Rule 11(e)(1)(C), which are binding.

Rule 24 (Alternate Jurors) would permit the court to retain alternate jurors during the deliberations if any other regular juror becomes incapacitated. The alternate jurors would remain insulated from the other jurors until required to replace a regular juror. The option would be particularly helpful in an extended trial when two or more original jurors could not participate in the deliberations because otherwise a new trial would be required.

The proposed amendments to Rule 30 (Instructions) would permit a court to require or permit the parties to file any requests for instructions before trial. Under the present rule, a court may direct the parties to file the requests only during trial or at the close of the evidence.

New Rule 32.2 (Forfeiture Procedures) consolidates several procedural rules governing the forfeiture of assets in a criminal case, including existing Rules 7(c)(2), 31(e), 32(d)(2), and 38(e). In *Libretti v. United States*, 116 S. Ct. 356 (1995), the Supreme Court held that criminal forfeiture constitutes an aspect of the sentence imposed in a criminal case, and that the defendant has no constitutional right to have the jury determine any part of the forfeiture. The proposed amendment was originally suggested by the Department of Justice and sets up a bifurcated post-guilt adjudication forfeiture procedure. At the first proceeding, the court determines what property is subject to forfeiture. At the second, the court rules on any petition filed by a third party claiming an interest in the forfeitable property and otherwise conducts ancillary proceedings. Parties are permitted to conduct discovery in accordance with the Federal Rules of Civil Procedure to the extent determined necessary by the court.

A technical amendment is proposed to Rule 54 removing the reference to the court in the Canal Zone, which no longer exists.

The Committee voted to circulate the proposed amendments to the bench and bar for comment.

Informational Items

The Standing Committee voted to reject the recommendation of the advisory committee to seek legislation amending 18 U.S.C. § 3060 to permit a magistrate judge to conduct a preliminary examination over the defendant's objection. Criminal Rule 5(c) tracks the statutory provision, and it would also need to be amended to conform to a statutory change. At the request

of the Committee, the Committee on the Administration of the Magistrate Judges System was asked to review the advisory committee's recommendation. It agreed with the substance of the proposal and endorsed the necessary legislative and rule changes. Your Committee concluded that the proposed change should be recommitted to the advisory committee to consider action under the rulemaking process. A parallel statutory change could be pursued at the appropriate time.

A bill was introduced in the House of Representatives (H.R. 1536) that would amend 18 U.S.C. § 3321 and reduce the number of grand jurors from a range of 16-23 to 9-13, with 7 jurors instead of 12 jurors necessary to concur in an indictment. Criminal Rule 6 tracks the language of the current statutory provision. The Advisory Committee on Criminal Rules has placed the matter on the agenda of its next meeting in October 1997, which is consistent with the recommendations of the Committee on Court Administration and Case Management and the Committee on Criminal Law.

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules submitted proposed amendments to Federal Rules of Evidence 615 (Exclusion of Witnesses). The amendment would expand the list of witnesses who may not be excluded from attending a trial to include any victim as defined in the Victim's Rights and Restitution Act of 1990 and the Victim Rights Clarification Act of 1997. The amendment is intended to conform to the two Acts. These laws provide that: (1) a victim-witness is entitled to attend the trial unless the witness' testimony would be materially affected by the testimony at trial; and (2) a victim-witness who may testify at a later sentencing proceeding cannot be excluded from the trial for that reason.

The advisory committee's proposed amendment was limited to witnesses specifically defined by the two victim rights' statutes. The Standing Rules Committee concluded that a more expansive amendment was preferable to account for any other existing or future statutory exception. It revised the proposed amendment to extend to any "person authorized by statute to be present." The Committee also agreed with the request to forward the proposed amendments directly to the Judicial Conference without publishing them for public comment. Under the governing, *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* the "Standing Committee may eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary." The Standing Rules Committee determined that the proposed amendment, as revised, was a conforming amendment.

The proposed amendment to the Federal Rules of Evidence, as recommended by your Committee, appears in Appendix E together with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Evidence Rule 615 and transmit it to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Informational Items

The Standing Rules Committee recommitted to the advisory committee for further study proposed amendments to Evidence Rule 103 (Rulings on Evidence) that would add a new subdivision governing *in limine* practice. The present rules do not address *in limine* practice, and this has resulted in some conflict in the courts and confusion in the practicing bar. Proposed amendments to Evidence Rule 103 were published for comment in 1995, but were eventually withdrawn. Although generally inclined to publish for comment another proposed *in limine* rule,

several members of the Standing Rules Committee expressed concern regarding certain technical issues that they believed needed first to be addressed by the advisory committee. The Committee agreed that further study by the advisory committee would be helpful before publishing another proposed change to Rule 103.

The advisory committee has refrained from considering amending Evidence Rule 702 to account for the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and later decisions generated by it, until a time when the district courts and courts of appeals have had an opportunity to explore some of the decision's far-reaching implications. Several years have now passed. *Daubert* case law has rapidly developed and involves many areas not considered nor in issue in the 1993 case. The advisory committee has concluded that the time is now right for a review of Evidence Rules 702 and 703 and has placed the matter on its agenda for its October meeting. In addition, both the Senate and the House of Representatives are considering bills to codify the Court's decision.

RULES GOVERNING ATTORNEY CONDUCT

A study by the Committee's reporter of appellate and bankruptcy cases involving rules of attorney conduct and a Federal Judicial Center empirical study on rules governing attorney conduct have now been completed. The Committee was also advised of the current status of meetings between the Department of Justice and the Conference of Chief Justices on contacting represented parties. The Committee's reporter was asked to prepare some specific proposals for the Committee's consideration at its next meeting in January.

UNIFORM NUMBERING SYSTEM FOR LOCAL RULES OF COURT

Amendments to the Federal Rules of Practice and Procedure took effect on December 1, 1995, which required that all local rules of court "must conform to any uniform numbering

system prescribed by the Judicial Conference." In March 1996, the Conference prescribed a numbering system for local rules of court to implement the 1995 rules amendments. The Conference set April 15, 1997, as the effective date of compliance with the uniform numbering system so that courts would have sufficient time to make necessary changes to their local rules.

Slightly less than half of the courts were able to renumber their local rules by April 15, 1997. Several additional courts completed their renumbering before the Standing Rules Committee met in June. Other courts have advised the Committee that they are nearing completion of their local rules renumbering. The Committee continues to encourage those courts that have not yet adopted a uniform numbering system to renumber their local rules. The Committee finds promising the recent increase in the number of courts adopting a uniform numbering system, and it will continue to offer to help the courts that are in the process of renumbering their local rules.

LONG RANGE PLANNING

The chairs of the Standing Rules Committee and the Advisory Committee on Civil Rules participated in the May 15, 1997, meeting of the Judicial Conference committee liaisons on the judiciary's *Long Range Plan*. During the discussion on mass torts, the advisory committee chair described the extensive work of the Advisory Committee on Civil Rules on the study of mass torts in the context of class actions during the past six years. As previously noted, the advisory committee garnered substantial information and data on class action and mass torts practice, which were compiled into a four-volume compendium of working papers. The rules committee chairs favored the consensus of the liaisons that the individual Conference committees should continue to coordinate their respective work with the other committees involved in the study of mass tort litigation.

LOCAL RULES AND OFFICIAL BANKRUPTCY FORMS ON INTERNET

The Committee was advised of ongoing efforts in the Administrative Office to place local rules of court and Official Bankruptcy Forms on the Internet. Rather than furnishing paper copies of local rules of court and any amendments to the Administrative Office—as presently required by 28 U.S.C.§ 2071(d)—courts could fulfill this statutory responsibility by placing and updating their local rules directly on the Internet. It is expected that Internet access to the rules would benefit lawyers researching local practices and relieve the clerks' offices of some of their burden in providing copies of local rules and otherwise responding to inquiries regarding them. Access to Official Bankruptcy Forms would benefit practitioners and pro se claimants in bankruptcy. Paper copies of most of these forms are not available from the courts, but must be obtained from private sector sources. The advantages of having public access to the forms on the Internet are clear.

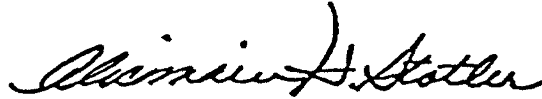
REPORT TO THE CHIEF JUSTICE

In accordance with the standing request of the Chief Justice, a summary of issues concerning select new amendments and proposed amendments generating controversy is set forth in Appendix F.

STATUS OF PROPOSED AMENDMENTS

A chart prepared by the Administrative Office (reduced print) is attached as Appendix G, which shows the status of the proposed amendments to the rules.

Respectfully submitted,

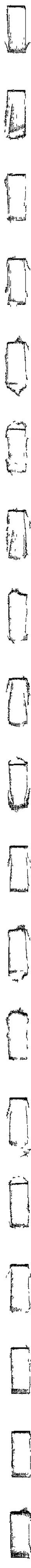


Alicemarie H. Stotler
Chair

Frank W. Bullock, Jr.	Alan W. Perry
Frank H. Easterbrook	Sol Schreiber
Seth P. Waxman	Morey L. Sear
Geoffrey C. Hazard, Jr.	James A. Parker
Phyllis A. Kravitch	E. Norman Veasey
Gene W. Lafitte	William R. Wilson, Jr.

APPENDICES

Appendix A —	Proposed Amendments to the Federal Rules of Appellate Procedure
Appendix B —	Proposed Amendments to the Federal Rules of Bankruptcy Procedure
Appendix C —	Proposed Amendments to the Federal Rules of Civil Procedure
Appendix D —	Proposed Amendments to the Federal Rules of Criminal Procedure
Appendix E —	Proposed Amendments to the Federal Rules of Evidence
Appendix F —	Report to the Chief Justice on Proposed Select New Rules or Rules Amendments Generating Controversy
Appendix G —	Chart Summarizing Status of Rules Amendments



PROPOSED SELECT NEW RULES OR RULES AMENDMENTS GENERATING SUBSTANTIAL CONTROVERSY

The following summary outlines considerations underlying the recommendations of the advisory rules committees and the Standing Rules Committee on certain new rules or controversial rules amendments. A fuller explanation of the committees' considerations was submitted to the Judicial Conference and is sent together with this report.

Federal Rules of Appellate Procedure

The proposed style revision of the Appellate Rules is intended to improve the rules' clarity, consistency, and readability. The advisory rules committee identified and eliminated ambiguities and inconsistencies that inevitably had crept into the rules since their enactment in 1976. The style changes are designed to be nonsubstantive, unless otherwise specified and except with respect to several rules that were under study when the style project commenced. Virtually all comments from the bench, bar, and law professors on the stylized rules were favorable.

The style revision has taken up most of the advisory committee's work during the past four years. The revision of the appellate rules completes the first step of a long-term plan to re-examine all the procedural rules. The rules committees do not, however, plan to revise the Evidence Rules for style purposes because of the disruptive effect it would have on trial practice. Judges and lawyers are familiar with, and rely heavily on, the current text and numbers of the Evidence Rules during trial proceedings. The style project was launched originally by Judge Robert E. Keeton, former chairman of the Standing Rules Committee, and Professor Charles Alan Wright, the first chairman of the Style Subcommittee. The consultant enlisted by them created *Guidelines for Drafting and Editing Court Rules*, which provides a uniform set of conventions for all future writing.

Two style changes are brought to the attention of the Court — the use of "en banc" instead of "in banc" and the use of "must" in place of "shall." Like several other style changes made in the rules, these two changes represent the consensus of the rules committees on a style issue that required a decision that would be adhered to uniformly throughout the rules for purposes of consistency. The committee recognizes room for differences of opinion and does not want the restylization work to be rejected due to the adoption of either usage.

Two other rules, published and commented on for revision other than style, drew notable comment. Rule 32 is of interest because it incorporates generally the acceptability of computerized word-processing programs that assist the bench and bar in determining the proper length of briefs and size of typeface for text. The proposed amendments addressed concerns expressed by many commentators that were aimed at earlier drafts of the rule. As revised in light of these comments, the amended rule was well received by the bench and bar. Rule 35 was rewritten after careful deliberations with representatives of the Department of Justice as well as careful attention to other

proposed word choices, to the extent of setting aside preferred style conventions, in order to improve the rule.

I. Use of "en banc" instead of "in banc"

A. Brief Description

The proposed amendment to Rule 35 substitutes the word "en banc" for "in banc."

B. Arguments in Favor

- "En banc" is the common usage and is overwhelmingly favored by the courts. More than 40,000 published opinions in circuit cases referred to "en banc" and just under 5,000 opinions used the term "in banc." A similar pattern was evidenced in Supreme Court opinions, with 950 opinions using "en banc" while only 46 opinions used "in banc." The Supreme Court rules refer to "en banc."

- "En banc" was used by Congress in a statute when authorizing a court of appeals having more than fifteen judges to perform its "en banc" functions. Act of Oct. 20, 1978, Pub. L. No. 95-486.

C. Objections

- 28 U.S.C. § 46(c) sets out the requirements for an "en banc" proceeding and uses the term "in banc."

D. Rules Committees' Consideration

Both the advisory rules committee and the Standing Rules Committee decided that the most commonly used spelling should be followed in the stylized rules. No objection from any committee member was expressed to the proposed use of "en banc."

II. Use of "must" instead of "shall"

A. Brief Description

The word "must" is used throughout the stylized rules whenever "is required to" is intended, instead of using the more traditional "shall."

B. Arguments in Favor

- The meaning of "must" is clear in all contexts.

- The meaning of the word "shall" is ambiguous and changes depending on the context of the sentence in which it is used. In fact, the word "shall" can shift its meaning even in midsentence. It has as many as eight senses in drafted documents. It is also commonly used as a future tense modal verb, which is inconsistent with present-tense drafting.

C. Objections

- The sound of "must" is jarring in many sentences. Statutes and current rules commonly use "shall."

D. Rules Committees' Consideration

Both the advisory rules committee and the Standing Rules Committee initially expressed skepticism about the use of "must" instead of "shall." But on careful consideration, both committees agreed that the use of "shall" has generated much unwarranted satellite litigation over its meaning. Case law is replete with examples of courts and litigants attempting to discern its precise meaning in various contexts. "Must" has the virtue of universal and uniform meaning. Both committees are sensitive to concerns over piecemeal stylistic changes and adopted the convention of using "must" in every instance that "is required to" is intended in the rules.

Federal Rules of Civil Procedure

I. Rule 23(f) (Interlocutory Appeal of Class Action Certification)

A. Brief Description

A new subdivision (f) would permit an interlocutory appeal from an order granting or denying class action certification in the sole discretion of the court of appeals. District court proceedings would be stayed only if the district judge or the court of appeals ordered a stay.

B. Arguments in Favor

- The proposed amendment would facilitate the establishment of a body of uniform class-action certification principles.

- Denial of certification can toll the death knell in actions that seek to vindicate large numbers of individual claims. A grant of certification can exert a reverse death knell, creating enormous pressure to settle that is often decisive as a practical matter. The need for immediate appellate review may be greater than the need for appellate review of many routine final civil judgments.

- Final judgment appeal, review on preliminary injunction appeal, certification for permissive appeal under § 1292(b), and mandamus together often fail to provide effective review. One response has been to strain ordinary mandamus principles.

- The committee was confident that, as with § 1292(b) appeals, the courts of appeal would act quickly and at a low cost in determining whether to grant permission to appeal. Significant costs would be incurred only in cases presenting such pressing issues as to warrant permission to appeal. In addition, the committee believed that although requests for interlocutory appeal may initially be frequent, that number would fall as the bar acquired experience with the rule and the appellate courts' responses to such requests.

- The committee also noted that a similar proposal had been introduced in Congress.

C. Objections

- Applications for permission to appeal would become a routine strategy to increase costs and delay.

- The proposed amendment would add hundreds, maybe thousands, of motions to the already overburdened workloads of the courts of appeals.

D. Rules Committees Consideration

Both committees agreed that the benefits of the proposed amendment greatly outweigh the predictably lesser disadvantages.

PROMULGATION OF RULES AMENDMENTS

1993 — FALL — DEC — SPRING — 1994 June — FALL — DEC

Advisory Committee (Fall 1993)

Published

AP. 4, 8, 10, 21, 25, 32, 47 & 48
BK. 8018, 9029, & 9037
CV: 26, 43, 50, 52, 59, 83 & 84
CR: 5, 10, 43, 53, 57 & 58
EV: 1102

Law (Dec 1993)

Effective

AP: 3, 3.1, 4, 5.1, 6, 10, 12, 15, 25, 28 & 34
BK: 1010, 1013, 1017, 2002, 2003, 2005, 3009, 3015, 3018, 3019, 3020, 5005, 6002, 6006, 6007, 8002, 9019 & 9036
CV: 1, 4, 4.1, 5, 11, 12, 15, 16, 26, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 50, 52, 53, 54, 58, 71A, 72, 73, 74, 75 & 76
CR: 1, 3, 4, 5, 5.1, 6, 8, 12, 16, 17, 26.2, 26.3, 32, 32.1, 40, 41, 44, 46, 49, 50, 54, 56, 57, 58 & Rule 8 of Sec 2255
EV: 101, 705 & 1101

Supreme Court

Transmit to Congress

AP: 1, 3, 5, 5.1, 8, 13, 21, 25, 26.1, 27, 28, 30, 31, 33, 35, 38, 40, 41 & 48
BK: 8002 & 9006
CV: NONE
CR: 16, 29, 32 & 40
EV: 412

Advisory Committee (Spring 1994)

Approve and Transmit to Standing Cmte.

AP: 4, 8, 10, 47 & 48
BK: 8018, 9029, & 9037
CV: 50, 52, 59, 83 & 84
CR: 5, 40, 43, 49, 53, 57 & 58
EV: 1102

Request Publication

AP: 21, 25, 27, 28 & 32
BK: 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8008 & 9006
CV: NONE
CR: 16 & 32
EV: NONE

Standing Committee (June 1994)

Approve and Transmit to Judicial Conference

AP: 4, 8, 10 & 47
BK: 8018 & 9029
CV: 50, 52, 59 & 83
CR: 5, 40, 43, 49, 53 & 57
EV: None

Approve Publication

AP: 21, 25, 26, 27, 28 & 32
BK: 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8008 & 9006
CV: 5(e)
CR: 16 & 32
EV: Tentative Decision not to amend 26 rules

Judicial Conference

Approve and Transmit to Supreme Court

AP: 4, 8, 10 & 47
BK: 8018 & 9029
CV: 50, 52, 59 & 83
CR: 5, 40, 43, 49, 53 & 57
EV: None

Advisory Committee (Fall 1994)

Published

AP: 21, 25, 26, 27, 28 & 32
BK: 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8008 & 9006
CV: 5(e)
CR: 16 & 32
EV: Tentative Decision not to amend 26 rules

Law (Dec 1994)

Effective

AP: 1, 3, 5, 5.1, 8, 13, 21, 25, 26.1, 27, 28, 30, 31, 33, 35, 38, 40, 41 & 48
BK: 8002 & 9006
CV: NONE
CR: 16, 29, 32 & 40
EV: 412

PROMULGATION OF RULES AMENDMENTS

SPRING		1995 July	FALL	DEC
Supreme Court	**Advisory Committee**	**Standing Committee**	**Judicial Conference**	**Law**
Transmit to Congress				Effective
AP: 4, 8, 10 & 47 BK: 8018 & 9029 CV: 50, 52, 59 & 83 CR: 5, 40, 43, 49 & 57 EV: None				AP: 4, 8, 10 & 47 BK: 8018 & 9029 CV: 50, 52, 59 & 83 CR: 5, 40, 43, 49 & 57 EV: None
	Approve and Transmit to Standing Committee	Approve and Transmit to Judicial Conference	Approve and Transmit to Supreme Court	
	AP: 21, 25, 26 & 27 BK: 1006, 1007, 1019, 2002 2015, 3002, 3016, 4004 5005, 7004, 8008, 9006 CV: 5(e) CR: 16 & 32 EV: Tentative Decision not to amend 25 rules	AP: 21, 25 & 26 BK: 1006, 1007, 1019, 2002 2015, 3002, 3016, 4004 5005, 7004, 8008, 9006 CV: 5(e) & 43* CR: 16 & 32 EV: Tentative Decision not to amend 25 rules	AP: 21, 25 & 26 BK: 1006, 1007, 1019, 2002 2015, 3002, 3016, 4004 5005, 7004, 8008, 9006 CV: 5(e) & 43 CR: 32 EV: Tentative Decision not to amend 25 rules	
	Request Publication	Approve Publication	Publish	
	AP: 26.1, 28, 29, 32, 35 & 41 BK: 1019, 1020, 2002, 2007.1, 3014, 3017, 3017.1, 3018, 3021, 8001, 8002, 8020, 9011, 9015 & 9035 CV: 9, 26 & 47 CR: 24 EV: 103, 407, 801, 803, 804, 806 & 807 Tentative Decision not to amend 24 rules	AP: 26.1, 29, 35 & 41 BK: 1019, 1020, 2002, 2007.1, 3014, 3017, 3017.1, 3018, 3021, 8001, 8002, 8020, 9011, 9015 & 9035 CV: 9, 26, 47 & 48* CR: 24 EV: 103, 407, 801, 803, 804, 806 & 807 Tentative Decision not to amend 24 rules	AP: 26.1, 29, 35 & 41 BK: 1019, 1020, 2002, 2007.1, 3014, 3017, 3017.1, 3018, 3021, 8001, 8002, 8020, 9011, 9015 & 9035 CV: 9, 26, 47 & 48 CR: 24 EV: 103, 407, 801, 803, 804, 806 & 807 Tentative Decision not to amend 24 rules	

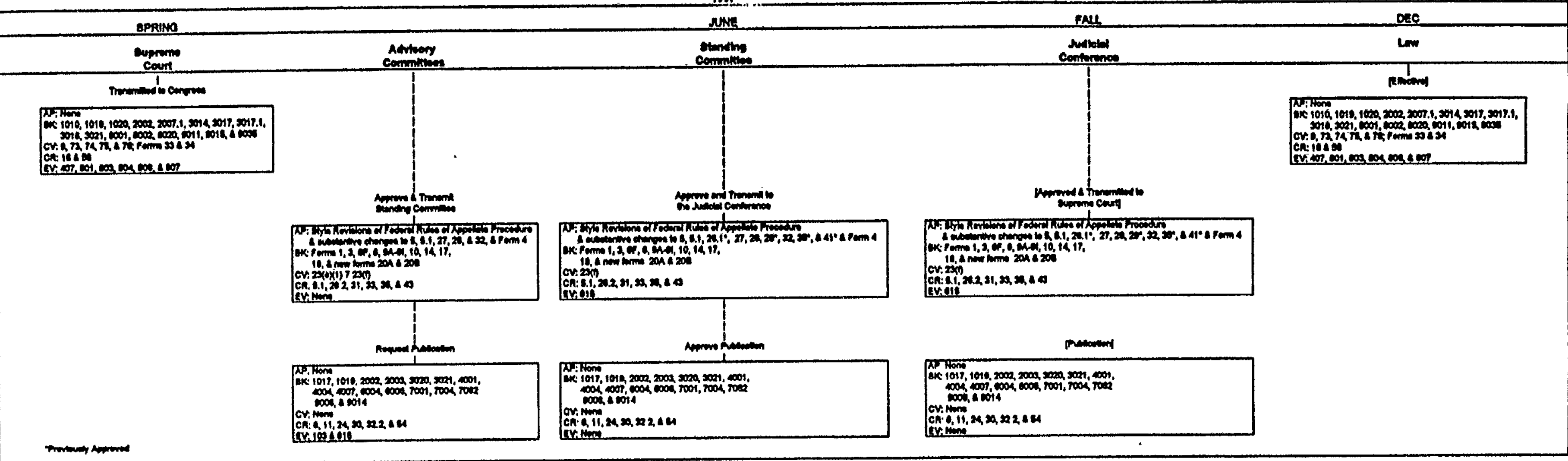
*Previously Approved

PROMULGATION OF RULES AMENDMENTS

1998

JAN	SPRING		JUNE	FALL	DEC
Standing Committee	**Supreme Court**	**Advisory Committees**	**Standing Committee**	**Judicial Conference**	**Law**
	Transmit to Congress				Effective
	AP: 21, 25 & 26 BK: 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8006, 9006 CV: 5(e) & 43 CR: 32 EV: None				AP: 21, 25 & 26 BK: 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8006, 9006 CV: 5(e) & 43 CR: 32 EV: None
		Approve & Transmit to Standing Committee	Approve & Transmit to Judicial Conference	Approve & Transmit to Supreme Court	
		AP: 26.1, 29, 35 & 41 BK: 1010, 1019, 1020, 2002, 2007.1, 3014, 3017, 3017.1, 3018, 3021, 8001, 8002, 8020, 9011, 9015 & 9035 CV: 9 & 48 CR: 16 EV: 407, 801, 803, 804, 806 & 807 Tentative Decision not to amend 24 rules	AP: 26.1, 29, 35 & 41 (Delayed transmission) BK: 1010, 1019, 1020, 2002, 2007.1, 3014, 3017, 3017.1, 3018, 3021, 8001, 8002, 8020, 9011, 9015 & 9035 CV: 9 & 48 CR: 16 EV: 407, 801, 803, 804, 806 & 807 Tentative Decision not to amend 24 rules	AP: None BK: 1010, 1019, 1020, 2002, 2007.1, 3014, 3017, 3017.1, 3018, 3021, 8001, 8002, 8020, 9011, 9015 & 9035 CV: 9 CR: 16 EV: 407, 801, 803, 804, 806 & 807 Tentative Decision not to amend 24 rules	
Approve Publication	Published	Request Publication	Approve Publication	Publication	
Federal Rules of Appellate Procedure as revised under Uniform Drafting Guidelines with substantive amendments to AP: 27, 28 & 32	Federal Rules of Appellate Procedure as revised under Uniform Drafting Guidelines with substantive amendments to AP: 27, 28 & 32	AP: 5, 5.1, and Form 4 BK: Forms 1, 3, 6F, 8, 9A-9I, 10, 14, 17, & 18 and new Forms 20A & 20B CV: 23 CR: 5.1, 26.2, 31, 33, 35, & 43 EV: None	AP: 5, 5.1, and Form 4 BK: Forms 1, 3, 6F, 8, 9A-9I, 10, 14, 17, & 18 and new Forms 20A & 20B CV: 23 CR: 5.1, 26.2, 31, 33, 35, & 43 EV: None	AP: 5, 5.1, and Form 4 BK: Forms 1, 3, 6F, 8, 9A-9I, 10, 14, 17, & 18 and new Forms 20 & 20B CV: 23 CR: 5.1, 26.2, 31, 33, 35, & 43 EV: None	

PROMULGATION OF RULES AMENDMENTS
1997



Agenda Item I D

AGENDA DOCKETING

ADVISORY COMMITTEE ON CRIMINAL RULES

Proposal	Source, Date, and Doc #	Status
[CR 4] — Require arresting officer to notify pretrial services officer, U.S. Marshal, and U.S. Attorney of arrest	Local Rules Project	10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee **COMPLETED**
[CR 5(a)] — Time limit for hearings involving unlawful flight to avoid prosecution arrests	DOJ 8/91; 8/92	10/92 — Subcommittee appointed 4/93 — Considered 6/93 — Approved for publication 9/93 — Published for public comment 4/94 — Revised and forwarded to ST Committee 6/94 — Approved by Stg Com 9/94 — Approved by Jud Conf 12/95 — Effective **COMPLETED**
[CR 5(c)] — Misdemeanor defendant in custody is not entitled to preliminary examination. Cf CR58(b)(2)(G)	Magistrate Judge Robert B. Collings 3/94	10/94 — Deferred pending possible restylizing efforts **PENDING FURTHER ACTION**
[CR 5(c)] — Eliminate consent requirement for magistrate judge consideration	Judge Swearingen 10/28/96 (96-CR-E)	1/97 — Sent to Reporter 4/97 — Recommends legislation to Stg Comm 6/97 — Recommitted by Stg Comm **PENDING FURTHER ACTION**
[CR 5.1] — Extend production of witness statements in CR26.2 to 5.1.	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — St Comm approved 8/96— Published for public comment 4/97— Forwarded to Stg Com 6/97 — Approved by Stg Com **PENDING FURTHER ACTION**
[CR 6] — Statistical reporting of indictments	David L. Cook AO 3/93	10/93 — Committee declined to act on the issue **COMPLETED**
[CR6(a)] — Reduce number of grand jurors	H.R. 1536 introduced by Cong Goodlatte	5/97 — introduced by Congressman Goodlatte, referred to CACM with input from Rules Com **PENDING FURTHER ACTION**
[CR 6(d)] — Interpreters allowed during grand jury	DOJ 1/22/97 (97-CR-B)	1/97 — Sent directly to Chair 4/97 — Draft presented and approved for request to publish 6/97 — Approved by Stg Com for publication 8/97— Published for public comment **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 6(e)] — Intra-Department of Justice use of Grand Jury materials	DOJ	4/92 — Rejected motion to send to ST Committee for public comment 10/94 — Discussed and no action taken **COMPLETED**
CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State Officials	DOJ	4/96 — Committee decided that current practice should be reaffirmed **COMPLETED**
[CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State attorney discipline agencies	Barry A. Miller, Esq. 12/93	10/94 — Considered, no action taken **COMPLETED**
[CR6 (f)] — Return by foreperson rather than entire grand jury	DOJ 1/22/97 (97-CR-A)	1/97 — Sent directly to Chair 4/97— Draft presented and aprroved for publication 6/97 — Approved by Stg Com for publication 8/97— Published for public comment **PENDING FURTHER ACTION**
[7(c)(2)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and aprroved for publication 6/97 — Approved by Stg Com for publication 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR 10] — Arraignment of detainees through video teleconferencing	DOJ 4/92	4/92 — Deferred for further action 10/92 — Subcommittee appointed 4/93 — Considered 6/93 — ST Committee approved for publication 9/93 — Published for public comment 4/94 — Action deferred, pending outcome of FJC pilot programs 10/94 — Considered **PENDING FURTHER ACTION**
[CR 10] — Guilty plea at an arraignment	Judge B. Waugh Crigler 10/94	10/94 — Suggested and briefly considered **DEFERRED INDEFINITELY**
[CR 11] — Magistrate judges authorized to hear guilty pleas, and inform accused of possible deportation	James Craven, Esq. 1991	4/92 — Disapproved **COMPLETED**
[CR 11] — Advise defendant of impact of negotiated factual stipulation	David Adair & Toby Slawsky, AO 4/92	10/92 — Motion to amend withdrawn **COMPLETED**
[CR 11(c)] — Advise defendant of any appeal waiver provision which may be contained in plea agreement	Judge Maryanne Trump Barry 7/19/96 (96-CR-A)	10/96 — Considered, draft presented 4/97 — Draft presented and approved for request to publish 6/97 — Approved by Stg Com for publication 8/97— Published for public comment **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 11(d)] — Examine defendant's prior discussions with an government attorney	Judge Sidney Fitzwater 11/94	4/95 — Discussed and no motion to amend **COMPLETED**
[CR 11(e)] — Judge, other than the judge assigned to hear case, may take part in plea discussions	Judge Jensen 4/95	10/95 — Considered 4/96 —Tabled as moot, but continued study by subcommittee on other Rule 11 issues **DEFERRED INDEFINITELY**
[CR 11(e)(4) — Binding Plea Agreement (Hyde decision)	Judge George P. Kazen 2/96	4/96 — Considered 10/96 — Considered 4/97 — Deferred until Sup Ct decision **PENDING FURTHER ACTION**
[CR 11(e)(1) (A)(B) and (C)] — Sentencing Guidelines effect on particular plea agreements	CR Rules Committee 4/96	4/96 — To be studied by reporter 10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved by Stg Com for publication 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR 12] — Inconsistent with Constitution	Paul Sauers 8/95	10/95 — Considered and no action taken **COMPLETED**
[CR 12(b)] — Entrapment defense raised as pretrial motion	Judge Manuel L. Real 12/92 & Local Rules Project	4/93 — Denied 10/95 — Subcommittee appointed 4/96 — No action taken **COMPLETED**
[CR 12(b)] — Require defense to give notice of intent to raise entrapment defense.		**PENDING FURTHER ACTION**
[CR 12(i)] — Production of statements		7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 16] — Disclosure to defense of information relevant to sentencing	John Rabiej 8/93	10/93 — Committee took no action **COMPLETED**
[CR 16] — Prado Report and allocation of discovery costs	'94 Report of Jud Conf	4/94 — Voted that no amendment be made to the CR rules **COMPLETED**
[CR 16] — Prosecution to inform defense of intent to introduce extrinsic act evidence	CR Rules Committee '94	10/94 — Discussed and declined **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 16(a)(1)] — Disclosure of experts		7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 16(a)(1)(A)] — Disclosure of statements made by organizational defendants	ABA	11/91 — Considered 4/92 — Considered 6/92 — Approved by ST Committee for publication, but deferred 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Committee 9/93 — Approved by Judicial Conference 4/94 — Approved by Supreme Court 12/94 — Effective **COMPLETED**
[CR 16(a)(1)(C)] — Government disclosure of materials implicating defendant	Prof. Charles W. Ehrhardt 6/92 & Judge O'Brien	10/92 — Rejected 4/93 — Considered 4/94 — Discussed and no motion to amend **COMPLETED**
[CR 16(a)(1)(E)] — Require defense to disclose information concerning defense expert testimony	Jo Ann Harris, Asst. Atty. Gen., CR Div., DOJ 2/94; clarification of the word "complies" Judge Propst 97-CR-C	4/94 — Considered 6/94 — Approved for publication by ST Committee 9/94 — Published for public comment 7/95 — Approved by ST Committee 9/95 — Rejected by Judicial Conference 1/96 — Discussed at ST meeting 4/96 — Reconsidered and voted to resubmit to ST Committee 6/96 — ST approved 9/96 — Jud Conf approved 4/97 — Sup Ct approved **COMPLETED** 3/97 — Referred to Reporter and Chair **PENDING FURTHER ACTION**
[CR 16(a) and (b)] — Disclosure of witness names and statements before trial	William R. Wilson, Jr., Esq. 2/92	2/92 — No action 10/92 — Considered and decided to draft amendment 4/93 — Deferred until 10/93 10/93 — Considered 4/94 — Considered 6/94 — Approved for publication by ST Committee 9/94 — Published for public comment 4/95 — Considered and approved 7/95 — Approved by ST Committee 9/95 — Rejected by Judicial Conference **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 16(d)] — Require parties to confer on discovery matters before filing a motion	Local Rules Project & Mag Judge Robert Collings 3/94	10/94 — Deferred 10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee **COMPLETED**
[CR23(b)] — Permits six-person juries in felony cases	S. 3 introduced by Sen Hatch 1/97	1/97 — Introduced as § 502 of the Omnibus Crime Prevention Act of 1997 **PENDING FURTHER ACTION**
[CR 24(a)] — Attorney conducted voir dire of prospective jurors	Judge William R. Wilson, Jr. 5/94	10/94 — Considered 4/95 — Considered 6/95 — Approved by ST Committee for publication 9/95 — Published for public comment 4/96 — Rejected by advisory committee, but should be subject to continued study and education, FJC to pursue educational programs **COMPLETED**
[CR 24(b)] — Reduce or equalize peremptory challenges in an effort to reduce court costs	Renewed suggestions from judiciary ; Judge Acker 97-CR-E	2/91 — ST Committee, after publication and comment, rejected CR Committee 1990 proposal 4/93 — No motion to amend 1/97 — Omnibus Crime Control Act of 1997 (S.3) introduced [Section 501] 6/97 — Stotler letter to Chairman Hatch **COMPLETED**
[CR 24(c)] — Alternate jurors to be retained in deliberations	Judge Bruce M. Selya 8/96 (96-CR-C)	10/96 — Considered and agreed to in concept, reporter to draft appropriate implementing language 4/97 — Draft presented and approved for request to publish 6/97 — Approved by Stg Com for publication 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR 26] — Questioning by jurors	Prof. Stephen Saltzburg	4/93 — Considered and tabled until 4/94 4/94 — Discussed and no action taken **COMPLETED**
[CR 26] — Expanding oral testimony, including video transmission	Judge Stotler 10/96	10/96 — Discussed 4/97 — Subcommittee will be appointed **PENDING FURTHER ACTION**
[CR 26] — Court advise defendant of right to testify	Robert Potter	4/95 — Discussed and no motion to amend **COMPLETED**
[CR 26.2] — Production of statements for proceedings under CR 32(e), 32.1(c), 46(i), and Rule 8 of § 2255		7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 26.2] — Production of a witness' statement regarding preliminary examinations conducted under CR 5.1	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered by committee 4/96 — Draft presented and approved 6/96 — St Comm approved 8/96 — Published for public comment 4/97— Forwarded to Stg Com 6/97 — Approved by Stg Com **PENDING FURTHER ACTION**
[CR26.2(f)] — Definition of Statement	Crim Rules Comm 4/95	4/95 — Considered 10/95 — Considered and no action to be taken **COMPLETED**
[CR 26.3] — Proceedings for a mistrial		7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 29(b)] — Defer ruling on motion for judgment of acquittal until after verdict	DOJ 6/91	11/91 — Considered 4/92 — Forwarded to ST Committee for public comment 6/92 — Approved for publication, but delayed pending move of RCSO 12/92 — Published for public comment on expedited basis 4/93 — Discussed 6/93 — Approved by ST Committee 9/93 — Approved by Judicial Conference 4/94 — Approved by Supreme Court 12/94 — Effective **COMPLETED**
[CR 30] — Permit or Require parties to submit proposed jury instructions before trial	Local Rules Project; Judge Stotler 1/15/97 97CRA	10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee **COMPLETED** 1/97 — Sent directly to chair and reporter 4/97 — Draft presented and approved for request to publish 6/97 — Approved by Stg Com for publication 8/97— Published for public comment
[CR 31] — Provide for a 5/6 vote on a verdict	Sen. Thur-mond, S.1426, 11/95	4/96 — Discussed, rulemaking should handle it **COMPLETED**
[CR 31(d)] — Individual polling of jurors	Judge Brooks Smith	10/95 — Considered 4/96 — Draft presented and approved 6/96 — St Comm approved 8/96 — Published for public comment 4/97 — Forwarded to Stg Com 6/97 — Approved by Stg Com **PENDING FURTHER ACTION**

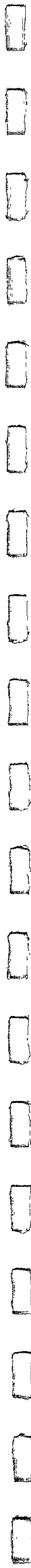
Proposal	Source, Date, and Doc #	Status
[31(e)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and aprroved for publication 6/97 — Approved by Stg Com for publication 8/97— Published for public comment
[CR 32] — Amendments to entire rule; victims' allocution during sentencing	Judge Hodges, before 4/92	10/92 — Forwarded to ST Committee for public comment 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Committee 9/93 — Approved by Judicial Conference 4/94 — Approved by Supreme Court 12/94 — Effective **COMPLETED**
[CR 32(d)(2) — Forfeiture proceedings and procedures Reflect proposed new Rule 32.2 governing criminal forfeitures	Roger Pauley, DOJ, 10/93	4/94 — Considered 6/94 — Approved by ST Committee for public comment 9/94 — Published for public comment 4/95 — Revised and approved 6/95 — Stg Com approved 9/95 — Jud Conf approved 4/96 — Sup Ct approved 12/96 — Effective **COMPLETED** 4/97— Draft presented and aprroved for publication 6/97 — Approved by Stg Com for publication 8/97— Published for public comment
[CR 32(e)] — Delete provision addressing probation and production of statements (later renumbered to CR32(c)(2))	DOJ	7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 32.1] — Production of statements		7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 32.2] — Create forfeiture procedures	John C. Keeney, DOJ, 3/96(96-CR-D)	10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved by Stg Com for publication 8/97— Published for public comment **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 33] — Time for filing motion for new trial on ground of newly discovered evidence	John C. Keeney, DOJ 9/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Stg Comm approved for publication 8/96 — Published for public comment 4/97 — Forwarded to Stg Com 6/97 — Approved by Stg Com **PENDING FURTHER ACTION**
[CR 35(b)] — Recognize combined pre-sentencing and post-sentencing assistance	Judge T. S. Ellis, III 7/95	10/95 — Draft presented and considered 4/96 — Forwarded to ST Committee 6/96 — Approved by ST Committee for publication 8/96 — Published for public comment 4/97 — Forwarded to Stg Com 6/97 — Approved by Stg Com **PENDING FURTHER ACTION**
[CR35(b)] — Recognize assistance in any offense	S.3, Sen Hatch 1/97	1/97 — Introduced as § 602 and 821 of the Omnibus Crime Prevention Act of 1997 6/97 — Stotler letter to chairman Hatch **PENDING FURTHER ACTION**
[CR 35(c)] — Correction of sentence, timing	Jensen, 1994 9th Cir. decision	10/94 — Considered 4/95 — No action pending restylization of CR Rules **PENDING FURTHER ACTION**
[CR 40] — Commitment to another district (warrant may be produced by facsimile)		7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 40] —Treat FAX copies of documents as certified	Mag Judge Wade Hampton 2/93	10/93 — Rejected **COMPLETED**
[CR 40(a)] — Technical amendment conforming with change to CR5	Criminal Rules Comm 4/94	4/94 — Considered, conforming change no publication necessary 6/94 — Stg Com approved 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**
[CR 40(a)] —Proximity of nearest judge for removal proceedings	Mag Judge Robert B. Collings 3/94	10/94 — Considered and deferred further discussion until 4/95 10/96 — Considered and rejected **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 40(d)] — Conditional release of probationer; magistrate judge sets terms of release of probationer or supervised release	Magistrate Judge Robert B. Collings 11/92	10/92 — Forwarded to ST Committee for publication 4/93 — Discussed 6/93 — Approved by ST Committee 9/93 — Approved by Judicial Conference 4/94 — Approved by Supreme Court 12/94 — Effective **COMPLETED**
[CR 41] — Search and seizure warrant issued on information sent by facsimile		7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 41] — Warrant issued by authority within the district	J.C. Whitaker 3/93	10/93 — Failed for lack of a motion **COMPLETED**
[CR 43(b)] — Arraignment of detainees by video teleconferencing; sentence absent defendant	DOJ 4/92	10/92 — Subcommittee appointed 4/93 — Considered 6/93 — Approved by ST Committee for publication 9/93 — Published for public comment 4/94 — Deleted video teleconferencing provision & forwarded to ST Committee 6/94 — Stg Comm approved 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**
[CR 43(c)(4)] — Defendant need not be present to reduce or change a sentence	John Keeney, DOJ 1/96	4/96 — Considered 6/96 — St Comm approved for publication 8/96 — Published for public comment 4/97 — Forwarded to Stg Com 6/97 — Approved by Stg Com **PENDING FURTHER ACTION**
[CR 46] — Production of statements in release from custody proceedings		6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 46] — Release of persons after arrest for violation of probation or supervised release	Magistrate Judge Robert Collings 3/94	10/94 — Defer consideration of amendment until rule might be amended or restylized **PENDING FURTHER ACTION**
[CR 46] — Requirements in AP 9(a) that court state reasons for releasing or detaining defendant in a CR case	11/95 Stotler letter	4/96 — Discussed and no action taken **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 46(i)] — Typographical error in rule in cross-citation	Jensen	7/91 — Approved by ST Committee for publication 4/94 — Considered 9/94 — No action taken by Judicial Conference because Congress corrected error **COMPLETED**
[CR 47] — Require parties to confer or attempt to confer before any motion is filed	Local Rules Project	10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee **COMPLETED**
[CR 49] — Double-sided paper	Environmental Defense Fund 12/91	4/92 — Chair informed EDF that matter was being considered by other committees in Judicial Conference **COMPLETED**
[CR 49(e)] —Delete provision re filing notice of dangerous offender status — conforming amendment	Prof. David Schlueter 4/94	4/94 — Considered 6/94 — Stg Comm approved without publication 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**
[CR53] — Cameras in the courtroom		7/93 — Stg Comm approved 10/93 — Published 4/94 — Considered and approved 6/94 — Stg Comm approved 9/94 — Jud Conf rejected 10/94 — Guidelines discussed by committee **COMPLETED**
[CR54] — Delete Canal Zone	Roger Pauley, minutes 4/97 mtg	4/97 — Draft presented and approved for request to publish 6/97 — Approved by Stg Com for publication 8/97— Published for public comment
[CR 57] — Local rules technical and conforming amendments & local rule renumbering	ST meeting 1/92	4/92 — Forwarded to ST Committee for public comment 6/93 — Approved by ST Committee for publication 9/93 — Published for public comment 4/94 — Forwarded to ST Committee 12/95 — Effective **COMPLETED**
[CR 58] — Clarify whether forfeiture of collateral amounts to a conviction	Magistrate Judge David G. Lowe 1/95	4/95 — No action **COMPLETED**
[CR 58 (b)(2)] — Consent in magistrate judge trials	Judge Philip Pro 10/24/96 (96- CR-B)	1/97 — Reported out by Criminal Rules Committee and approved by the Stg. Com. for transmission to the Jud. Conf. without publication; consistent with Federal Courts Improvement Act 4/97 — Sup Ct approved **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 59] — Authorize Judicial Conference to correct technical errors with no need for Supreme Court & Congressional action	Report from ST Subcommittee on Style	4/92 — Considered and sent to ST Committee 6/93 — Approved by ST Committee for publication 10/93 — Published for public comment 4/94 — Approved as published and forwarded to ST Committee 6/94 — Rejected by ST Committee **COMPLETED**
[Megatrials] — Address issue	ABA	11/91 — Agenda 1/92 — ST Committee, no action taken **COMPLETED**
[Rule 8. Rules Governing §2255] — Production of statements at evidentiary hearing		7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[U.S. Attorneys admitted to practice in Federal courts]	DOJ 11/92	4/93 — Considered **PENDING FURTHER ACTION**
[Restyling CR Rules]		10/95 — Considered 4/96 — On hold pending consideration of restyled AP Rules published for public comment **PENDING FURTHER ACTION**



Agenda Item II A - C

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor David A. Schlueter, Reporter**

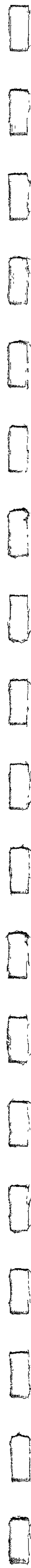
RE: **Rules Published for Public Comment**

DATE: **September 8, 1997**

The following rules have been published for public comment.

1. Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment)
2. Rule 11. Pleas (Acceptance of Pleas and Agreements, etc).
3. Rule 24(c). Alternate Jurors (Retention During Deliberations).
4. Rule 30. Instructions (Submission of Requests for Instructions).
5. Rule 32.2. Forfeiture Procedures.
6. Rule 54. Application and Exception.

The comment period ends on February 15, 1998. A public hearing on the proposed amendments has been scheduled for New Orleans on December 12, 1997.



Agenda Item II D

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Subcommittee on Victim's Rights Legislation : Proposed Amendments to Rules 11, 32, and 32.1**

DATE: **September 8, 1997**

Congress is currently considering the Crime Victims Assistance Act (S. 1081) which would in part amend Rules 11, 32, and 32.1. As explained in Mr. John Rabiej's attached memorandum, the bill currently provides a 6-month delay in the effective date of the Act for the Judicial Conference and its committees to provide alternatives. The legislatively proposed amendments appear at pages 10, 14, and 18 of the copy of the bill. They also appear in Judge Dowd's letter, which is also attached.

Judge Davis has appointed a subcommittee consisting of Judge Dowd (chair), Judge Smith, Mr. Josefsberg, and Mr. Pauley or Ms. Harkenrider to study the matter and propose any suggested amendments to those three rules.

The attached materials are as follows:

- Judge Davis' letter appointing the subcommittee
- Mr. Rabiej's memo explaining the timetables
- Judge Dowd's letter to the subcommittee
- Copy of S. 1081, Victims Assistance Act

This matter will be on the October agenda.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
556 JEFFERSON STREET
SUITE 300
LAFAYETTE, LOUISIANA 70501

W. EUGENE DAVIS
CIRCUIT JUDGE

August 28, 1997

Honorable David D. Dowd, Jr.
Honorable D. Brooks Smith
Robert C. Josefsberg, Esquire
Roger A. Pauley or Mary Frances Harkenrider, Esquire

Re: Advisory Committee on Criminal Rules
Crime Victims Assistance Act (S. 1081)

Dear Colleagues:

With Judge Jensen's concurrence, I ask that you serve on a subcommittee to consider how we should react to recently introduced legislation (S. 1081) relating to victim allocution. The bill's sponsors introduced the legislation as a substitute to the crime victims' rights constitutional amendment proposal. Judge Dowd has agreed to chair the subcommittee.

John Rabiej is sending you a copy of the pending legislation along with background information on it. If enacted, S. 1081 amends a number of our rules and provides generous victim allocution rights to be exercised at various stages of the proceedings. It includes a proviso, however, that its changes to our rules will not become effective if we amend the criminal rules to provide for some victim allocution. But S. 1081 gives us a limited amount of time after the legislation passes to take advantage of this proviso. We, of course, do not know when, if ever, this legislation will pass. But because we will be under a severe time crunch to take advantage of the bill's proviso if it passes, Judge Jensen and I agree that we need to get started with the process of (tentatively) adopting our own amendments at the October meeting. We will appreciate your assistance in proposing suggested amendments to our rules to take advantage of S. 1081's proviso.

Please call me or Dave Schlueter if we can help.

Sincerely,

W. Eugene Davis

cc: Honorable D. Lowell Jensen
Honorable Alicemarie H. Stotler
Professor David A. Schlueter
Mr. John K. Rabiej

LEONIDAS 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 31, 1997
Via Federal Express Mail

MEMORANDUM TO JUDGES STOTLER, SMITH, DAVIS, AND JENSEN AND PROFESSORS CAPRA AND SCHLUETER

SUBJECT: *Victims' Rights Legislation*

Senators Kennedy and Leahy introduced the Crime Victims Assistance Act (S. 1081) on July 29, 1997. The bill represents the Democratic attempt to derail the move for a victims' rights constitutional amendment, which is strongly favored by various victims' groups. A copy of the bill is attached.

The bill contains separate provisions affecting Criminal Rules 11, 32, and 32.1, and Evidence Rule 615. In each provision, the bill directly amends the pertinent rule, but delays the effective date for six months until the Judicial Conference has submitted its own recommendations for rules changes. Unlike the "Molinari" Evidence Rules 413-415 process, which allowed the Congress to ignore the Conference's alternative recommendations, this bill gives more weight to the Conference's recommendations. Under the bill, the alternative version submitted by the Conference becomes law, unless "an Act of Congress is passed overturning the recommendations" within 180 days after the Conference's submission.

Legislative Insights

Senator Hatch privately opposes a victims rights constitutional amendment. But it does not appear likely that he will publicly oppose it. Senator Thompson voiced strong qualms over a constitutional amendment and was willing to co-sponsor the bill. But Senator Kyl persuaded him that such an act would be viewed as turning on the Republicans. Senators Feinstein and Kyl are the leading victims' rights constitutional amendment advocates in the Senate. The bill has no Republican co-sponsor.

Congress will recess on Friday for the month of August and will return after the Labor Day holiday. Hearings were held on the victims' rights constitutional amendment earlier, and it is possible that no additional hearings will be scheduled. A separate bill has been introduced in the House by Congressman Hyde (H.R. 1372). That bill ostensibly is intended to implement an earlier bill introduced by the Congressman, which would provide for a constitutional amendment. But in reality H.R. 1372 is designed to be a stand-alone bill that provides a statutory alternative to the constitutional amendment. Congressman Hyde hopes that the statutory approach will prevail. Its provisions are not

similar to the Crime Victims' Assistance Act. The Administration has a bill on victims' rights also, but it has not been introduced yet.

It is clear that many Congressmen and Senators have concerns about a victims' rights constitutional amendment, but they will not publicly oppose it. It remains to be seen whether a statutory alternative can be politically feasible.

Judicial Conference Position

In April, Judge George Kazen, chair of the Judicial Conference Committee on Criminal Law, responded to the request of Senators Kennedy and Leahy for the Conference's views on an earlier preliminary draft of the Crime Victims Assistance Act. Judge Kazen noted that the Conference at its March 1997 session:

> resolved to take no position on the enactment of a victim's rights constitutional amendment at the present time. However, the Conference authorized the Committee on Criminal Law to maintain contact with Congress to inform it of the interests of the federal judiciary in the impact of a victim's rights constitutional amendment upon the administration of justice.

Judge Kazen went on to say that "we strongly prefer a statutory approach to this issue." At the same time, Judge Kazen advised the Senators that the Conference had not taken a position on any specific provision in the draft bill because it had not yet had sufficient time to analyze it. Although emphasizing a preference for a statutory approach over a constitutional amendment, Judge Kazen cautioned the Senators that "we have serious concerns regarding the provisions amending the Federal Rules of Evidence and Criminal Procedure in a manner inconsistent with the Rules Enabling Act."

I understand that Judge Kazen hopes to compile position papers on the Administration's proposed bill and the two introduced bills. He hopes to be ready to submit the papers, when necessary, depending on which legislative vehicle is moving. His approach is sound and we should be prepared to send the rules committees' concerns on the Crime Victims' Assistance Act at the end of August.

Rules Committees' Planning

Staff to the Criminal Law Committee advises me that their committee will defer to the rules committees' recommendations regarding any provision in the proposed bill affecting the rules. They understand and agree that any rule change outside the Rules Enabling Act violates Conference standing policy and must be objected to on those grounds.

In the event that Congress exercises its prerogative notwithstanding, our fallback position will be to extend the six-month study period provided in the bill for the Conference to prepare alternative recommendations. I see the following problems.

Congress likely will end its first session before the Thanksgiving Holiday; so that this bill, if passed, will be acted on in October or November. Under its provisions, alternative Conference recommendations become effective 180 days after the Conference's submission or a total of one year

after the bill is passed. Next year is an election year. There may be some pressure to ensure that the bill becomes fully operative by the time Congress adjourns next year, probably in early October. In the end, I believe that we will be negotiating within this one-year time frame. Perhaps we can persuade Congress to give us 7 or 8 months and reduce their review to 5 or 4 months, respectively.

Under the six-month worst case scenario and assuming a November 1 bill enactment date, we can consider making some contingency plans. The Criminal Rules Committee meets on October 13-14 and the Evidence Rules Committee meets on October 20-21. Alternative recommendations could be drafted and submitted to the relevant committee for preliminary discussion in advance of their respective meeting. Perhaps subcommittees could be appointed to assist the reporter in drafting alternative recommendations, if appropriate. The following is one possible schedule:

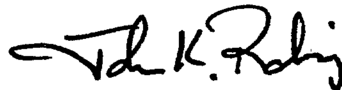
Sept. 1:	Reporters, in consultation with chairs, prepare position paper identifying problems with Crime Victims' Assistance Act and send them to Judge Stotler, who coordinates their submission (if necessary) with Judge Kazen
Oct. 13 — 14:	Criminal Rules Committee considers (hypothetical) preliminary draft of alternative recommendations
Oct. 20 — 21:	Evidence Rules Committee considers (hypothetical) preliminary draft of alternative recommendations
Nov. 1:	Legislation Enacted — six-month deadline begins
Nov. 10 — Nov. 14:	Advisory Committees polled (or new meetings are held) on recommendation to publish alternative recommendations considered at October meetings
Nov. 17 — Nov. 21:	Standing Committee polled on request to publish
Dec. 1 — Mar. 3:	Alternative recommendations published on Internet, sent to West, court family, and lawyers organizations on mailing list. Send to additional 500-1,000 randomly selected law professors. Schedule public hearings in Washington, D.C.
Mar. 16 — Mar. 20:	Advisory Committee meets and reviews comments and makes any necessary changes
Apr. 6 — Apr. 10:	Standing Committee is polled or meets and reviews draft prepared by advisory committee
Apr. 20 — Apr. 24:	Judicial Conference polled on alternative recommendations
Apr. 30:	Alternative recommendations sent to Congress

The above schedule is one example of how we could handle this legislation. It is intended only for planning purposes and to stimulate further thinking on how to prepare for a possibility that

hopefully will not occur. The above schedule illustrates, however, that addressing these proposals at the October Advisory Committee meetings may obviate the need to hold a separate advisory committee meeting to consider the legislation if the bill is passed later in November. There are a lot of "ifs" built into this schedule. We should be in a better position to know what Congress intends to do after the August recess.

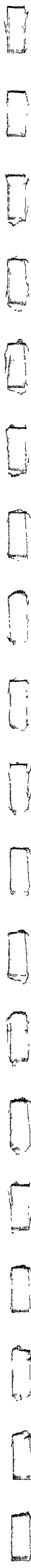
One final thought, perhaps the Standing Committee or individual members could be asked to attend the March advisory committee meetings when the committees make their decision to facilitate the decision-making process. In this regard, the change to Evidence Rule 615 is similar in spirit to the one originally proposed by the Evidence Rules Committee. The changes to the Criminal Rules, however, affect matters that have not been previously considered by the rules committees and there may be more urgency for the Standing Committee members to attend that advisory committee's meeting.

I will stay in touch with you on this matter and keep you apprised immediately of developments.



John K. Rabiej

cc: Professor Daniel R. Coquillette



United States District Court
Northern District of Ohio
United States Courthouse
2 South Main Street
Akron, Ohio 44308

RECEIVED 9/15/97

David D. Dowd, Jr.
Judge

September 10, 1997

(330) 375-5834
Fax: (330) 375-5628

Judge W. Eugene Davis
Judge D. Brooks Smith
Mr. Robert C. Josefsberg
Mr. Roger Pauley - w/Justice Dept.

In re: Crime Victims Assistance Act (S. 1081)

Dear Colleagues:

In my role as the designated chair of the subcommittee to address the proposed changes to Criminal Rules 11, 32, 32.1 and Evidence Rule 615, I have prepared the enclosed document which sets forth the revisions of those four rules as envisioned by Senate Bill 1081.

As I understand our assignment as set forth in Judge Davis's letter of August 28, 1997, we have been requested to propose suggested amendments to our rules to take advantage of S. 1081's provision allowing us a limited amount of time to amend the Criminal Rules in a manner consistent with the principles set forth in S. 1081.

It is my hope that the enclosed document will assist each of you in examining the proposals. I am requesting by this letter that you forward to Professor David Schlueter with copies to the members of the committee, any proposals, comments, suggestions or critiques that you have with respect to S. 1081. I ask that you mail or fax said comments, etc., by September 22. I have requested and Professor Schlueter has agreed to review the suggestions and respond by letter or fax to the members of the committee by September 29.

In the interim, my secretary will be contacting each of you to see if we can arrange a date for a massive telephone conference beginning as early as October 1 and not later than October 3 with the hope that we will be able to arrive at a proposal for presentation to the committee on October 13.

Many thanks for your assistance.

Yours very truly,

David D. Dowd, Jr.
U.S. District Judge

DDD:gh
Enc.
cc: Professor David A. Schlueter
Mr. John K. Rabiej

Rule 11.[1] Pleas

(a) **Alternatives.**

(1) **In General.** A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) **Conditional Pleas.** With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(b) **Nolo Contendere.** A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) **Advice to Defendant.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

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[1] This type indicates Rule as presently composed
~~This type indicates language proposed to be stricken.~~
This type indicates proposed changes to Rule.
This type indicates instructions and text is not part of the proposed Rule.

(d) **Insuring That the Plea is Voluntary.** The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

(e) **Plea Agreement Procedure.**

(1) **In General.** The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) **Notice of Such Agreement.** If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) **Acceptance of a Plea Agreement.** If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) **Rejection of a Plea Agreement.** If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) **Time of Plea Agreement Procedure.** Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) **Inadmissibility of Pleas, Plea Discussions, and Related Statements.** Except as otherwise provided in this paragraph, evidence of the following is not, in any

civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) **Determining Accuracy of Plea.** Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) **Record of Proceedings.** A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(h) **Harmless Error.** Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

(i) ***Rights of Victims.***

(1) ***In General.*** *In any case involving a defendant who is charged with an offense involving death or bodily injury to any person, a threat of death or bodily injury to any person, a sexual assault, or an attempted sexual assault --*

(A) *the Government, prior to a hearing at which a plea of guilty or nolo contendere is entered, shall make a reasonable effort to notify the victim of--*

(i) the date and time of the hearing; and

(ii) the right of the victim to attend the hearing and to address the court; and

(B) *if the victim attends a hearing described in subparagraph (A), the court, before accepting a plea of guilty or nolo contendere, shall afford the victim an opportunity to be heard on the proposed plea agreement.*

(2) ***Address.*** *With respect to any case described in paragraph (1), the victim shall notify the appropriate authority of an address to which notification under this subsection may be sent.*

(3) ***Definition of Victim.*** *In this subsection, the term "victim" means any individual against whom an offense involving death or bodily injury to any person, a threat of death or bodily injury to any person, a sexual assault, or an attempted sexual*

assault, has been committed and also includes the parent or legal guardian of a victim who is less than 18 years of age, or incompetent, or 1 or more family members designated by the court if the victim is deceased or incapacitated.

(4) ***Mass Victim Cases.*** *In any case involving more than 15 victims, the court, after consultation with the Government and the victims, may appoint a number of victims to serve as representatives of the victims' interests.*

Rule 32. Sentence and Judgment

(a) In General; Time for Sentencing. When a presentence investigation and report are made under subdivision (b)(1), sentence should be imposed without unnecessary delay following completion of the process prescribed by subdivision (b)(6). The time limits prescribed in subdivision (b)(6) may be either shortened or lengthened for good cause.

(b) Presentence Investigation and Report.

(1) When Made. The probation officer must make a presentence investigation and submit a report to the court before the sentence is imposed, unless:

(A) the court finds that the information in the record enables it to exercise its sentencing authority meaningfully under 18 U.S.C. § 3553; and

(B) the court explains this finding on the record.

Notwithstanding the preceding sentence, a presentence investigation and report, or other report containing information sufficient for the court to enter an order of restitution, as the court may direct, shall be required in any case in which restitution is required to be ordered.

(2) Presence of Counsel. On request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation.

(3) Nondisclosure. The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty.

(4) Contents of the Presentence Report. The presentence report must contain --

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

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. § 994(a), as the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. § 994(a)(1); and the probation officer's explanation of any factors that may suggest a different sentence -- within or without the applicable guideline -- that would be more appropriate, given all the circumstances;

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

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

(D) a victim impact statement, identifying, to the maximum extent practicable --

(i) each victim of the offense (except that such identification shall not include information relating to any telephone number, place of employment, or residential address of any victim);

(ii) an itemized account of any economic loss suffered by each victim as a result of the offense;

(iii) any physical injury suffered by each victim as a result of the offense, along with its seriousness and permanence;

(iv) a description of any change in the personal welfare or familial relationships of each victim as a result of the offense; and

(v) a description of the impact of the offense upon each victim and the recommendation of each victim regarding an appropriate sanction for the defendant;

(E) in appropriate cases, information about the nature and extent of nonprison programs and resources available for the defendant;

(F) in appropriate cases, information sufficient for the court to enter an order of restitution;

(G) any report and recommendation resulting from a study ordered by the court under 18 U.S.C. § 3552(b); and

(H) any other information required by the court.

(5) Exclusions. The presentence report must exclude:

(A) any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation;

(B) sources of information obtained upon a promise of confidentiality; or

(C) any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.

(6) Disclosure and Objections.

(A) Not less than 35 days before the sentencing hearing -- unless the defendant waives this minimum period -- the probation officer must furnish the presentence report to the defendant, the defendant's counsel, and the attorney for the Government. The court may, by local rule or in individual cases, direct that the probation officer not disclosure the probation officer's recommendation, if any, on the sentence.

(B) Within 14 days after receiving the presentence report, the parties shall communicate in writing to the probation officer, and to each other, any objections to any material information, sentencing classifications, sentencing guidelines ranges, and policy statements contained in or omitted from the presentence report. After receiving objections, the probation officer may meet with the defendant, the defendant's counsel, and the attorney for the Government to discuss those objections. The probation officer may also conduct a further investigation and revise the presentence report as appropriate.

(C) Not later than 7 days before the sentencing hearing, the probation officer must submit the presentence report to the court, together with an addendum setting forth any unresolved objections, the grounds for those objections, and the probation officer's comments on the objections. At the same time, the probation officer must furnish the revisions of the presentence report and the addendum to the defendant, the defendant's counsel, and the attorney for the Government.

(D) Except for any unresolved objection under subdivision (b)(6)(B), the court may, at the hearing, accept the presentence report as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.

(7) Victim Impact Statements.

(A) In General. *Any probation officer preparing a presentence report shall --*

(i) make a reasonable effort to notify each victim of the offense that such a report is being prepared and the purpose of such report; and

(ii) provide the victim with an opportunity to submit an oral or written statement, or a statement on audio or videotape outlining the impact of the offense upon the victim.

(B) Use of Statements. *Any written statement submitted by a victim under subparagraph (A) shall be attached to the presentence report and shall be provided to the sentencing court and to the parties.*

(c) Sentence.

(1) Sentencing Hearing. At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule on any unresolved objections to the presentence report. The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections. For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons. *Before sentencing in any case in which a defendant has been charged with or found guilty of an offense involving death or bodily injury to any person, a threat of death or bodily injury to any person, a sexual assault, or an attempted sexual assault, the Government shall make a reasonable effort to notify the victim (or the family of a victim who is deceased) of the time and place of sentencing and of their right to attend and to be heard.*

(2) Production of Statements at Sentencing Hearing. Rule 26.2(a)-(d) and (f) applies at a sentencing hearing under this rule. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the movant, the court may not consider the affidavit or testimony of the witness whose statement is withheld.

(3) Imposition of Sentence. Before imposing sentence, the court must:

(A) verify that the defendant and defendant's counsel have read and discussed the presentence report made available under subdivision (b)(6)(A). If the court has received information excluded from the presentence report under subdivision (b)(5) the court -- in lieu of making that information available -- must summarize it in writing, if the information will be relied on in determining sentence. The court must also give the defendant and the defendant's counsel a reasonable opportunity to comment on that information;

(B) afford defendant's counsel an opportunity to speak on behalf of the defendant;

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

(D) afford the attorney for the Government an opportunity equivalent to that of the defendant's counsel to speak to the court; and

(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 Camera Proceedings.** The court's summary of information under subdivision (c)(3)(A) may be in camera. Upon joint motion by the defendant and by the attorney for the Government, the court may hear in camera the statements -- made under subdivision (c)(3)(B), (C), (D), and (E) -- by the defendant, the defendant's counsel, the victim, or the attorney for the Government.

(5) **Notification of Right to Appeal.** After imposing sentence in a case which has gone to trial on a plea of not guilty, the court must advise the defendant of the right to appeal. After imposing sentence in any case, the court must advise the defendant of any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court must immediately prepare and file a notice of appeal on behalf of the defendant.

(d) Judgment.

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

(2) **Criminal Forfeiture.** If a verdict contains a finding that property is subject to a criminal forfeiture, or if a defendant enters a guilty plea subjecting property to such forfeiture, the court may enter a preliminary order of forfeiture after providing notice to the defendant and a reasonable opportunity to be heard on the timing and form of the order. The order of forfeiture shall authorize the Attorney General to seize the property subject to forfeiture, to conduct any discovery that the court considers proper to help identify, locate, or dispose of the property, and to begin proceedings consistent with any statutory requirements pertaining to ancillary hearings and the rights of third parties.

At sentencing, a final order of forfeiture shall be made part of the sentence and included in the judgment. The court may include in the final order such conditions as may be reasonably necessary to preserve the value of the property pending any appeal.

(e) **Plea Withdrawal.** If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

(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 to notification and to submit a statement under subdivision (b)(7), the right to notification and to be heard under subdivision (c)(1), and* 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.

Rule 32.1 Revocation or Modification of Probation or Supervised Release

(a) Revocation of Probation or Supervised Release.

(1) Preliminary Hearing. Whenever a person is held in custody on the ground that the person has violated a condition of probation or supervised release, the person shall be afforded a prompt hearing before any judge, or a United States magistrate who has been given the authority pursuant to 28 U.S.C. § 636 to conduct such hearings, in order to determine whether there is probably[2] cause to hold the person for a revocation hearing. The person shall be given

(A) notice of the preliminary hearing and its purpose and of the alleged violation;

(B) an opportunity to appear at the hearing and present evidence in the person's own behalf;

(C) upon request, the opportunity to question witnesses against the person unless, for good cause, the federal magistrate decides that justice does not require the appearance of the witness; and

(D) notice of the person's right to be represented by counsel.

The proceedings shall be recorded stenographically or by an electronic recording device. If probable cause is found to exist, the person shall be held for a revocation hearing. The person may be released pursuant to Rule 46(c) pending the revocation hearing. If probable cause is not found to exist, the proceeding shall be dismissed.

(2) Revocation Hearing. The revocation hearing, unless waived by the person, shall be held within a reasonable time in the district of jurisdiction. The person shall be given

(A) written notice of the alleged violation;

(B) disclosure of the evidence against the person;

(C) an opportunity to appear and to present evidence in the person's own behalf;

(D) the opportunity to question adverse witnesses; and

(E) notice of the person's right to be represented by counsel.

(b) Modification of Probation or Supervised Release. A hearing and assistance of counsel are required before the terms or conditions of probation or supervised release can be modified, unless the relief to be granted to the person on probation or supervised release upon the person's request or the court's own motion is favorable to the person, and the attorney for the government, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of the term of probation or supervised release is not favorable to the person for the purposes of this rule.

(c) Production of Statements.

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[2]So in original. Probably should be "probable".

(1) In General. Rule 26.2(a)-(d) and (f) applies at any hearing under this rule.

(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.

(d) Rights of Victims.

(1) In General. At any hearing pursuant to subsection (a)(2) involving one or more persons who have been convicted of an offense involving death or bodily injury to any person, a threat of death or bodily injury to any person, a sexual assault, or an attempted sexual assault, the Government shall make reasonable effort to notify the victim of the offense (and the victim of any new charges giving rise to the hearings), of --

(A) the date and time of the hearing; and

(B) the right of the victim to attend the hearing and to address the court regarding whether the terms or conditions of probation or supervised release should be modified.

(2) Duties of Court at Hearing. At any hearing described in paragraph (1) at which a victim is present, the court shall --

(A) address each victim personally; and

(B) afford the victim an opportunity to be heard on the proposed terms or conditions of probation or supervised release.

(3) Address. In any case described in paragraph (1), the victim shall notify the appropriate authority of an address to which notification under this paragraph may be sent.

(4) Definition of Victim. In this rule, the term "victim" means any individual against whom an offense involving death or bodily injury to any person, a threat of death or bodily injury to any person, a sexual assault, or an attempted sexual assault, has been committed and a hearing pursuant to subsection (a)(2) is conducted, including --

(A) a parent or legal guardian of the victim, if the victim is less than 18 years of age or is incompetent; or

(B) 1 or more family members or relatives of the victim designated by the court, if the victim is deceased or incapacitated.

Rule 615. Exclusion of Witnesses

~~At the request~~

(a) ***In General.*** *Except as provided in subsection (b), at the request* of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. ~~This rule~~

(b) Exceptions. *Subsection (a)* does not authorize ~~exclusion of (1) a party~~ *exclusion of --*

(1) *a party* who is a natural ~~person, or (2) an officer~~ *person;*

(2) *an officer* or employee of a party which is not a natural person designated as its representative by its ~~attorney, or (3) a person~~ *attorney;*

(3) *a person* whose presence is shown by a party to be essential to the presentation of the party's cause~~.~~ *; or*

(4) *a person who is a victim (or a member of the immediate family of a victim who is deceased or incapacitated) of an offense involving death or bodily injury to any person, a threat of death or bodily injury to any person, a sexual assault, or an attempted sexual assault, for which a defendant is being tried in a criminal trial, unless the court concludes that --*

(A) *the testimony of the person will be materially affected by hearing the testimony of other witnesses, and the material effect of hearing the testimony of other witnesses on the testimony of that person will result in unfair prejudice to any party; or*

(B) *due to the large number of victims or family members of victims who may be called as witnesses, permitting attendance in the courtroom itself when testimony is being heard is not feasible.*

(c) ***Discretion of Court; Effect on Other Law.*** *Nothing in subsection (b)(4) shall be construed --*

(1) *to limit the ability of a court to exclude a witness, if the court determines that such action is necessary to maintain order during a court proceeding; or*

(2) *to limit or otherwise affect the ability of a witness to be present during court proceedings pursuant to section 3510 of title 18, United States Code.*

105TH CONGRESS
1ST SESSION

S. ______

IN THE SENATE OF THE UNITED STATES

Mr. LEAHY (for himself and Mr. KENNEDY) introduced the following bill; which was read twice and referred to the Committee on ______________

A BILL

To enhance rights and protections for victims of crime.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 "Crime Victims Assistance Act".

6 (b) TABLE OF CONTENTS.—The table of contents for
7 this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Definitions.

TITLE I—VICTIM RIGHTS

Subtitle A—Amendments to Title 18, United States Code

Sec. 101. Right to be notified of detention hearing and right to be heard on the issue of detention.

Sec. 102. Right to a speedy trial and prompt disposition free from unreasonable delay.
Sec. 103. Enhanced right to order of restitution.
Sec. 104. Enhanced right to be notified of escape or release from prison.
Sec. 105. Enhanced penalties for witness tampering.

Subtitle B—Amendments to Federal Rules of Criminal Procedure

Sec. 121. Right to be notified of plea agreement and to be heard on merits of the plea agreement.
Sec. 122. Enhanced rights of notification and allocution at sentencing.
Sec. 123. Rights of notification and allocution at a probation revocation hearing.

Subtitle C—Amendment to Federal Rules of Evidence

Sec. 131. Enhanced right to be present at trial.

Subtitle D—Remedies for Noncompliance

Sec. 141. Remedies for noncompliance.

TITLE II—VICTIM ASSISTANCE INITIATIVES

Sec. 201. Increase in victim assistance personnel.
Sec. 202. Increased training for State and local law enforcement, State court personnel, and officers of the court to respond effectively to the needs of victims of crime.
Sec. 203. Increased resources for State and local law enforcement agencies, courts, and prosecutors' offices to develop state-of-the-art systems for notifying victims of crime of important dates and developments.
Sec. 204. Pilot programs to establish ombudsman programs for crime victims.
Sec. 205. Amendments to Victims of Crime Act of 1984.
Sec. 206. Technical correction.
Sec. 207. Services for victims of crime and domestic violence.
Sec. 208. Pilot program to study effectiveness of restorative justice approach on behalf of victims of crime.

1 **SEC. 2. DEFINITIONS.**

2 In this Act—

3 (1) the term "Attorney General" means the At-
4 torney General of the United States;

5 (2) the term "bodily injury" has the meaning
6 given that term in section 1365(g) of title 18, Unit-
7 ed States Code;

1 (3) the term "Commission" means the Commis-
2 sion on Victims' Rights established under section
3 204;
4 (4) the term "Indian tribe" has the same mean-
5 ing as in section 4(e) of the Indian Self-Determina-
6 tion and Education Assistance Act (25 U.S.C.
7 450b(e));
8 (5) the term "Judicial Conference" means the
9 Judicial Conference of the United States established
10 under section 331 of title 28, United States Code;
11 (6) the term "law enforcement officer" means
12 an individual authorized by law to engage in or su-
13 pervise the prevention, detection, investigation, or
14 prosecution of any violation of law, and includes cor-
15 rections, probation, parole, and judicial officers;
16 (7) the term "Office of Victims of Crime"
17 means the Office of Victims of Crime of the Depart-
18 ment of Justice;
19 (8) the term "State" means each of the several
20 States of the United States, the District of Colum-
21 bia, the Commonwealth of Puerto Rico, the Virgin
22 Islands, Guam, American Samoa, and the Common-
23 wealth of the Northern Mariana Islands;
24 (9) the term "unit of local government" means
25 any—

1 (A) city, county, township, town, borough,
2 parish, village, or other general purpose politi-
3 cal subdivision of a State; or
4 (B) Indian tribe;
5 (10) the term "victim"—
6 (A) means an individual harmed as a re-
7 sult of a commission of an offense; and
8 (B) in the case of a victim who is less than
9 18 years of age, incompetent, incapacitated, or
10 deceased—
11 (i) the legal guardian of the victim;
12 (ii) a representative of the estate of
13 the victim;
14 (iii) a member of the family of the vic-
15 tim; or
16 (iv) any other person appointed by the
17 court to represent the victim, except that
18 in no event shall a defendant be appointed
19 as the representative or guardian of the
20 victim; and
21 (11) the term "qualified private entity" means
22 a private entity that meets such requirements as the
23 Attorney General may establish.

1 # TITLE I—VICTIM RIGHTS
2 ## Subtitle A—Amendments to Title
3 ## 18, United States Code

4 **SEC. 101. RIGHT TO BE NOTIFIED OF DETENTION HEARING**
5 **AND RIGHT TO BE HEARD ON THE ISSUE OF**
6 **DETENTION.**

7 Section 3142 of title 18, United States Code, is
8 amended by adding at the end the following:
9 "(k) NOTIFICATION OF RIGHT TO BE HEARD.—
10 "(1) IN GENERAL.—In any case involving a de-
11 fendant who is arrested for an offense involving
12 death or bodily injury to any person, a threat of
13 death or bodily injury to any person, a sexual as-
14 sault, or an attempted sexual assault, in which a de-
15 tention hearing is scheduled pursuant to subsection
16 (f)—
17 "(A) the Government shall make a reason-
18 able effort to notify the victim of the hearing,
19 and of the right of the victim to be heard on
20 the issue of detention; and
21 "(B) at the hearing under subsection (f),
22 the court shall inquire of the Government as to
23 whether the efforts at notification of the victim
24 under subparagraph (A) were successful and, if
25 so, whether the victim wishes to be heard on

1 the issue of detention and, if so, shall afford the
2 victim such an opportunity.
3 "(2) LIMITATION.—Upon motion of either
4 party that identification of the defendant by the vic-
5 tim is a fact in dispute, and that no means of ver-
6 ification has been attempted, the Court shall use ap-
7 propriate measures to protect integrity of the identi-
8 fication process.
9 "(3) ADDRESS.—With respect to any case de-
10 scribed in paragraph (1), the victim shall notify the
11 appropriate authority of an address to which notifi-
12 cation under this subsection may be sent.
13 "(4) DEFINITION OF VICTIM.—In this sub-
14 section, the term 'victim' means any individual
15 against whom an offense involving death or bodily
16 injury to any person, a threat of death or bodily in-
17 jury to any person, a sexual assault, or an attempted
18 sexual assault, has been committed and also includes
19 the parent or legal guardian of a victim who is less
20 than 18 years of age, or incompetent, or 1 or more
21 family members designated by the court if the victim
22 is deceased or incapacitated.".

1 **SEC. 102. RIGHT TO A SPEEDY TRIAL AND PROMPT DIS-**
2 **POSITION FREE FROM UNREASONABLE**
3 **DELAY.**

4 Section 3161(h)(8)(B) of title 18, United States
5 Code, is amended by adding at the end the following:
6 "(v) The interests of the victim (or the family
7 of a victim who is deceased or incapacitated) in the
8 prompt and appropriate disposition of the case, free
9 from unreasonable delay.".

10 **SEC. 103. ENHANCED RIGHT TO ORDER OF RESTITUTION.**

11 Section 3664(d)(2)(A)(iv) of title 18, United States
12 Code, is amended by inserting ", and the right of the vic-
13 tim (or the family of a victim who is deceased or incapaci-
14 tated) to attend the sentencing hearing and to make a
15 statement to the court at the sentencing hearing" before
16 the semicolon.

17 **SEC. 104. ENHANCED RIGHT TO BE NOTIFIED OF ESCAPE**
18 **OR RELEASE FROM PRISON.**

19 Section 503(c)(5)(B) of the Victims' Rights and Res-
20 titution Act of 1990 (42 U.S.C. 10607(c)(5)(B)) is
21 amended by inserting after "offender" the following: ", in-
22 cluding escape, work release, furlough, or any other form
23 of release from a psychiatric institution or other facility
24 that provides mental health services to offenders".

1 **SEC. 105. ENHANCED PENALTIES FOR WITNESS TAMPER-**
2 **ING.**
3 Section 1512 of title 18, United States Code, is
4 amended—
5 (1) in subsection (a)—
6 (A) in paragraph (1), by striking "as pro-
7 vided in paragraph (2)" and inserting "as pro-
8 vided in paragraph (3)";
9 (B) by redesignating paragraph (2) as
10 paragraph (3);
11 (C) by inserting after paragraph (1) the
12 following:
13 "(2) Whoever uses physical force or the threat
14 of physical force, or attempts to do so, with intent
15 to—
16 "(A) influence, delay, or prevent the testi-
17 mony of any person in an official proceeding;
18 "(B) cause or induce any person to—
19 "(i) withhold testimony, or withhold a
20 record, document, or other object, from an
21 official proceeding;
22 "(ii) alter, destroy, mutilate, or con-
23 ceal an object with intent to impair the ob-
24 ject's integrity or availability for use in an
25 official proceeding;

1 "(iii) evade legal process summoning
2 that person to appear as a witness, or to
3 produce a record, document, or other ob-
4 ject, in an official proceeding; and
5 "(iv) be absent from an official pro-
6 ceeding to which such person has been
7 summoned by legal process; or
8 "(C) hinder, delay, or prevent the commu-
9 nication to a law enforcement officer or judge
10 of the United States of information relating to
11 the commission or possible commission of a
12 Federal offense or a violation of conditions of
13 probation, parole, or release pending judicial
14 proceedings;
15 shall be punished as provided in paragraph (3).";
16 and
17 (D) in paragraph (3)(B), as redesignated,
18 by striking "in the case of" and all that follows
19 before the period and inserting "an attempt to
20 murder, the use of physical force, the threat of
21 physical force, or an attempt to do so, imprison-
22 ment for not more than 20 years"; and
23 (2) in subsection (b), by striking "or physical
24 force".

1 ## Subtitle B—Amendments to Fed-
2 eral Rules of Criminal Proce-
3 dure

4 **SEC. 121. RIGHT TO BE NOTIFIED OF PLEA AGREEMENT**
5 **AND TO BE HEARD ON MERITS OF THE PLEA**
6 **AGREEMENT.**

7 (a) IN GENERAL.—Rule 11 of the Federal Rules of
8 Criminal Procedure is amended by adding at the end the
9 following:

10 "(i) RIGHTS OF VICTIMS.—

11 "(1) IN GENERAL.—In any case involving a de-
12 fendant who is charged with an offense involving
13 death or bodily injury to any person, a threat of
14 death or bodily injury to any person, a sexual as-
15 sault, or an attempted sexual assault—

16 "(A) the Government, prior to a hearing at
17 which a plea of guilty or nolo contendere is en-
18 tered, shall make a reasonable effort to notify
19 the victim of—

20 "(i) the date and time of the hearing;
21 and

22 "(ii) the right of the victim to attend
23 the hearing and to address the court; and

24 "(B) if the victim attends a hearing de-
25 scribed in subparagraph (A), the court, before

1 accepting a plea of guilty or nolo contendere,
2 shall afford the victim an opportunity to be
3 heard on the proposed plea agreement.
4 "(2) ADDRESS.—With respect to any case de-
5 scribed in paragraph (1), the victim shall notify the
6 appropriate authority of an address to which notifi-
7 cation under this subsection may be sent.
8 "(3) DEFINITION OF VICTIM.—In this sub-
9 section, the term 'victim' means any individual
10 against whom an offense involving death or bodily
11 injury to any person, a threat of death or bodily in-
12 jury to any person, a sexual assault, or an attempted
13 sexual assault, has been committed and also includes
14 the parent or legal guardian of a victim who is less
15 than 18 years of age, or incompetent, or 1 or more
16 family members designated by the court if the victim
17 is deceased or incapacitated.
18 "(4) MASS VICTIM CASES.—In any case involv-
19 ing more than 15 victims, the court, after consulta-
20 tion with the Government and the victims, may ap-
21 point a number of victims to serve as representatives
22 of the victims' interests.".
23 (b) EFFECTIVE DATE.—

1 (1) IN GENERAL.—The amendment made by
2 subsection (a) shall become effective as provided in
3 paragraph (3).
4 (2) ACTION BY JUDICIAL CONFERENCE.—
5 (A) RECOMMENDATIONS.—Not later than
6 180 days after the date of enactment of this
7 Act, the Judicial Conference shall submit to
8 Congress a report containing recommendations
9 for amending the Federal Rules of Criminal
10 Procedure to provide enhanced opportunities for
11 victims of offenses involving death or bodily in-
12 jury to any person, the threat of death or bodily
13 injury to any person, a sexual assault, or an at-
14 tempted sexual assault, to be heard on the issue
15 of whether or not the court should accept a plea
16 of guilty or nolo contendere.
17 (B) INAPPLICABILITY OF OTHER LAW.—
18 Chapter 131 of title 28, United States Code,
19 does not apply to any recommendation made by
20 the Judicial Conference under this paragraph.
21 (3) CONGRESSIONAL ACTION.—Except as other-
22 wise provided by law, if the Judicial Conference—
23 (A) submits a report in accordance with
24 paragraph (2) containing recommendations de-
25 scribed in that paragraph, and those rec-

1 ommendations are the same as the amendment
2 made by subsection (a), then the amendment
3 made by subsection (a) shall become effective
4 30 days after the date on which the rec-
5 ommendations are submitted to Congress under
6 paragraph (2);
7 (B) submits a report in accordance with
8 paragraph (2) containing recommendations de-
9 scribed in that paragraph, and those rec-
10 ommendations are different in any respect from
11 the amendment made by subsection (a), the rec-
12 ommendations made pursuant to paragraph (2)
13 shall become effective 180 days after the date
14 on which the recommendations are submitted to
15 Congress under paragraph (2), unless an Act of
16 Congress is passed overturning the rec-
17 ommendations; and
18 (C) fails to comply with paragraph (2), the
19 amendment made by subsection (a) shall be-
20 come effective 360 days after the date of enact-
21 ment of this Act.
22 (4) APPLICATION.—Any amendment made pur-
23 suant to this section (including any amendment
24 made pursuant to the recommendations of the Unit-
25 ed States Sentencing Commission under paragraph

1 (2)) shall apply in any proceeding commenced on or
2 after the effective date of the amendment.

3 **SEC. 122. ENHANCED RIGHTS OF NOTIFICATION AND ALLO-**
4 **CUTION AT SENTENCING.**

5 (a) IN GENERAL.—Rule 32 of the Federal Rules of
6 Criminal Procedure is amended—
7 (1) in subsection (b)—
8 (A) in paragraph (4), by striking subpara-
9 graph (D) and inserting the following:
10 "(D) a victim impact statement, identify-
11 ing, to the maximum extent practicable—
12 "(i) each victim of the offense (except
13 that such identification shall not include
14 information relating to any telephone num-
15 ber, place of employment, or residential ad-
16 dress of any victim);
17 "(ii) an itemized account of any eco-
18 nomic loss suffered by each victim as a re-
19 sult of the offense;
20 "(iii) any physical injury suffered by
21 each victim as a result of the offense,
22 along with its seriousness and permanence;
23 "(iv) a description of any change in
24 the personal welfare or familial relation-

1 ships of each victim as a result of the of-
2 fense; and
3 "(v) a description of the impact of the
4 offense upon each victim and the rec-
5 ommendation of each victim regarding an
6 appropriate sanction for the defendant;";
7 and
8 (B) by adding at the end the following:
9 "(7) VICTIM IMPACT STATEMENTS.—
10 "(A) IN GENERAL.—Any probation officer
11 preparing a presentence report shall—
12 "(i) make a reasonable effort to notify
13 each victim of the offense that such a re-
14 port is being prepared and the purpose of
15 such report; and
16 "(ii) provide the victim with an oppor-
17 tunity to submit an oral or written state-
18 ment, or a statement on audio or videotape
19 outlining the impact of the offense upon
20 the victim.
21 "(B) USE OF STATEMENTS.—Any written
22 statement submitted by a victim under subpara-
23 graph (A) shall be attached to the presentence
24 report and shall be provided to the sentencing
25 court and to the parties.";

1 (2) in subsection (c)(1), by adding at the end
2 the following: "Before sentencing in any case in
3 which a defendant has been charged with or found
4 guilty of an offense involving death or bodily injury
5 to any person, a threat of death or bodily injury to
6 any person, a sexual assault, or an attempted sexual
7 assault, the Government shall make a reasonable ef-
8 fort to notify the victim (or the family of a victim
9 who is deceased) of the time and place of sentencing
10 and of their right to attend and to be heard."; and
11 (3) in subsection (f), by inserting "the right to
12 notification and to submit a statement under sub-
13 division (b)(7), the right to notification and to be
14 heard under subdivision (c)(1), and" before "the
15 right of allocution".
16 (b) EFFECTIVE DATE.—
17 (1) IN GENERAL.—The amendments made by
18 subsection (a) shall become effective as provided in
19 paragraph (3).
20 (2) ACTION BY JUDICIAL CONFERENCE.—
21 (A) RECOMMENDATIONS.—Not later than
22 180 days after the date of enactment of this
23 Act, the Judicial Conference shall submit to
24 Congress a report containing recommendations
25 for amending the Federal Rules of Criminal

1 Procedure to provide enhanced opportunities for
2 victims of offenses involving death or bodily in-
3 jury to any person, the threat of death or bodily
4 injury to any person, a sexual assault, or an at-
5 tempted sexual assault, to participate during
6 the presentencing phase of the criminal process.
7 (B) INAPPLICABILITY OF OTHER LAW.—
8 Chapter 131 of title 28, United States Code,
9 does not apply to any recommendation made by
10 the Judicial Conference under this paragraph.
11 (3) CONGRESSIONAL ACTION.—Except as other-
12 wise provided by law, if the Judicial Conference—
13 (A) submits a report in accordance with
14 paragraph (2) containing recommendations de-
15 scribed in that paragraph, and those rec-
16 ommendations are the same as the amendments
17 made by subsection (a), then the amendments
18 made by subsection (a) shall become effective
19 30 days after the date on which the rec-
20 ommendations are submitted to Congress under
21 paragraph (2);
22 (B) submits a report in accordance with
23 paragraph (2) containing recommendations de-
24 scribed in that paragraph, and those rec-
25 ommendations are different in any respect from

1 the amendments made by subsection (a), the
2 recommendations made pursuant to paragraph
3 (2) shall become effective 180 days after the
4 date on which the recommendations are submit-
5 ted to Congress under paragraph (2), unless an
6 Act of Congress is passed overturning the rec-
7 ommendations; and
8 (C) fails to comply with paragraph (2), the
9 amendments made by subsection (a) shall be-
10 come effective 360 days after the date of enact-
11 ment of this Act.
12 (4) APPLICATION.—Any amendment made pur-
13 suant to this section (including any amendment
14 made pursuant to the recommendations of the Unit-
15 ed States Sentencing Commission under paragraph
16 (2)) shall apply in any proceeding commenced on or
17 after the effective date of the amendment.
18 **SEC. 123. RIGHTS OF NOTIFICATION AND ALLOCUTION AT A**
19 **PROBATION REVOCATION HEARING.**
20 (a) IN GENERAL.—Rule 32.1 of the Federal Rules
21 of Criminal Procedure is amended by adding at the end
22 the following:
23 "(d) RIGHTS OF VICTIMS.—
24 "(1) IN GENERAL.—At any hearing pursuant to
25 subsection (a)(2) involving one or more persons who

1 have been convicted of an offense involving death or
2 bodily injury to any person, a threat of death or
3 bodily injury to any person, a sexual assault, or an
4 attempted sexual assault, the Government shall
5 make reasonable effort to notify the victim of the of-
6 fense (and the victim of any new charges giving rise
7 to the hearings), of—

8 "(A) the date and time of the hearing; and
9 "(B) the right of the victim to attend the
10 hearing and to address the court regarding
11 whether the terms or conditions of probation or
12 supervised release should be modified.

13 "(2) DUTIES OF COURT AT HEARING.—At any
14 hearing described in paragraph (1) at which a victim
15 is present, the court shall—

16 "(A) address each victim personally; and
17 "(B) afford the victim an opportunity to be
18 heard on the proposed terms or conditions of
19 probation or supervised release.

20 "(3) ADDRESS.—In any case described in para-
21 graph (1), the victim shall notify the appropriate au-
22 thority of an address to which notification under this
23 paragraph may be sent.

24 "(4) DEFINITION OF VICTIM.—In this rule, the
25 term 'victim' means any individual against whom an

1 offense involving death or bodily injury to any per-
2 son, a threat of death or bodily injury to any person,
3 a sexual assault, or an attempted sexual assault, has
4 been committed and a hearing pursuant to sub-
5 section (a)(2) is conducted, including—
6 "(A) a parent or legal guardian of the vic-
7 tim, if the victim is less than 18 years of age
8 or is incompetent; or
9 "(B) 1 or more family members or rel-
10 atives of the victim designated by the court, if
11 the victim is deceased or incapacitated.".
12 (b) EFFECTIVE DATE.—
13 (1) IN GENERAL.—The amendment made by
14 subsection (a) shall become effective as provided in
15 paragraph (3).
16 (2) ACTION BY JUDICIAL CONFERENCE.—
17 (A) RECOMMENDATIONS.—Not later than
18 180 days after the date of enactment of this
19 Act, the Judicial Conference shall submit to
20 Congress a report containing recommendations
21 for amending the Federal Rules of Criminal
22 Procedure to ensure that reasonable efforts are
23 made to notify victims of offenses involving
24 death or bodily injury to any person, or the
25 threat of death or bodily injury to any person,

1 of any revocation hearing held pursuant to rule
2 32.1(a)(2) of the Federal Rules of Criminal
3 Procedure.
4 (B) INAPPLICABILITY OF OTHER LAW.—
5 Chapter 131 of title 28, United States Code,
6 does not apply to any recommendation made by
7 the Judicial Conference under this paragraph.
8 (3) CONGRESSIONAL ACTION.—Except as other-
9 wise provided by law, if the Judicial Conference—
10 (A) submits a report in accordance with
11 paragraph (2) containing recommendations de-
12 scribed in that paragraph, and those rec-
13 ommendations are the same as the amendment
14 made by subsection (a), then the amendment
15 made by subsection (a) shall become effective
16 30 days after the date on which the rec-
17 ommendations are submitted to Congress under
18 paragraph (2);
19 (B) submits a report in accordance with
20 paragraph (2) containing recommendations de-
21 scribed in that paragraph, and those rec-
22 ommendations are different in any respect from
23 the amendment made by subsection (a), the rec-
24 ommendations made pursuant to paragraph (2)
25 shall become effective 180 days after the date

1 on which the recommendations are submitted to
2 Congress under paragraph (2), unless an Act of
3 Congress is passed overturning the rec-
4 ommendations; and
5 (C) fails to comply with paragraph (2), the
6 amendment made by subsection (a) shall be-
7 come effective 360 days after the date of enact-
8 ment of this Act.
9 (4) APPLICATION.—Any amendment made pur-
10 suant to this section (including any amendment
11 made pursuant to the recommendations of the Unit-
12 ed States Sentencing Commission under paragraph
13 (2)) shall apply in any proceeding commenced on or
14 after the effective date of the amendment.

15 Subtitle C—Amendment to Federal 16 Rules of Evidence

17 **SEC. 131. ENHANCED RIGHT TO BE PRESENT AT TRIAL.**

18 (a) IN GENERAL.—Rule 615 of the Federal Rules of
19 Evidence is amended—
20 (1) by striking "At the request" and inserting
21 the following:
22 "(a) IN GENERAL.—Except as provided in subsection
23 (b), at the request";
24 (2) by striking "This rule" and inserting the
25 following:

1 "(b) EXCEPTIONS.—Subsection (a)";
2 (3) by striking "exclusion of (1) a party" and
3 inserting the following: "exclusion of—
4 "(1) a party";
5 (4) by striking "person, or (2) an officer" and
6 inserting the following: "person;
7 "(2) an officer";
8 (5) by striking "attorney, or (3) a person" and
9 inserting the following: "attorney;
10 "(3) a person";
11 (6) by striking the period at the end and insert-
12 ing "; or"; and
13 (7) by adding at the end the following:
14 "(4) a person who is a victim (or a member of
15 the immediate family of a victim who is deceased or
16 incapacitated) of an offense involving death or bodily
17 injury to any person, a threat of death or bodily in-
18 jury to any person, a sexual assault, or an attempted
19 sexual assault, for which a defendant is being tried
20 in a criminal trial, unless the court concludes that—
21 "(A) the testimony of the person will be
22 materially affected by hearing the testimony of
23 other witnesses, and the material effect of hear-
24 ing the testimony of other witnesses on the tes-

1 timony of that person will result in unfair prej-
2 udice to any party; or
3 "(B) due to the large number of victims or
4 family members of victims who may be called as
5 witnesses, permitting attendance in the court-
6 room itself when testimony is being heard is not
7 feasible.
8 "(c) DISCRETION OF COURT; EFFECT ON OTHER
9 LAW.—Nothing in subsection (b)(4) shall be construed—
10 "(1) to limit the ability of a court to exclude a
11 witness, if the court determines that such action is
12 necessary to maintain order during a court proceed-
13 ing; or
14 "(2) to limit or otherwise affect the ability of
15 a witness to be present during court proceedings
16 pursuant to section 3510 of title 18, United States
17 Code.".
18 (b) EFFECTIVE DATE.—
19 (1) IN GENERAL.—The amendments made by
20 subsection (a) shall become effective as provided in
21 paragraph (3).
22 (2) ACTION BY JUDICIAL CONFERENCE.—
23 (A) RECOMMENDATIONS.—Not later than
24 180 days after the date of enactment of this
25 Act, the Judicial Conference shall submit to

1 Congress a report containing recommendations
2 for amending the Federal Rules of Evidence to
3 provide enhanced opportunities for victims of
4 offenses involving death or bodily injury to any
5 person, or the threat of death or bodily injury
6 to any person, to attend judicial proceedings,
7 even if they may testify as a witness at the pro-
8 ceeding.
9 (B) INAPPLICABILITY OF OTHER LAW.—
10 Chapter 131 of title 28, United States Code,
11 does not apply to any recommendation made by
12 the Judicial Conference under this paragraph.
13 (3) CONGRESSIONAL ACTION.—Except as other-
14 wise provided by law, if the Judicial Conference—
15 (A) submits a report in accordance with
16 paragraph (2) containing recommendations de-
17 scribed in that paragraph, and those rec-
18 ommendations are the same as the amendments
19 made by subsection (a), then the amendments
20 made by subsection (a) shall become effective
21 30 days after the date on which the rec-
22 ommendations are submitted to Congress under
23 paragraph (2);
24 (B) submits a report in accordance with
25 paragraph (2) containing recommendations de-

1 scribed in that paragraph, and those rec-
2 ommendations are different in any respect from
3 the amendments made by subsection (a), the
4 recommendations made pursuant to paragraph
5 (2) shall become effective 180 days after the
6 date on which the recommendations are submit-
7 ted to Congress under paragraph (2), unless an
8 Act of Congress is passed overturning the rec-
9 ommendations; and
10 (C) fails to comply with paragraph (2), the
11 amendments made by subsection (a) shall be-
12 come effective 360 days after the date of enact-
13 ment of this Act.
14 (4) APPLICATION.—Any amendment made pur-
15 suant to this section (including any amendment
16 made pursuant to the recommendations of the Unit-
17 ed States Sentencing Commission under paragraph
18 (2)) shall apply in any proceeding commenced on or
19 after the effective date of the amendment.

20 Subtitle D—Remedies for 21 Noncompliance

22 **SEC. 141. REMEDIES FOR NONCOMPLIANCE.**

23 (a) GENERAL LIMITATION.—Any failure to comply
24 with any amendment made by this Act shall not give rise
25 to a claim for damages, or any other action against the

1 United States, or any employee of the United States, any
2 court official or officer of the court, or an entity contract-
3 ing with the United States, or any action seeking a rehear-
4 ing or other reconsideration of action taken in connection
5 with a defendant.

6 (b) REGULATIONS TO ENSURE COMPLIANCE.—

7 (1) IN GENERAL.—Notwithstanding subsection
8 (a), not later than 1 year after the date of enact-
9 ment of this Act, the Attorney General and the
10 Chairman of the United States Parole Commission
11 shall promulgate regulations to implement and en-
12 force the amendments made by this title.

13 (2) CONTENTS.—The regulations promulgated
14 under paragraph (1) shall—

15 (A) contain disciplinary sanctions, includ-
16 ing suspension or termination from employ-
17 ment, for employees of the Department of Jus-
18 tice (including employees of the United States
19 Parole Commission) who willfully or repeatedly
20 violate the amendments made by this title, or
21 willfully or repeatedly refuse or fail to comply
22 with provisions of Federal law pertaining to the
23 treatment of victims of crime;

24 (B) include an administrative procedure
25 through which parties can file formal com-

1 plaints with the Department of Justice alleging
2 violations of the amendments made by this title;
3 (C) provide that a complainant is prohib-
4 ited from recovering monetary damages against
5 the United States, or any employee of the Unit-
6 ed States, either in his official or personal ca-
7 pacity; and
8 (D) provide that the Attorney General, or
9 the designee of the Attorney General, shall the
10 ultimate arbiter of the complaint, and there
11 shall be no judicial review of the final decision
12 of the Attorney General by a complainant.

13 TITLE II—VICTIM ASSISTANCE 14 INITIATIVES

15 SEC. 201. INCREASE IN VICTIM ASSISTANCE PERSONNEL.

16 There are authorized to be appropriated such sums
17 as may be necessary to enable the Attorney General to—
18 (1) hire 50 full-time or full-time equivalent em-
19 ployees to serve victim-witness advocates to provide
20 assistance to victims of any criminal offense inves-
21 tigated by any department or agency of the Federal
22 Government; and
23 (2) provide grants through the Office of Victims
24 of Crime to qualified private entities to fund 50 vic-

1 tim-witness advocate positions within those organiza-
2 tions.

3 **SEC. 202. INCREASED TRAINING FOR STATE AND LOCAL**
4 **LAW ENFORCEMENT, STATE COURT PERSON-**
5 **NEL, AND OFFICERS OF THE COURT TO RE-**
6 **SPOND EFFECTIVELY TO THE NEEDS OF VIC-**
7 **TIMS OF CRIME.**

8 Notwithstanding any other provision of law, amounts
9 collected pursuant to sections 3729 through 3731 of title
10 31, United States Code (commonly known as the "False
11 Claims Act"), may be used by the Office of Victims of
12 Crime to make grants to States, units of local government,
13 and qualified private entities, to provide training and in-
14 formation to prosecutors, judges, law enforcement officers,
15 probation officers, and other officers and employees of
16 Federal and State courts to assist them in responding ef-
17 fectively to the needs of victims of crime.

18 **SEC. 203. INCREASED RESOURCES FOR STATE AND LOCAL**
19 **LAW ENFORCEMENT AGENCIES, COURTS,**
20 **AND PROSECUTORS' OFFICES TO DEVELOP**
21 **STATE-OF-THE-ART SYSTEMS FOR NOTIFYING**
22 **VICTIMS OF CRIME OF IMPORTANT DATES**
23 **AND DEVELOPMENTS.**

24 (a) IN GENERAL.—Subtitle A of title XXIII of the
25 Violent Crime Control and Law Enforcement Act of 1994

1 (Public Law 103–322; 108 Stat. 2077) is amended by
2 adding at the end the following:
3 **"SEC. 230103. STATE-OF-THE-ART SYSTEMS FOR NOTIFYING**
4 **VICTIMS OF CRIME OF IMPORTANT DATES**
5 **AND DEVELOPMENTS.**
6 "(a) AUTHORIZATION OF APPROPRIATIONS.—There
7 are authorized to be appropriated to the Office of Victims
8 of Crime of the Department of Justice such sums as may
9 be necessary for grants to State and local prosecutors' of-
10 fices, State courts, county jails, State correctional institu-
11 tions, and qualified private entities, to develop and imple-
12 ment state-of-the-art systems for notifying victims of
13 crime of important dates and developments relating to the
14 criminal proceedings at issue.
15 "(b) FALSE CLAIMS ACT.—Notwithstanding any
16 other provision of law, amounts collected pursuant to sec-
17 tions 3729 through 3731 of title 31, United States Code
18 (commonly known as the 'False Claims Act'), may be used
19 for grants under this section.".
20 (b) VIOLENT CRIME REDUCTION TRUST FUND.—
21 Section 310004(d) of the Violent Crime Control and Law
22 Enforcement Act of 1994 (42 U.S.C. 14214(d)) is amend-
23 ed—
24 (1) in the first paragraph designated as para-
25 graph (15) (relating to the definition of the term

1 "Federal law enforcement program"), by striking
2 "and" at the end;
3 (2) in the first paragraph designated as para-
4 graph (16) (relating to the definition of the term
5 "Federal law enforcement program"), by striking
6 the period at the end and inserting "; and"; and
7 (3) by inserting after the first paragraph des-
8 ignated as paragraph (16) (relating to the definition
9 of the term "Federal law enforcement program") the
10 following:
11 "(17) section 230103.".
12 **SEC. 204. PILOT PROGRAMS TO ESTABLISH OMBUDSMAN**
13 **PROGRAMS FOR CRIME VICTIMS.**
14 (a) DEFINITIONS.—In this section:
15 (1) DIRECTOR.—The term "Director" means
16 the Director of the Office of Victims of Crime.
17 (2) OFFICE.—The term "Office" means the Of-
18 fice of Victims of Crime.
19 (3) QUALIFIED PRIVATE ENTITY.—The term
20 "qualified private entity" means a private entity
21 that meets such requirements as the Attorney Gen-
22 eral, acting through the Director, may establish.
23 (4) QUALIFIED UNIT OF STATE OR LOCAL GOV-
24 ERNMENT.—The term "qualified unit of State or
25 local government" means a unit or a State or local

1 government that meets such requirements as the At-
2 torney General, acting through the Director, may es-
3 tablish.
4 (5) VOICE CENTERS.—The term "VOICE Cen-
5 ters" means the Victim Ombudsman Information
6 Centers established under the program under sub-
7 section (b).
8 (b) PILOT PROGRAMS.—
9 (1) IN GENERAL.—Not later than 12 months
10 after the date of enactment of this Act, the Attorney
11 General, acting through the Director, shall establish
12 and carry out a program to provide for pilot pro-
13 grams to establish and operate Victim Ombudsman
14 Information Centers in each of the following States:
15 (A) Iowa.
16 (B) Massachusetts.
17 (C) Ohio.
18 (D) Tennessee.
19 (E) Utah.
20 (F) Vermont.
21 (2) AGREEMENTS.—
22 (A) IN GENERAL.—The Attorney General,
23 acting through the Director, shall enter into an
24 agreement with a qualified private entity or
25 unit of State or local government to conduct a

1 pilot program referred to in paragraph (1).
2 Under the agreement, the Attorney General,
3 acting through the Director, shall provide for a
4 grant to assist the qualified private entity or
5 unit of State or local government in carrying
6 out the pilot program.
7 (B) CONTENTS OF AGREEMENT.—The
8 agreement referred to in subparagraph (A)
9 shall specify that—
10 (i) the VOICE Center shall be estab-
11 lished in accordance with this section; and
12 (ii) except with respect to meeting ap-
13 plicable requirements of this section con-
14 cerning carrying out the duties of a
15 VOICE Center under this section (includ-
16 ing the applicable reporting duties under
17 subsection (c) and the terms of the agree-
18 ment) each VOICE Center shall operate
19 independently of the Office; and
20 (C) NO AUTHORITY OVER DAILY OPER-
21 ATIONS.—The Office shall have no supervisory
22 or decisionmaking authority over the day-to-day
23 operations of a VOICE Center.
24 (c) OBJECTIVES.—

1 (1) MISSION.—The mission of each VOICE
2 Center established under a pilot program under this
3 section shall be to assist a victim of a Federal or
4 State crime to ensure that the victim—
5 (A) is fully apprised of the rights of that
6 victim under applicable Federal or State law;
7 and
8 (B) participates in the criminal justice
9 process to the fullest extent of the law.
10 (2) DUTIES.—The duties of a VOICE Center
11 shall include—
12 (A) providing information to victims of
13 Federal or State crime regarding the right of
14 those victims to participate in the criminal jus-
15 tice process (including information concerning
16 any right that exists under applicable Federal
17 or State law);
18 (B) identifying and responding to situa-
19 tions in which the rights of victims of crime
20 under applicable Federal or State law may have
21 been violated;
22 (C) attempting to facilitate compliance
23 with Federal or State law referred to in sub-
24 paragraph (B);

1 (D) educating police, prosecutors, Federal
2 and State judges, officers of the court, and em-
3 ployees of jails and prisons concerning the
4 rights of victims under applicable Federal or
5 State law; and
6 (E) taking measures that are necessary to
7 ensure that victims of crime are treated with
8 fairness, dignity, and compassion throughout
9 the criminal justice process.
10 (d) OVERSIGHT.—
11 (1) TECHNICAL ASSISTANCE.—The Office may
12 provide technical assistance to each VOICE Center.
13 (2) ANNUAL REPORT.—Each qualified private
14 entity or qualified unit of State or local government
15 that carries out a pilot program to establish and op-
16 erate a VOICE Center under this section shall pre-
17 pare and submit to the Director, not later than 1
18 year after the VOICE Center is established, and an-
19 nually thereafter, a report that—
20 (A) describes in detail the activities of the
21 VOICE Center during the preceding year; and
22 (B) outlines a strategic plan for the year
23 following the year covered under subparagraph
24 (A).
25 (e) REVIEW OF PROGRAM EFFECTIVENESS.—

1 (1) GAO STUDY.—Not later than 2 years after
2 the date on which each VOICE Center established
3 under a pilot program under this section is fully
4 operational, the Comptroller General of the United
5 States shall conduct a review of each pilot program
6 carried out under this section to determine the effec-
7 tiveness of the VOICE Center that is the subject of
8 the pilot program in carrying out the mission and
9 duties described in subsection (c).
10 (2) OTHER STUDIES.—Not later than 2 years
11 after the date on which each VOICE Center estab-
12 lished under a pilot program under this section is
13 fully operational, the Attorney General, acting
14 through the Director, shall enter into an agreement
15 with 1 or more private entities that meet such re-
16 quirements the Attorney General, acting through the
17 Director, may establish, to study the effectiveness of
18 each VOICE Center established by a pilot program
19 under this section in carrying out the mission and
20 duties described in subsection (c).
21 (f) TERMINATION DATE.—
22 (1) IN GENERAL.—Except as provided in para-
23 graph (2), a pilot program established under this
24 section shall terminate on the date that is 4 years
25 after the date of enactment of this Act.

1 (2) RENEWAL.—If the Attorney General deter-
2 mines that any of the pilot programs established
3 under this section should be renewed for an addi-
4 tional period, the Attorney General may renew that
5 pilot program for a period not to exceed 2 years.
6 (g) FUNDING.—Notwithstanding any other provision
7 of law, an aggregate amount not to exceed $5,000,000 of
8 the amounts collected pursuant to sections 3729 through
9 3731 of title 31, United States Code (commonly known
10 as the "False Claims Act"), may be used by the Director
11 to make grants under subsection (b).
12 **SEC. 205. AMENDMENTS TO VICTIMS OF CRIME ACT OF**
13 **1984.**
14 (a) CRIME VICTIMS FUND.—Section 1402 of the Vic-
15 tims of Crime Act of 1984 (42 U.S.C. 10601) is amend-
16 ed—
17 (1) in subsection (b)—
18 (A) in paragraph (3), by striking "and" at
19 the end;
20 (B) in paragraph (4), by striking the pe-
21 riod at the end and inserting "; and"; and
22 (C) by adding at the end the following:
23 "(5) any gifts, bequests, and donations from
24 private entities or individuals."; and
25 (2) in subsection (d)—

1 (A) by striking paragraph (1) and insert-
2 ing the following:
3 "(1) All unobligated balances transferred to the
4 judicial branch for administrative costs to carry out
5 functions under sections 3611 and 3612 of title 18,
6 United States Code, shall be returned to the Crime
7 Victims Fund and may be used by the Director to
8 improve services for crime victims in the Federal
9 criminal justice system."; and
10 (B) in paragraph (4), by adding at the end
11 the following:
12 "(C) States that receive supplemental funding
13 to respond to incidents or terrorism or mass violence
14 under this section shall be required to return to the
15 Crime Victims Fund for deposit in the reserve fund,
16 amounts subrogated to the State as a result of
17 third-party payments to victims.".
18 (b) CRIME VICTIM COMPENSATION.—Section 1403 of
19 the Victims of Crime Act of 1984 (42 U.S.C. 10602) is
20 amended—
21 (1) in subsection (a)—
22 (A) in each of paragraphs (1) and (2), by
23 striking "40" and inserting "60"; and
24 (B) in paragraph (3), by inserting "and
25 evaluation" after "administration"; and

1 (2) in subsection (b)(7), by inserting "because
2 the identity of the offender was not determined be-
3 yond a reasonable doubt in a criminal trial, because
4 criminal charges were not brought against the of-
5 fender, or" after "deny compensation to any victim".
6 (c) CRIME VICTIM ASSISTANCE.—Section 1404 of the
7 Victims of Crime Act of 1984 (42 U.S.C. 10603) is
8 amended—
9 (1) in subsection (c)—
10 (A) in paragraph (1)—
11 (i) by striking the comma after "Di-
12 rector";
13 (ii) by inserting "or enter into cooper-
14 ative agreements" after "make grants";
15 (iii) by striking subparagraph (A) and
16 inserting the following:
17 "(A) for demonstration projects, evalua-
18 tion, training, and technical assistance services
19 to eligible organizations;";
20 (iv) in subparagraph (B), by striking
21 the period at the end and inserting ";
22 and"; and
23 (v) by adding at the end the following:
24 "(C) training and technical assistance that
25 address the significance of and effective delivery

1 strategies for providing long-term psychological
2 care."; and
3 (B) in paragraph (3)—
4 (i) in subparagraph (C), by striking
5 "and" at the end;
6 (ii) in subparagraph (D), by striking
7 the period at the end and inserting ";
8 and"; and
9 (iii) by adding at the end the follow-
10 ing:
11 "(E) use funds made available to the Di-
12 rector under this subsection—
13 "(i) for fellowships and clinical intern-
14 ships; and
15 "(ii) to carry out programs of training
16 and special workshops for the presentation
17 and dissemination of information resulting
18 from demonstrations, surveys, and special
19 projects."; and
20 (2) in subsection (d)—
21 (A) by striking paragraph (1) and insert-
22 ing the following:
23 "(1) the term 'State' includes—
24 "(A) the District of Columbia, the Com-
25 monwealth of Puerto Rico, the United States

1 Virgin Islands, and any other territory or pos-
2 session of the United States; and
3 "(B) for purposes of a subgrant under
4 subsection (a)(1) or a grant or cooperative
5 agreement under subsection (c)(1), the United
6 States Virgin Islands and any agency of the
7 government of the District of Columbia or the
8 Federal Government performing law enforce-
9 ment functions in and on behalf of the District
10 of Columbia.";
11 (B) in paragraph (2)—
12 (i) in subparagraph (C), by striking
13 "and" at the end; and
14 (ii) by adding at the end the follow-
15 ing:
16 "(E) public awareness and education and
17 crime prevention activities that promote, and
18 are conducted in conjunction with, the provision
19 of victim assistance; and
20 "(F) for purposes of an award under sub-
21 section (c)(1)(A), preparation, publication, and
22 distribution of informational materials and re-
23 sources for victims of crime and crime victims
24 organizations.";

1 (C) by striking paragraph (4) and insert-
2 ing the following:
3 "(4) the term 'crisis intervention services'
4 means counseling and emotional support including
5 mental health counseling, provided as a result of cri-
6 sis situations for individuals, couples, or family
7 members following and related to the occurrence of
8 crime;";
9 (D) in paragraph (5), by striking the pe-
10 riod at the end and inserting "; and"; and
11 (E) by adding at the end the following:
12 "(6) for purposes of an award under subsection
13 (c)(1), the term 'eligible organization' includes
14 any—
15 "(A) national or State organization with a
16 commitment to developing, implementing, evalu-
17 ating, or enforcing victims' rights and the deliv-
18 ery of services;
19 "(B) State agency or unit of local govern-
20 ment;
21 "(C) tribal organization;
22 "(D) organization—
23 "(i) described in section 501(c) of the
24 Internal Revenue Code of 1986; and

1 "(ii) exempt from taxation under sec-
2 tion 501(a) of such Code; or
3 "(E) other entity that the Director deter-
4 mines to be appropriate.".
5 (d) COMPENSATION AND ASSISTANCE TO VICTIMS OF
6 TERRORISM OF MASS VIOLENCE.—Section 1404B of the
7 Victims of Crime Act of 1984 (42 U.S.C. 10603b) is
8 amended—
9 (1) in subsection (a), by striking "1404(a)" and
10 inserting "1402(d)(4)(B)"; and
11 (2) in subsection (b), by striking
12 "1404(d)(4)(B)" and inserting "1402(d)(4)(B)".
13 **SEC. 206. TECHNICAL CORRECTION.**
14 Section 233(d) of the Antiterrorism and Effective
15 Death Penalty Act of 1996 (110 Stat. 1245) is amended
16 by striking "1 year after the date of enactment of this
17 Act" and inserting "October 1, 1999".
18 **SEC. 207. SERVICES FOR VICTIMS OF CRIME AND DOMES-**
19 **TIC VIOLENCE.**
20 Section 504 of Public Law 104–134 (110 Stat. 1321–
21 53) shall not be construed to prohibit a recipient (as that
22 term is used in that section) from using funds derived
23 from a source other than the Legal Services Corporation
24 to provide related legal assistance to any person with
25 whom an alien (as that term is used in subsection (a)(11)

1 of that section) has a relationship covered by the domestic
2 violence laws of the State in which the alien resides or
3 in which an incidence of violence occurred.

4 **SEC. 208. PILOT PROGRAM TO STUDY EFFECTIVENESS OF**
5 **RESTORATIVE JUSTICE APPROACH ON BE-**
6 **HALF OF VICTIMS OF CRIME.**

7 (a) IN GENERAL.—Notwithstanding any other provi-
8 sion of law, amounts collected pursuant to sections 3729
9 through 3731 of title 31, United States Code (commonly
10 known as the "False Claims Act"), may be used by the
11 Office of Victims of Crime to make grants to States, units
12 of local government, and qualified private entities for the
13 establishment of pilot programs that implement balanced
14 and restorative justice models.

15 (b) DEFINITION OF BALANCED AND RESTORATIVE
16 JUSTICE MODEL.—In this section, the term "balanced
17 and restorative justice model" means an approach to
18 criminal justice that promotes the maximum degree of in-
19 volvement by a victim, offender, and the community served
20 by a criminal justice system by allowing the criminal jus-
21 tice system and related criminal justice agencies to im-
22 prove the capacity of the system and agencies to—

23 (A) protect the community served by the
24 system and agencies; and

1 (B) ensure accountability of the offender
2 and the system.

Agenda Item II E 1

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor David A. Schlueter, Reporter**

RE: **Proposed Amendment to Rule 5(c)**

DATE: **September 8, 1997**

At its last meeting the Committee considered the attached materials regarding a proposed amendment to Rule 5(c). That rule currently permits the magistrate judge to grant a continuance in a preliminary examination only where the defendant consents. If the defendant objects to any continuance, a district judge may grant a continuance. Because that language tracks with language in 18 U.S.C. § 3060, the Committee believed that it would be more appropriate to first seek a change in the statute. To that end, Judge Jensen indicated that he would bring the matter to the attention of the Standing Committee, with a recommendation that that Committee take steps to have the statute amended.

The Standing Committee considered the matter and indicated that it would be more appropriate for the Advisory Committee to first propose an amendment to Rule 5 and use the Rule Enabling Act procedures to and seek public comment and provide a catalyst for legislative change. Thus, the proposal is once again before the Advisory Committee for its consideration.

In addition to the original matters presented to the Committee at its April 1997 meeting, I have attached a draft of a proposed amendment to Rule 5(c) to accomplish the proposal from the Federal Magistrate Judges Association (FMJA) and a brief, albeit tentative draft, of a Committee Note.

1 **Rule 5. Initial Appearance Before the Magistrate Judge**

2 * * * * *

3 (c) OFFENSES NOT TRIABLE BY THE UNITED STATES MAGISTRATE JUDGE. If
4 the charge against the defendant is not triable by the United States magistrate
5 judge, the defendant shall not be called upon to plead. The magistrate judge shall
6 inform the defendant of the complaint against the defendant and of any affidavit
7 filed therewith, of the defendant's right to retain counsel or to request the
8 assignment of counsel if the defendant is unable to obtain counsel, and of the
9 general circumstances under which the defendant may secure pretrial release. The
10 magistrate judge shall inform the defendant that the defendant is not required to
11 make a statement and that any statement made by the defendant may be used
12 against the defendant. The magistrate judge shall also inform the defendant of the
13 right to a preliminary examination. The magistrate judge shall allow the defendant
14 reasonable time and opportunity to consult counsel and shall detain or
15 conditionally release the defendant as provided by statute or in these rules.

16 A defendant is entitled to a preliminary examination, unless waived, when
17 charged with any offense, other than a petty offense, which is to be tried by a judge
18 of the district court. If the defendant waives preliminary examination, the
19 magistrate judge shall forthwith hold the defendant to answer in the district court.
20 If the defendant does not waive the preliminary examination, the magistrate judge
21 shall schedule a preliminary examination. Such examination shall be held within a
22 reasonable time but in any event not later than 10 days following the initial

23 appearance if the defendant is in custody and no later than 20 days if the defendant

24 is not in custody, provided, however, that the preliminary examination shall not be

25 held if the defendant is indicted or if an information against the defendant is filed in

26 district court before the date set for the preliminary examination. With the consent

27 of the defendant and upon a showing of good cause, taking into account the public

28 interest in the prompt disposition of criminal cases, time limits specified in this

29 subdivision may be extended one or more times by a federal magistrate judge ~~. In~~

30 ~~the absence of such consent by the defendant, time limits may be extended~~ or by a

31 judge of the United States only upon a showing that extraordinary circumstances

32 exist and that delay is indispensable to the interests of justice.

ADVISORY COMMITTEE NOTE

The amendment expands the authority of a United States Magistrate Judge to determine whether to grant a continuance for a preliminary examination conducted under the Rule. Currently, the magistrate judge's authority to do so is limited to those cases in which the defendant has consented to the continuance. If the defendant does not consent, then the government must present the matter to a district court judge, usually on the same day. That procedure can lead to needless consumption of judicial resources and the consumption of time by counsel, staff personnel, marshals, and other personnel.

The proposed amendment conflicts with 18 U.S.C. § 3060, which tracks the original language of the rule and permits only district court judges to grant continuances where the defendant objects. But the current distinction between continuances granted with or without the consent is an anomaly. While the magistrate judge is charged with making probable cause determination and other decisions regarding the defendant's liberty interests, the current rule prohibits the magistrate judge from making a decision regarding a continuance unless the defendant consents. On the other hand, it seems clear that the role of the magistrate judge has developed toward a higher level of responsibility for pre-indictment matters. Furthermore, the Committee believes that the change in the rule will provide greater judicial economy.

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposal to Amend Rule 5(c)**

DATE: **Feb. 26, 1997**

Attached is a letter from Magistrate Judge Ervin S. Swearingen who recommends, on behalf of the Federal Magistrate Judges Association (FMJA) that Rule 5(c) and 18 USC 3060 be amended. His materials include proposed language for both the rule itself and an Advisory Committee Note.

The proposed amendment would address current language in Rule 5(c) regarding the ability of a magistrate judge to grant a continuance for the preliminary examination. As the rule currently reads, a magistrate judge's authority to grant a continuance extends only to those cases where the defendant or accused has consented to the delay. In those cases where the defendant does not consent to the delay, only a district judge may grant the continuance and then only in those cases where the "delay of the preliminary hearing is indispensable to the interests of justice."

The proposed Committee Note in the materials explains the reasons for amending the rule to permit the magistrate judge to grant continuances even in those cases where the defendant does not consent. Chief among the reasons is the argument the magistrate judge's lack of authority can result in unnecessary loss of time.

Assuming that the proposal has merit, the current rule clearly tracks the statutory language in 18 USC 3060 (attached). As stated in § 3060(c), only the district judge may grant a contested request for a continuance of the preliminary examination. Thus, any proposed amendment to Rule 5(c) would be inconsistent with the clear language of the statute.

FEDERAL MAGISTRATE JUDGES ASSOCIATION

35th Annual Convention – Denver, Colorado
July 8-11, 1997

10/30/96

October 28, 1996

96-CV-C
96-CR-F

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Peter McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

RE: **Proposed Amendment to Rule 68 of the Federal Rules of Civil Procedure and Rule 5(c) of the Federal Rules of Criminal Procedure.**

Dear Pete:

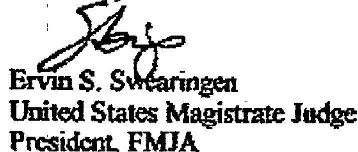
The Federal Magistrate Judges Association (FMJA) submits two proposed rules changes to the Rules Advisory Committee. These matters were first considered by the Rules Committee of the FMJA chaired by Hon. Carol E. Heckman. The committee members are: Hon. Nancy Stein Nowak, Hon. Anthony Battaglia, Hon. Paul Komives, Hon. Andrew Wistrich, Hon. Thomas Phillips, Hon. Patricia Hemann, Hon. John L. Carroll, and Hon. B. Waugh Crigler. The committee members come from several kinds of districts and have varying types of duties. Many of them consulted with their colleagues in the course of preparing these proposals. The proposals were then reviewed and approved by the Officers and Directors of the FMJA. They reflect the considered position of the magistrate judges as a whole.

The first proposal is an amendment to Rule 68 of the Federal Rules of Civil Procedure, which relates to offers of judgment. The proposal allows the rule to be equally available to plaintiffs and claimants, adds expert witness fees and expenses to costs recoverable under the rule, and advances the timing from more than 10 days before the trial to more than 30 days before trial to reduce last minute settlements.

The second proposal is to amend Rule 5(c) of the Federal Rules of Criminal Procedure as well as 18 U.S.C. § 3060(c). These amendments relate to the ability of a magistrate judge to continue a preliminary examination absent the consent of the defendant. Currently, both of these provisions require a district court, and not a magistrate judge, to make such determinations.

Comments are included with both proposals. We are pleased to have this opportunity to present our proposals for your committee's consideration.

Sincerely,



Ervin S. Swearingen
United States Magistrate Judge
President, FMJA

ESS/gmc
enclosures

Committee Note Re: Proposed Amendments to Rule 5(c), Fed. R. Crim. P, and 18 U.S.C. § 3060 (c)

The proposed amendments to Criminal Rule 5(c) and 18 U.S.C. § 3060 (c) relate to the ability of a magistrate judge to continue the preliminary examination absent the consent of the defendant.

Rule 5 of the Federal Rules of Criminal Procedure entitles a defendant in a felony case to a preliminary examination before a magistrate judge, within a specified period of time. The time for the examination can be continued by a magistrate judge on the consent of the defendant, or in the alternative, upon the order of a district judge showing that extraordinary circumstances exist and that the delay is indispensable to the interests of justice.

Magistrate judges in most districts are frequently called upon to extend the time for the preliminary hearing to allow the parties to discuss pre-indictment disposition. In fact, in many districts, very few preliminary examinations are actually conducted. Under the current statutory provisions, in the circumstances where a defendant is unwilling to consent to a continuance of the hearing date, and the prosecution moves to continue the hearing, the magistrate judge is required to transfer the matter to a district judge for purposes of the contested motion. The motion to continue typically arises on the date set for the preliminary hearing. As a result, a district judge must address the matter that same day. This procedure results in a great consumption of time for the judges, the judicial staff, the marshals, the attorneys, the court interpreters, and the pre-trial service officers. Realistically, providing magistrate judges jurisdiction to hear and determine the contested motion to continue will facilitate the handling of Rule 5 proceedings and conserve the resources of the judiciary and the associated individuals and agencies.

While the committee found no case law specifically limiting magistrate judges from exercising jurisdiction to grant the contested motion to continue, contemporary federal jurisprudence seems to indicate that the decision is outside the jurisdiction of the magistrate judge. This premise is supported by the notes of the Advisory Committee on Rules regarding the 1972 amendments to Fed. R. Crim. P. 54(c)[1] stating that the phrase "judge of the United States" does not include an United States magistrate. This premise is also reflected in The Legal Manual for United States Magistrate Judges, Vol. 1, § 7.02.h, published by the Administrative Office of the Courts, Magistrate Judges Division. Citing 18 U.S.C. § 3060(c) and Fed. R. Crim. P. 5(c), the Legal Manual states, "absent the defendant's consent, the preliminary examination may be continued only upon the order of a United States district judge. The district judge must find that extraordinary circumstances exist and that the delay of the preliminary examination is indispensable to the interests of justice."

The Legal Manual does point out that by local rules a district court could empower a magistrate judge to conduct the hearing on a request for a continuance of the preliminary examination and submit a report and recommendation to a district judge. This, of course, does nothing to save the resources of the involved entities and agencies, or expedite the process, and is not a practical solution to the problem.

In terms of other published works, Kent Sinclair, Jr., Practice Before Federal Magistrates (1995) confirms the contemporary position that "in the absence of defendants consent, a district judge may no less extend these dates" (for preliminary examination). Id. at §409. The cited authority in this instance is again, Fed. R. Crim. P. 5(c). The current statutory framework for this issue has been in effect since 1968. In 1968, 18 U.S.C. § 3060 (c) was amended[2] to clarify procedures with regard to the preliminary examination. Prior to that time, the only statutory

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[1] Fed. R. Crim. P. 54 deals with the application of these rules. Paragraph (c) defines many of the terms used throughout the rules including "federal magistrate judge," "magistrate judge," and "judge of the United States."

[2] The amendment was part of a bill to amend the Federal Magistrates Act, 28 U.S.C. § 631 et seq., with a stated purpose to "abolish the office of U.S. Commissioner and reform the first echelon of the Federal Judiciary into an effective component of a modern scheme of justice by establishing a system of U.S. Magistrates. H.R. 90-1629, 1968 U.S.C.C.A.N. 4252, 1968 W.L. 5307 [Leg. Hist. at *2].

guidance regarding the time for preliminary examination was the reference in Fed. R. Crim. P. 5 which provided that the preliminary examination must be held "within a reasonable time following the initial appearance of an accused". HR 90-1629, 1968 U.S.C.C.A.N. 4252, 1968 WL 5307 [Leg. Hist., at *13 ("House Report")]. The 1968 amendment to 3060(c) introduced the specific outside time limits of 10 (for defendants in custody) and 20 (for defendants on bond or otherwise released) days from the initial appearance for holding the preliminary examination. At that time the amendment also added the provisions with regard to continuances.

The 1968 amendment to 18 U.S.C. § 3060(c) was the subject of discussion in the case of United States v. Green, 305 F. Supp. 125 (S.D.N.Y. 1969).[3] In Green, the Court highlighted that the amendment was precipitated by the routine continuances of the preliminary examination by commissioners (the predecessor of the magistrate judge), under the "reasonable time" standard. Congress moved to insure that a determination on probable cause is made soon after a person is taken into custody.

Review of 18 U.S.C. § 3060 (c) shows a distinction in contrasting the circumstances concerning a continuance by the magistrate judge with the defendant's consent and a continuance absent consent only on an order of a "judge of the appropriate United States district court". This distinction in the statutory language may well be the genesis of the current interpretation. Viewed in light of the 1972 amendments to Fed. R. Crim. P. 54(c) and its definitions, this premise is provided support.

In 1972, in concert with amendments to the Federal Magistrates Act (28 U.S.C. § 631 et seq.), Rule 54(c), Rule 5 was amended to be consistent with 18 U.S.C. §3060(c) concerning the timing of the preliminary examination. As amended in 1972, Rule 5(c) also, specifically discusses the role of the magistrate judge regarding a continuance of the preliminary examination with defendant's consent versus disposition absent consent by "a judge of the United States," supporting the distinction and the limitation in the power of the magistrate judge to grant the opposed continuance.

Interestingly, however, the published Advisory Committee Notes regarding the 1972 amendment to Rule 5 state that the time limits of Rule 5(c) were taken directly from Section 3060 with two exceptions:

> The new language allows delay to be consented to by the defendant only if there is 'a showing of good cause, taking into account the public interest and the prompt disposition of criminal cases'...*The second difference between the new rule and 18 U.S.C.A. §3060 is that the rule allows the decision to grant a continuance to be made by United States magistrate as well as by a judge of the United States.* This reflects the view of the advisory committee that the United States magistrate should have sufficient judicial competence to make decisions such as that contemplated by subdivision (c).

While an argument can be made that the 1972 amendments to Rule 5, and as explained by the Advisory Committee Notes, did confer full jurisdiction to the magistrate judge to continue the preliminary examination, with or without the defendant's consent, this statement is in conflict with the 1972 Advisory Committee notes to Rule 54(c) and the legal culture has maintained the distinction in the authority between magistrate judges and district judges regarding Rule 5(c).

This is an anomaly since the magistrate judge sets the preliminary examination on his or her calendar at the initial appearance in each case,[4] and is the judicial officer rendering the determination of probable cause resulting in the defendant's release or requirement that the defendant proceed

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[3] This case involved an appeal of the district courts dismissal of a criminal complaint for failure of the government to afford the defendant an opportunity for preliminary examination under the former "reasonable time" standard for the hearing of a preliminary examination.

[4] Fed. R. Crim. P. 5(c).

toward trial in the case.[5] While the magistrate judge is empowered to hear and determine probable cause[6] as well as other liberty interest issues[7], this same judicial officer cannot make the decision with regard to the extraordinary circumstances or the interests of justice in an issue where the need for the continuance of a proceeding on this judicial officer's calendar is disputed. Like the Preliminary Examination itself, the magistrate judges order would be reviewable by a district judge.[8]

For all of the foregoing reasons, the proposed amendments would be consistent with the utilization of magistrate judges envisioned by the Congress, would serve in the best interests of judicial economy, and would be consistent with the pre-indictment management of criminal proceedings envisioned in developing the role of United States Magistrate Judge.

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[5] Fed. R. Crim. P. 5.1.

[6] "This procedure is designed to insure that a determination of probable cause is made-- by either the magistrate, some other judicial officer, or the grand jury-- soon after a person is taken into custody. No citizen should have his liberty restrained, even to the limited extent of being required to post bail or meet other conditions of release, unless some independent judicial determination has been made that the restraint is justified." U.S. v. Green, 305 F. Supp. 125, 132, fn.5 (S.D.N.Y. 1969).

[7] This would include bail determinations and pre-trial detention, 18 U.S.C. § 3142 et. seq.

[8] See United States v. Florida, 165 F. Supp. 318, 331 (E.D.Ark. 1958) and United States v.Vassallo, 282 F. Supp. 928, 929(E.D. Pa. 1968).

§ 3060. Preliminary examination.

(c) With the consent of the arrested person, the date fixed by the judge or magistrate judge[9] for the preliminary examination may be a date later than that prescribed by subsection (b), or may be continued one or more times to a date subsequent to the date initially fixed therefor. In the absence of such consent of the accused, the date fixed for the preliminary hearing may be a date later than that prescribed by subsection (b), or may be continued to a date subsequent to the date initially fixed therefor, only upon the order of a United States magistrate judge or other judge of the appropriate United States district court after a finding that extraordinary circumstances exist, and that the delay of the preliminary hearing is indispensable to the interests of justice. . . .

---

[9] This statute was last amended in 1968, prior to the change of name of United States Magistrate to United States Magistrate Judge, effective December 1, 1990. The proposed amendment to section (c) should also include correction so that the term United States magistrate judge is replaced whereever the former term magistrate is used in section (c) and throughout Rule 5.

RULE 5. Initial Appearance Before the Magistrate Judge

(c) **Offenses Not Triable by the United States Magistrate Judge.** . . . With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate judge. In the absence of such consent by the defendant, time limits may be extended by a United States magistrate judge or other judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

ajb/rules.civ/rule5(a)

§ 3060. Preliminary examination

(a) Except as otherwise provided by this section, a preliminary examination shall be held within the time set by the judge or magistrate pursuant to subsection (b) of this section, to determine whether there is probable cause to believe that an offense has been committed and that the arrested person has committed it.

(b) The date for the preliminary examination shall be fixed by the judge or magistrate at the initial appearance of the arrested person. Except as provided by subsection (c) of this section, or unless the arrested person waives the preliminary examination, such examination shall be held within a reasonable time following initial appearance, but in any event not later than—

(1) the tenth day following the date of the initial appearance of the arrested person before such officer if the arrested person is held in custody without any provision for release, or is held in custody for failure to meet the conditions of release imposed, or is released from custody only during specified hours of the day; or

(2) the twentieth day following the date of the initial appearance if the arrested person is released from custody under any condition other than a condition described in paragraph (1) of this subsection.

(c) With the consent of the arrested person, the date fixed by the judge or magistrate for the preliminary examination may be a date later than that prescribed by subsection (b), or may be continued one or more times to a date subsequent to the date initially fixed therefor. In the absence of such consent of the accused, the date fixed for the preliminary hearing may be a date later than that prescribed by subsection (b), or may be continued to a date subsequent to the date initially fixed therefor, only upon the order of a judge of the appropriate United States district court after a finding that extraordinary circumstances exist, and that the delay of the preliminary hearing is indispensable to the interests of justice.

(d) Except as provided by subsection (e) of this section, an arrested person who has not been accorded the preliminary examination required by subsection (a) within the period of time fixed by the judge or magistrate in compliance with subsections (b) and (c), shall be discharged from custody or from the requirement of bail or any other condition of release, without prejudice, however, to the institution of further criminal proceedings against him upon the charge upon which he was arrested.

(e) No preliminary examination in compliance with subsection (a) of this section shall be required to be accorded an arrested person, nor shall such arrested person be discharged from custody or from the requirement of bail or any other condition of release pursuant to subsection (d), if at any time subsequent to the initial appearance of such person before a judge or magistrate and prior to the date fixed for the preliminary examination pursuant to subsections (b) and (c) an indictment is returned or, in appropriate cases, an information is filed against such person in a court of the United States.

(f) Proceedings before United States magistrates under this section shall be taken down by a court reporter or recorded by suitable sound recording equipment. A copy of the record of such proceeding shall be made available at the expense of the United States to a person who makes affidavit that he is unable to pay or give security therefor, and the expense of such copy shall be paid by the Director of the Administrative Office of the United States Courts.

(June 25, 1948, c. 645, 62 Stat. 819; Oct. 17, 1968, Pub.L. 90–578, Title III, § 303(a), 82 Stat. 1117.)

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

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CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

December 23, 1996

Honorable Ervin S. Swearingen
United States Magistrate Judge
President, FMJA
P.O. Box 1049
Florence, South Carolina 29503

Dear Judge Swearingen:

Thank you for your letter on behalf of the Federal Magistrate Judges Association proposing amendments to Rule 68 of the Federal Rules of Civil Procedure and Rule 5(c) of the Federal Rules of Criminal Procedure. A copy of your letter will be sent to the chairs and reporters of the Advisory Committees on Civil and Criminal Rules for their consideration.

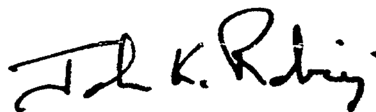
From 1992 to 1995, the Advisory Committee on Civil Rules spent substantial time studying proposed revisions of Rule 68. A draft proposed amendment together with an extensive Committee Note was prepared, which would have extended the rule to both parties and permitted the shifting of attorney fees under a capped formula. The committee also requested the Federal Judicial Center to survey the bar on their reaction to the proposed amendments to Rule 68. During its many discussions on this subject, the committee considered more modest proposals, including variations of the California offer-of-judgment procedure.

The committee concluded that the proposed amendments and the more modest alternative proposals were subject to abusive gamesmanship. In the end, the committee decided to defer indefinitely further consideration of a proposed revision of Rule 68. For your information, I am enclosing the following committee materials on Rule 68: (1) a copy of the Federal Judicial Center survey; (2) draft proposed amendments to Rule 68 and excerpts of minutes of various committee

meetings on Rule 68 ; and (3) a discussion of the problems with Rule 68 and the many suggested proposals amending it prepared by Professor Edward H. Cooper, the committee's reporter.

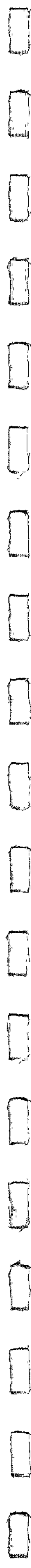
We welcome the Federal Magistrate Judges Association's suggestions and appreciate your interest in the rulemaking process.

Sincerely,



Peter G. McCabe
Secretary

cc: Chairs and Reporters,
Advisory Committees on Civil and Criminal Rules
Agenda and Policy Subcommittee



Agenda Item II E 2

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor David A. Schlueter, Reporter**

RE: **Rule 6. The Grand Jury: Legislative Proposals to Reduce Size of Grand Jury**

DATE: **September 7, 1997**

As briefly noted at the Committee's meeting in April, there is apparently a pending legislative proposal sponsored by Congressman Goodlatte (Virginia) which would reduce the size of the grand jury to as few as nine persons. That matter is on the agenda for the October meeting in California.

Attached are some materials which should assist the Committee in its discussion. The first item, a memorandum from Mr. John Rabiej sets out several options and in turn includes a memo from the Committee on Criminal Law which summarizes the Judicial Conference's position on the issue.

Also attached are materials from the 1970's which should provide ample historical background of the question of how many persons should comprise a federal grand jury.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

JOHN K. RABIEJ
Chief
Rules Committee Support Office

WASHINGTON, D.C. 20544

May 28, 1997
Via Facsimile

MEMORANDUM TO JUDGE D. LOWELL JENSEN

SUBJECT: *Grand Jury Legislation*

For your information, I am attaching a copy of the Committee on Court Administration and Case Management's draft agenda report on Congressman Goodlatte's grand jury reduction bill. The report concludes with five options, including recommending to the Judicial Conference that it do the following:

1. Support the legislation;

2. Oppose it;

3. Take no position on it;

4. Oppose it and refer it to the rules committees; or

5. Take no position on it and refer it to the rules committees.

I have sent a copy of the agenda item to Judge Stotler. A similar agenda item was prepared for the Committee on Criminal Law, although its final recommended options combined CACM's fourth and fifth options suggesting simply that the bill be referred to the rules committees. I will be contacting Judge Stotler for instructions on how to proceed. I will advise you immediately if she suggests that you consider polling the Criminal Rules Committee on whether to recommend publishing the proposed amendments to Rule 6 this fall.

JKR

John K. Rabiej

Attachment

cc: Honorable Aliceмarie H. Stotler (without attach.)
Professor David A. Schlueter (with attach.)

DRAFT

Agenda Item V
Court Administration
and Case Management
June 1997
Action

PROPOSED LEGISLATION TO REDUCE THE SIZE OF GRAND JURIES

Issue

Representative Bob Goodlatte, from Virginia, has proposed legislation (Attachment A) that would amend 18 U.S.C. § 3321 and would reduce federal grand juries to not less than nine nor more than thirteen persons; and require seven jurors to concur in the finding of an indictment as long as at least nine jurors were present.[1] Congressman Goodlatte suggests that the judiciary would realize significant costs savings, in addition to an increase in administrative efficiency, if the number of federal grand jurors was reduced.

Although the size of federal grand juries has been considered by various Judicial Conference committees in the past and referenced in several Conference reports, to date, the Judicial Conference has not taken a formal position on this issue. Congressman Goodlatte's proposal was referred to this Committee for any recommendation to the

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[1] Title 18 U.S.C. § 3321 includes a provision that the grand jury shall consist of not less than 16 nor more than 23 members. Twenty-three grand jurors may be sworn, but 16 must serve as a quorum. In addition, Rule 6(a) of the Federal Rules of Criminal Procedure provides that the grand jury shall consist of not less than 16 nor more than 23 persons, and Rule 6(f) provides that at least 12 grand jurors must concur in the finding of an indictment.

Judicial Conference; in addition, the Committees on Rules of Practice and Procedure and Criminal Law were asked to consider the proposal.

Background

The current procedure of selecting 23 grand jury members in the federal system continues a long-standing custom that existed at English common law (Wayne R. LaFave & Jerold H. Israel, Criminal Procedure, Vol 1, §§ 82, 84 (1984)).

A common law grand jury was twice the size of the petit jury, although one member typically was dropped to preclude a tie, thereby reducing the number to 23. Along with other elements of the English law, the grand jury was adopted as part of the criminal justice process in the American colonies. In 1865, an Act of Congress provided that the grand jury should consist of not less than 16 persons and not more than 23 persons, and that 12 must concur in finding an indictment.

When the Federal Rules of Criminal Procedure were being drafted in the early 1940's, several judges commented to the Advisory Committee on the various preliminary drafts regarding the size of grand juries. Some judges were concerned that any reduction in size would permit one juror to dominate the jury. They favored continuing with existing law because the grand jury was not so small that it could be subject to improper influences; nor was it too large to be a burden on the public or upon the members. Other judges favored reducing the size. Former Judge Alfred Barkdale of the Western District of Virginia favored a grand jury of not less than 10 nor more than 14, with the

concurrence of eight to be necessary for finding an indictment. The provision in Rule 6 dealing with the size of the grand jury as finally adopted, nonetheless, continued existing law (18 U.S.C. § 419, now 18 U.S.C. § 3321).

The first reference to subsequent Judicial Conference action on this matter occurred in 1951 (JCUS-SEP 51, p.21). The former Committee on the Operation of the Jury System reported to the Conference that it had Judge Barkdale's earlier proposal under consideration; the Judicial Conference authorized the Committee to continue its study on the subject and to report its conclusions to the Conference. It does not appear that the Committee ever reported to the Conference on this issue.

In 1974, the Committee on the Administration of the Criminal Law advised the Conference that it had communicated to the Advisory Committee on Criminal Rules its view that Rule 6(a) of the Federal Rules of Criminal Procedure should be revised to reduce the number of grand jurors to, preferably, not less than nine nor more than fifteen, with the concurrence of two-thirds required for return of an indictment (JCUS-SEP 74, p.59). Speaking on behalf of the Administrative Office, Mr. Carl Imlay, then General Counsel of the Administrative Office, testified before the House Judiciary Committee in 1977 in support of the principle of reducing the grand jury in size, and he noted that the Judicial Conference Committee on the Administration of the Criminal Law supported reducing the size of grand juries (Attachment B). Obviously, the proposed legislation never became law.

More recently, in December 1993, this Committee considered a proposal from Magistrate Judge John A. Jelderks of the District of Oregon to reduce the grand jury size to nine members as a cost saving measure. This Committee, observing that the long-standing practice with the grand jury worked well in the federal courts, declined further study of the matter.

Discussion

The federal system requires 16 to 23 grand jurors with 12 votes necessary for indictment. This allows the grand jury to drop below the maximum size to accommodate the likely need to excuse one or more jurors over the long grand jury term. Rule 6(a)(2), added in 1987, also permits use of alternative grand jurors to replace jurors who are excused during a panel's term.

The Fifth Amendment to the Constitution requires the grand jury procedure as a prerequisite to an indictment; however, the Constitution through its due process clause imposes no limitation on the right of a state through its legislature to fix the number of grand jurors. A state is thus free to abolish the grand jury or reduce it in size, even to a single member. See, e.g., Salvaggio v. Cotter, 324 F.Supp. 681, 685 (D. Conn. 1971), *aff'd*, 447 F2d 1406 (2nd Cir 1971).

Most states have the grand jury indictment process available. From a review of information compiled in 1993 and provided by the National Center for State Courts, the majority of states (33) utilize a grand jury of a set size, ranging from six jurors in one

state to 23 jurors in three states with 12 jurors the most common panel size in 10 states. These states generally accept as a working quorum two-thirds or three-fourths of the jurors. Many of these states provide for the same two-thirds or three-fourths to indict. A minority of states (18) permit a grand jury of variable size with a majority of the minimum size required for indictment.

As indicated above, the proposal contemplated by Congressman Goodlatte would require not less than nine nor more than thirteen persons to be impaneled. At least nine jurors would have to be present and seven would have to vote for an indictment to issue.

There are a couple of technical peculiarities in the proposal. Proposed new 18 U.S.C.§ 3321 sets out the procedure for empaneling the grand jury. If fewer than nine persons respond to the jury summons, the proposal would require the court to summon additional persons in accordance with the procedures applicable to petit juries set out in 28 U.S.C.§ 1866. This procedure, which was proposed by Mr. Imlay in his 1977 testimony to replace the outmoded procedure provided in section 3321, is unwieldy and is inferior to the provision already in place in F.R.Crim.P. 6(a), which simply directs the court to summon a sufficient number of people to meet the size requirement. Additionally, any legislation would, in effect, amend Rule 6(a) and 6(f) (see footnote 1) without the benefit of the Rules Enabling Act process.

Cost Implications

The average number of grand jurors per session in FY 1996 was 19.7 members and there were 10,121 sessions convened. The actual cost (i.e., attendance, travel and subsistence fees) per grand juror day in FY 1996 was $69.76; thus, the total cost for the year was $13,909,006. If the grand jury had averaged 13 members (the maximum number that may be sworn under the proposed legislation) per session, then the total cost for FY 1996 would have been $9,178,532, a savings of $4,730,474.

Notwithstanding this considerable potential for cost savings, a reduction in size would require a change to F.R.Crim.P. 6, and would affect a long-standing practice in the federal courts. In addition, smaller grand juries may inhibit minority group representation, and encourage domination by a single juror. Finally, there is no evidence to suggest that the current administrative procedures for managing grand jurors are unwieldy or inefficient.

Options for Committee's Recommendation to the Judicial Conference:

(1) oppose the proposed legislation to reduce the size of the grand jury;

(2) take no position on the proposed legislation;

(3) support the proposed legislation;

(4) oppose the legislation and refer the issue to the Committee on Rules of Practice and Procedure for consideration and public comment pursuant to the rule-making process; or

(5) take no position on the proposed legislation and refer the issue to the Committee on Rules of Practice and Procedure for consideration and public comment under the Rules Enabling Act.

LEONIDAS 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

May 16, 1997
Via Federal Express Mail

MEMORANDUM TO JUDGE D. LOWELL JENSEN AND PROFESSOR DAVID A. SCHLUETER

SUBJECT: *Background on Grand Jury Materials*

For your information, I have attached materials that we located in our records on an earlier proposal considered by the Advisory Committee on Criminal Rules to reduce the number of grand jurors.

In 1972, the chair of the House Judiciary Committee requested the judiciary to study the grand jury process. The Chief Justice assigned the project to the Advisory Committee on Criminal Rules. The committee prepared a draft report with wide-ranging recommendations on the grand jury process, including one to reduce its size. The committee expected to forward the report to the Judicial Conference for approval in 1976, before sending it to the Hill. In late 1975, however, the House Judiciary Committee was considering several pending bills on grand jury. And it requested a copy of the preliminary report before the report was submitted to the Conference. The preliminary report on the grand jury was sent to the Hill, but the report was never submitted to the Conference. (In the interim, several new bills were introduced that raised new issues. A new subcommittee was planned to be formed, but it appears that the subcommittee was not renewed at that time.)

In sum, a proposal to amend the statute governing the grand jury process to reduce the number of grand jurors was considered and approved by the Advisory Committee on Criminal Rules. But the Standing Committee and the Judicial Conference were not requested to adopt the position nor was the proposal vetted through the rulemaking process.

Items G and Q are memoranda from the Reporter, Professor Wayne R. LaFave, on the proposal to reduce the number of grand jurors. It is a detailed memorandum of law that addresses and answers a number of challenges to the proposal. If we decide to poll the committee on this proposal, this memorandum would be helpful to them and to the drafting of a Committee Note. The Committee on Court Administration and Case Management meets on June 15-18 outside of Washington. I will forward to you a copy of the final agenda item prepared for that committee, which should be available next week.

John K. Rabiej

Attachments

cc: Honorable Alicemarie H. Stotler (with attach.)

A

EMANUEL CELLER, N.Y., CHAIRMAN

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U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
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SAMUEL A. GARRISON, III

September 12, 1972

The Chief Justice
The Supreme Court
Washington, D. C. 20543

Dear Mr. Chief Justice:

I write to urge you to place on the agenda of the forthcoming meeting of the Judicial Conference of the United States a matter of mounting national concern affecting public confidence in the operation of the Federal courts. The subject is the Federal grand jury process.

The Rules of Criminal Procedure for the United States Courts (which are prescribed by the Court and studied and appraised by the Conference) govern, in part, the operation of Federal grand juries. Except for perfunctory amendments adopted in 1966, the grand jury rules have remained unchanged since 1948. Over the years Congress has enacted a number of amendments to the Federal Judicial Code and the Federal Criminal Code that significantly affect the functioning of the Federal grand jury. Recent examples of such amendments include provisions authorizing the creation of special grand juries and the so-called use-immunity statute enacted as Titles I and II, respectively, of the Organized Crime Control Act of 1970. Developments in the decisional law also underscore the desirability of reviewing the adequacy of present grand jury rules and practices.

A meaningful reassessment of existing rules and practices calls for consideration of such questions as whether hearsay evidence should continue to be admissible; whether a forum non conveniens objection should be provided in meritorious cases; whether the signature of an attorney for the Government should remain a requirement of a valid indictment; and whether a witness' counsel should continue to be excluded from grand jury proceedings.

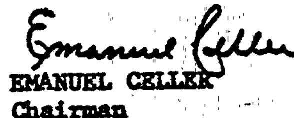
copy to Mr. [illegible] 9/15/72
[illegible]

In the course of public hearings in November 1971, held by a Subcommittee of this Committee, I inquired of a Department of Justice witness whether any written guidelines had been promulgated within the Department to govern the nature and scope of grand jury investigations and to prescribe who decides whether to initiate such proceedings. Subsequent correspondence from the then Deputy Attorney General, Richard G. Kleindienst, indicated that no such standards or written guidelines exist. ("Federal Jury Service," Hearings before Subcommittee No. 5, House Committee on the Judiciary, 92d Cong., 1st sess., pp. 64-71.) I am today requesting the Attorney General to undertake an immediate review of Departmental policy with respect to the institution of grand jury investigations.

Our citizens' confidence in the Federal judicial system demands an effective and fair Federal grand jury process. I, therefore, urge that the Judicial Conference at its forthcoming meeting institute a comprehensive review of Federal grand jury rules and practices and issue a report and recommendations thereon no later than the next scheduled meeting of the Conference in the Spring of 1973.

With every good wish,

Sincerely yours,



EMANUEL CELLER
Chairman

EC:za

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February 21, 1973

B

Honorable Warren E. Burger
Chief Justice
Supreme Court
Washington, D. C.

Dear Mr. Chief Justice:

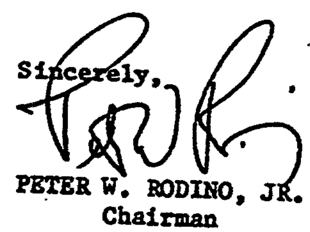
I would like respectfully to express to you my deep concern with the matter of public confidence in the operation of the Federal grand jury process.

In reviewing the past activities of this Committee, I note that the former Chairman, Representative Emanuel Celler, wrote to you on September 12, 1972, requesting that the subject of the Federal grand jury process be placed on the agenda of the Judicial Conference of the United States. In your reply of September 22, 1972, you indicated that the agenda of the October meeting included that subject.

I would be most grateful if you would advise the Committee on the Judiciary as to the current status of consideration of this matter by the Judicial Conference.

With every good wish, I am

Sincerely,



PETER W. RODINO, JR.
Chairman

PWR:jc

RECEIVED
FEB 22 10 38 AM '73
CHAMBERS OF THE
CHIEF JUSTICE

cc Mr. Kirks

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

CHAMBERS OF
THE CHIEF JUSTICE

February 26, 1973

Dear Mr. Chairman:

In response to your letter of February 21, 1973, upon receipt of the letter from former Chairman Celler of September 12, 1972, concerning the subject of the Federal grand jury process, I placed the matter on the agenda of the Judicial Conference of the United States at its October meeting and I was authorized by the Conference at that time to refer the matter to the appropriate committee of the Conference. I have asked Judge J. Edward Lumbard, Chairman of the Advisory Committee on Criminal Rules, to look into the matter and this committee now has it under active consideration.

Cordially,

Honorable Peter W. Rodino, Jr.
Chairman, Committee on the Judiciary
House of Representatives
Washington, D. C. 20515

P.S. The Committee on the Operation of the Jury System has also looked into this subject.

bc: Judge Lumbard
Mr. Kirks
Mr. Cannon

CURRENT ISSUES RELATING TO THE INVESTIGATIVE FUNCTION OF THE GRAND JURY IN THE FEDERAL SYSTEM

Prepared by Attorney ~~Marc~~ Mari Gursky
under the Supervision of Frank J. Remington

Sent to Members of the Criminal Rules Committee at the request of the Grand Jury subcommittee Chairman, Judge Russell Smith

6-5-73

The investigative role of the federal grand jury has recently aroused much discussion, particularly because of its use in political xxgx activities. This memorandum is designed to outline the current law on the investigative powers of grand juries; some of the major issues that have been raised regarding the operation of the grand jury and proposals that would alleviate some of the problems raised; and alternative instrumentalities that could replace or supplement the investigative grand jury.

Part I - The Law On Grand Juries

1. How the Investigative Grand Jury Functions

A. History

Before discussing how modern grand juries operate, it is first necessary to look briefly at the origins of the institution.

The grand jury is almost exclusively a product of common law. Its beginnings have been traced to the Assize of Clarendon in 1164, when it was composed of freemen who aided the Crown in ferreting out those guilty of crime. The role of the grand jury in apprehending criminals, however, was eventually expanded to include protection for the accused. In fact, the grand jury's incorporation into the Fifth Amendment was based in large part on thk the latter function: to protect the accused, though the investigatory role of the grand jury was adopted also. The grand jury has long played an important role in exploring areas of crime and corruption, and its unrestricted investigatory powers have been commented upon in case law. (Hale v. Hinkel, 301 U. S. 43

compelling interest would have to be shown before an investigation can be made which encroaches on contitutional rights. Gibson v. Florida Legislative XHXXX Investigation Committee, 372 U.S. 539 (1963). Also, the investigation would be conducted by lawmakers, rather than lay jurors.

Some of the arguments against positing this duty in the legislature are: the exposure involved in legislative investigations; the fact that the functions of the legislature should involve its duty to make laws, not a determination of whether they are being violated; the fact that legislative investigation is subject to exploitation for political purposes; and that the compelling interest requirement would thwart effective law enforcement.

E. An Entirely New Agency

Finally CXXX there is the possibility of creating a new investigatory agency. In Canada, the Office of Auditor General was established to do the wide scope investigations that American grand juries conduct. The office is held during good behavior until the office holder reaches age sixty-five. (See John W. Oliver, The Grand Jury: An Effort to Get A Dragon Out of His Cave, 1962 Wash. U. L. . 1661.)

July 10, 1973

MEMORANDUM

TO: All Members of the Advisory Committee on Criminal Rules
Frank J. Remington
William Foley
Wayne LaFave

FROM: Russell E. Smith

SUBJECT: Study of the Grand Jury

The advisory committee has been requested by the Chief Justice to make a study of the grand jury. It is the subcommittee's thought that at the August 2nd meeting we should consider:

1. The scope of the study.

Should it be confined to those matters which might fall within the rule-making function? Should we consider constitutional problems, and, if so, should we confine ourselves to those problems peculiar to the grand jury?

2. The method of the study.

It is probable that with respect to some of the problems, statistical evidence of some value could be accumulated. Thus an analysis of grand jury minutes in selected districts over a period of time might show whether the grand jury is actually a rubber stamp for the United

States Attorney, whether the evidence of probable cause is generally presented by a witness without first-hand knowledge, and whether there is any significant disagreement among members of grand juries in returning indictments. If we should consider the constitutional question of dispensing with the grand jury as the sole accusatory agent, the experience (opinion, probably) of persons watching the criminal system in states where all proceedings may be initiated by information might be useful. It would probably be desirable to consider each problem and the method of study to be conducted with respect to it.

3. <u>The product of the study.</u>

Should we boil our product down to a consideration of what the committee deems to be the real problems? Where problems exist should we make recommendations or simply express opinions, and, if the latter, should we provide for the expressions of separate views of committeemen? Should the study include something in the nature of a treatise on the history and function of the grand jury with a fairly precise analysis of its power?

To give the members of the committee some premeeting aid we present in an outline form a list of some problems and some random comments. We urge members of this committee to be prepared at the August 2nd meeting to supplement this list.

Some problems:

I.

Should the inquisatorial function of the grand jury be continued?

There are at least two aspects to this problem.

The grand jury is the tool of the prosecutor. It is vital that the government have some power to investigate and in the course of investigation to compel testimony. This function could, of course, be served were the power transferred to a magistrate or other officer.

Does the use by the grand jury of its power to pursue an uncontrolled investigation of crime warrant the continuance of the grand jury as an inquisatorial tool?

II.

Should the grand jury continue as an exclusive accusatory body in felony cases?

If, in modern practice, the grand jury does not serve its historical function to protect those who may be unjustifiably suspected, but is in effect merely a rubber stamp for the United States Attorney, might we not substitute some other method of presenting crimes?

III.

Is the grand jury selection system adequate?

Present criticism is based on the claim that the system does not result in an adequate representation of the young and of minority groups.

IV.

Should the size of the grand jury be changed?

What are the reasons for the 16-23 member rule (Rule 6a) and the requirement that 12 concur. Is anything other than a problem of cost involved? 9-13 -2

V.

Should there be rules governing the quality of evidence required to demonstrate probable cause? Reject

In which direction should we go? Should an effort be made to regulate the quantity or quality of the evidence necessary to secure an indictment, or should the judicial trend in that direction, reflected by the dissent in United States v. Payton, 363 F.2d 996 (2d Cir. 1966) and in the opinion in United States v. Arcuri, 405 F.2d 691 (2d Cir. 1968), be stopped? Yes -1

VI.

Should there be a requirement for the mandatory reporting of grand jury proceedings? Yes 8-2

This problem is closely allied to problem "V" since if courts are to pass upon the sufficiency of evidence

Closely allied also is the problem (which has long vexed the committee) as to whether for the benefit of defendants, grand jury transcripts should be reported and delivered to the accused. One may look in two directions at this problem. Should affirmative steps be taken to secure these discovery rights or should affirmative steps be taken to stop a judicial movement in this direction? See United States v. King (9th Cir. 72-1593, Feb. 28, 1973); United States v. Price (9th Cir. 71-3038, March 5, 1973).

VII.

Should the process be reformed to provide additional protections:

Is the subpoena power abused as to witnesses?

Should witnesses be entitled to the presence of counsel? NO

Do grand jury proceedings pose any unique problems in terms of the 1st, 4th, and 5th amendment rights of witnesses?

You will receive some material from Professor LaFave and also a paper from Ms Gurskey (a student of Frank Remington's) commenting on grand jury problems. These materials will pretty well outline the issues. For further study we suggest:

E

M E M O R A N D U M

* * * * * *

CURRENT ISSUES RELATING TO THE USE OF FEDERAL GRAND JURIES

* * * * * *

TO: Advisory Committee on Criminal Rules

FROM: Wayne R. LaFave

DATE: July 12, 1973

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MEMORANDUM

CURRENT ISSUES RELATING TO THE USE OF FEDERAL GRAND JURIES

This memorandum attempts to summarize a number of issues which continue to receive attention in the cases and the literature concerning the use of federal grand juries. The purpose of the memo is to place before the committee the major lines of argument which have developed on the various sides of these issues. The inclusion of certain issues herein is not intended to suggest that any particular change in federal law is desirable or, if desirable, is appropriately accomplished by revision of the federal rules.

The memorandum is divided into three parts. Part One deals with a series of issues which most directly relate to the appearance of witnesses before the grand jury. Concern about this general area has grown considerably in recent years, which presumably is the primary reason we have been asked to explore the subject of grand juries. Part Two, by contrast, deals with a group of issues which relate to challenge of an indictment by a defendant; in the main, these issues have been before the courts for some years. Part Three consists of miscellaneous issues concerning the structure of and alternatives to the grand jury.

Part One: Issues Relating to the Appearance of Witnesses

A. Whether a Prospective Defendant Should be Required to Appear Before the Grand Jury

"Orthodox learning treats the person who has been bound over by the magistrate, or who is otherwise the potential defendant whose indictment the grand jury is considering, no differently than it does any other witness. [I]f he is called by the grand jury, he is required to appear and to testify, although like any other witness he may claim his privilege with regard to any particular question that may be incriminating." 1 Wright, Federal Practice and Procedure - Criminal § 104 (1969). See, e.g., United States v. Friedman, 445 F.2d 1076 (9th Cir. 1971); United States v. Capaldo, 402 F.2d 821 (2nd Cir. 1968). Indeed, a prospective defendant may be compelled to appear even though the United States attorney has been advised that he will claim his privilege against self-incrimination. United States v. Fortunato, 402 F.2d 79 (2nd Cir. 1966); United States v. Isaacs, 347 F. Supp. 743 (N.D. Ill. 1972).

The explanation most commonly offered for the above rule is that a defendant's privilege against self-incrimination need not be protected before the grand jury in precisely the same way it is at trial, where the defendant may decline to take the stand at all. As noted in United States v. Scully, 225 F.2d 113 (2d Cir. 1955), "the principle which underlies the rule that the defendant in a criminal trial may refrain even from being sworn as a witness, has no application to proceedings before a Grand Jury. . . . . [A] defendant may not be called as a witness by the prosecution [at

strong showing that such grounds exist. See, e.g., Beatrice Foods Co. v. United States, 312 F.2d 29 (8th Cir. 1963) (affidavit of attorney as to misconduct of government counsel before grand jury, though uncontradicted, not sufficient basis for production of grand jury minutes for inspection). This might be criticized on the ground that it is difficult to make such a showing until the minutes have been inspected, but it has been aptly noted that so long as it remains the law that there are almost no grounds on which an indictment will be dismissed because of what occurred before the grand jury, "the matter is not of practical importance." 1 Wright, Federal Practice and Procedure - Criminal § 108 (1969). In jurisdictions where it is possible to attack an indictment because of the quality of the evidence upon which it is based, it is often easier to obtain the minutes; see, e.g., Burkholder v. State, 491 P.2d 754 (Alaska, 1971), holding that the defendant must be permitted to inspect the transcript of the grand jury testimony relating to his indictment in order to give meaning to State v. Parks, 437 P.2d 642 (Alaska, 1968), which provides that an indictment is invalid if based upon incompetent evidence.

In some states it is the practice to provide grand jury transcripts to defendants. All California grand jury proceedings are recorded, and whenever an indictment is returned the proceedings are transcribed and a free copy is delivered to the defendant. Cal. Penal Code § 938.1. See also Iowa Code Ann. § 772.4; Minn.Stat.Ann. § 628.04; Mont. Code Crim. Proc. § 95-1406; Okla.Stat.Ann. tit. 22, § 340. It was proposed in Model Code of Pre-Arraignment Procedure § 340.3(2) (Tent. Draft No. 5, 1972): "A record shall be made of all proceedings had before the grand jury other than of its deliberations and the vote of individual jurors. The record shall be transcribed and filed with the court together with the indictment or within a reasonable time after the indictment is filed. A copy of the transcript of the proceedings relating to the defendant shall be made available to the defendant at the time it is filed with the court, if, after being informed by the clerk of the court that the transcript is available, he so requests. The court may enter an order providing for the nondisclosure of particular testimony when it believes such action is necessary to protect a witness or is otherwise in the interests of justice." However, in Tent. Draft 5A (1973) the Reporter proposed elimination of that provision, noting that the Federal Rules and ABA Standards do not go this far and that the question "is part of the broader issue of discovery" not dealt with in the Code.

Part Three: Miscellaneous Issues Relating to the Structure of and Alternatives to the Grand Jury

N. Whether the Size of the Grand Jury Should be Reduced

Rule 6 provides that a federal grand jury shall consist of not less than 16 nor more than 23 members, with the concurrence of 12 needed for the finding of an indictment. While this appears to be derived from the common law rule which required that 12 concur in indictment and that the jury consist of anywhere from that number up to and including 23, Younger, The People's Panel 10 (1963), it would seem that the requirements could be changed in the interest of minimizing the cost and trouble in empanelling and using grand juries without violating the Fifth Amendment. Cf. Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), holding that

the Sixth Amendment right to jury trial does not encompass the common law rule requiring 12 jurors and that the number only need be "large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community."

If change were considered, attention should be given to at least these questions: (1) Is there any reason why the grand jury should be substantially larger than the petit jury? and (2) Is there any justification for permitting a grand jury of a variable size, while requiring a set number for indictment, so that the requisite support for indictment ranges from 51% of the maximum size jury to 75% of the minimum size jury?

Most states have favored the variable size membership, although not always of the same number provided in the federal system, e.g.: Alaska (12-18, majority needed for indictment); Florida (15-18, with 12 needed for indictment); Illinois (16-23, with 12 needed for indictment); Maine (13-23, with 12 needed for indictment); New Jersey (limit of 23, with apparent minimum of 12, which is number needed for indictment); New York (16-23, with 12 needed for indictment); Pennsylvania (15-23, with 12 needed for indictment). Some states, however, have set a specific size for the grand jury, often below the minimum size for federal grand juries, e.g.: California (23 or 19, depending upon county size, with 14 and 12 to indict); Colorado (12, with 9 needed to indict); Louisiana (12, with 9 needed to indict); Nevada (17, with 12 needed to indict); Montana (7, with 5 needed to indict); Texas (12, with 9 needed to indict); Wisconsin (17, but 14 for quorum, 12 needed to indict).

O. Whether Alternatives to the Investigative Grand Jury are Needed

Even those states that permit prosecution by information in felony cases have generally retained the grand jury as an investigative body. See Note, 111 U.Pa.L.Rev. 954 (1963). Some, however, have attempted to develop other investigative agencies to replace the grand jury, such as the judicial one-man grand jury or the prosecutor's investigation with subpoena power. Given the Fifth Amendment right to grand jury indictment in the federal system, it is less than clear whether such alternatives would be useful, for if probable cause were developed as a consequence of their use it would nonetheless be necessary to present that evidence to the grand jury. It may be, however, that something would be gained from such a separation of the investigative and indicting functions. (In this connection, it has been noted that the investigative grand jury frequently does not itself indict; it merely develops evidence that is then presented by the prosecutor to a succeeding grand jury which decides whether or not to issue indictments. See Note, supra.)

One possible alternative, as noted above, is to authorize prosecutors to issue subpoenas for investigative purposes. Several states now have provisions authorizing investigatory deposition procedures on the initiative of the prosecutor; see, e.g., Ark.Stat. § 43-801; Fla.Stat. § 32.20; Kan. Stat.Ann. § 22.3101; La. Code Crim.P. art. 66. National Conference of [Com]missioners on Uniform State Laws, Uniform Rules of Criminal Procedure [(T]ent. Draft No. 2, 1973), which favors abolition of the grand jury wherever possible, provides in Rule 26 for the prosecutor to "have authority to take the testimony by deposition of any person believed to possess information

MAR 6 - 1974

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THE FEDERAL JUDICIAL CENTER
DOLLEY MADISON HOUSE
1520 H STREET, N.W.
WASHINGTON, D.C. 20005

TELEPHONE
202/393-1640

January 25, 1974

The Honorable Russell E. Smith
Judge, United States District Court
District of Montana
Missoula, Montana 59801

Dear Judge Smith:

This letter is intended as a memorandum of our phone conversation on January 23, 1974, and a response to your November inquiry. The Research Division has considered the proposed grand jury study according to your request of November 7, 1973, and I have discussed my opinions with Mr. Green, the Deputy Director, in Judge Murrah's absence.

Our evaluation of the feasibility of the proposed methods of examining the effectiveness of the grand jury system as it presently operates is a difficult evaluation to make in the absence of a stated goal for the study. If the study is undertaken for the purpose of supporting as great a step as a constitutional amendment, the availability, reliability, and the significance of hard statistics will be of paramount importance. If the purpose of the study is to provide support for a limited change of rules and jury instructions within the authority of immediate action by the Federal judiciary, then a descriptive study of the general situation, with the footnote that individual judge response should be keyed to the situation in his own district, may be adequate to the objective.

Beginning with the researcher's premise that any data collected must be of quality sufficient to fulfill its purpose, I would make the following responses to your three questions:

1. Is the list of jurisdictions in your letter a satisfactory base for examining the operation of grand juries? The list would be satisfactory to me for design purposes. As you point out, it covers a range of geography, size of court, mix of cases and other probably significant characteristics. For a study that

hard data on this question, it would be necessary to transcribe and read all recorded proceedings. The large cost and minimal benefits of this method have been mentioned earlier. The alternative source of this information would be interviews with the U. S. Attorneys; such interviews would be valuable if the goal of the study were for limited grand jury reforms.

3. The third point you raise, the feasibility of identifying the delays occasioned by the grand jury system, requires some preliminary and theoretical determinations of measurement. Most likely, the date of presentment would be the "end" date of the measurement of delay caused by waiting for a grand jury. The "beginning" date could be the arrest date, or the date of the first investigative agency report,but such a starting point may be valid in a postal theft case and not so convincing in a tax case. The date of the final investigatory report would also be susceptible of misinterpretation, since the U. S. Attorney's office may do further investigation on its own, or may be waiting to indict for other reasons.

Further the measurement from some point of readiness to presentment may be attributable to something other than grand jury system. This is especially true in large courts where grand juries are in continuous session. We could not say with certainty whether the time difference would be due to grand jury queuing or due to other reasons of the U. S. Attorney.

In the districts where grand juries do not sit continuously, the measurement may have more meaning, if a satisfactory "ready" date could be determined. It is my impression though, that in those districts, the cart may be pulling the horse in that the prospect of an imminent grand jury stimulates U. S. Attorney readiness.

If the theoretical question could be solved satisfactorily, the question of data availability would be important. The U. S. Attorneys' offices indicated that date of presentment and date of some (either first or last) investigatory report information could be linked. Department of Justice authorization would be necessary to permit researchers to have access to these confidential files.

While the Department of Justice might be more willing to seek out the data themselves than to permit file examination, the problem of keying on grand juries rather than on a specified period of time would be present here as well.

The inquiry of delays caused by waiting for the grand jury may also be better pursued by interviewing U. S. Attorneys, since "ready" dates and file access present such problems.

In summary, the availability of reliable hard data appears to be a pervasive problem if the goal of the study is to develop statistics significant enough to indicate whether or not major changes in the grand jury system are desirable. However, it is feasible to pursue a limited descriptive study which would give the federal judiciary some assistance in assessing the presently unknown problems of the grand jury system.

Finally, I would mention the point of timing that we discussed briefly. For many policy reasons it may not be the propitious time to suggest alterations in the grand jury no matter how promising those changes might be. Purely from a research point of view, the timing may also be a problem. As I have indicated, co-operation and favorable policy decisions would be required to facilitate the studies. Obtaining favorable policy decisions might be more difficult now than ordinarily. Further, changes in policy could derail a study that was halfway home. Such changes are a risk to be considered.

Despite the pessimistic tone of this reply, we are eager to be of help where we can.

Sincerely,

William B. Eldridge
Director of Research

G

February 27, 1974

MEMORANDUM

To: Criminal Rules Committee

From: Wayne LaFave WRL

Subject: Grand Jury Report

At our August 1973 meeting, the Committee asked that I proceed to prepare sections of our report recommending: (1) reduction in the size of the grand jury; (2) mandatory recording of grand jury procedings; (3) a prohibition on the challenge of the competency or adequacy of evidence produced before the grand jury; (4) some form of relief for the witness who would be required to travel a great distance to testify; (5) greater protection against the unauthorized release of grand jury testimony; and (6) the use of alternatives to the grand jury, such as investigatory depositions. Materials on these subjects are enclosed, all in the form of a draft of a section of the report. A memorandum on the special problem of whether secrecy should be required of grand jury witnesses, which was mentioned only in passing at our last meeting, is also enclosed. Finally, I have enclosed the section which would briefly discuss those areas as to which we have decided to make no recommendation.

I have not had an opportunity to explore the question of abolition of the grand jury, discussed at our last meeting, which in any event may have to await the results of the study requested of the Federal Judicial Center. Nor have I had a chance to put anything together on use of magistrates in connection with or instead of grand juries. (It is my misfortune to be Acting Dean of the College this semester, which has left me with little research time.)

Because the date of our meeting is rapidly approaching, I have had to send out this material without first discussing it with Judge Smith. He may have some thoughts on how we could best proceed to handle the enclosed material.

See you all on March 14

PART ----: SIZE OF THE GRAND JURY

It is recommended that federal grand juries be reduced in size so as to consist of nine to thirteen members and that concurrence by two-thirds of the members be required for an indictment. This would require revision of 18 U.S.C. § 3321 as follows:

1 Every grand jury impaneled before any district court shall
2 consist of not less than nine ~~sixteen~~ nor more than thirteen ~~twenty-~~
3 ~~three~~ persons. If less than nine ~~sixteen~~ of the persons summoned
4 attend, they shall be placed on the grand jury, and the court shall
5 order the marshal to summon, either immediately or for a day fixed,
6 from the body of the district, and not from the bystanders, a
7 sufficient number of persons to complete the grand jury. Whenever
8 a challenge to a grand juror is allowed, and there are not in
9 attendance other jurors sufficient to complete the grand jury, the
10 court shall make a like order to the marshal to summon a sufficient
11 number of persons for that purpose.

In addition, rule 6 would be revised in the following fashion:

1 (a) SUMMONING GRAND JURIES. The court shall order one or more
2 grand juries to be summoned at such times as the public interest
3 requires. The grand jury shall consist of not less than 9 ~~16~~ nor
4 more than 13 ~~23~~ members. The court shall direct that a sufficient
5 number of legally qualified persons be summoned to meet this
6 requirement.
7 (b) OBJECTIONS TO GRAND JURY AND TO GRAND JURORS.
8 * * *
9 (2) Motion to Dismiss. A motion to dismiss the indictment
10 may be based on objections to the array or on the lack of legal

11 qualifications of an individual juror, if not previously determined
12 upon challenge. It shall be made in the manner prescribed in 28
13 U.S.C. § 1867(e) and shall be granted under the conditions pre-
14 scribed in that statute. An indictment shall not be dismissed on
15 the ground that one or more members of the grand jury were not
16 legally qualified if it appears from the record kept pursuant to
17 subdivision (c) of this rule that the requisite number of ~~12 or~~
18 ~~more~~ jurors, after deducting the number not legally qualified,
19 concurred in finding the indictment.

20 (c) FOREMAN AND DEPUTY FOREMAN. The court shall appoint one of
21 the jurors to be foreman and another to be deputy foreman. The foreman
22 shall have power to administer oaths and affirmations and shall sign
23 all indictments. He or another juror designated by him shall keep a
24 record of the number of jurors present at and concurring in the finding
25 of every indictment and shall file the record with the clerk of the
26 court, but the record shall not be made public except on order of the
27 court. During the absence of the foreman, the deputy foreman shall
28 act as foreman.

29 * * *

30 (f) FINDING AND RETURN OF INDICTMENT. An indictment may be found
31 only if at least 9 jurors are present and two-thirds of those present
32 concur. ~~upon the concurrence of 12 or more jurors.~~ The indictment
33 shall be returned by the grand jury to a judge in open court. If the
34 defendant is in custody or has been released pending trial ~~given bail~~
35 and the requisite number of ~~12~~ jurors do not concur in finding an
36 indictment, the foreman shall so report to the court in writing forth-
37 with.

The early common law grand jury consisted of twelve persons, all of whom had to concur in the indictment. Thompson & Merriam, Juries §§ 464, 583 (1882); United States v. Williams, 28 F. Cas. 666 (No. 16, 716) (C.C.D. Minn. 1871). Later, however, the size of the grand jury was increased, the purpose being "to prevent, on the one hand, the course of justice from being defeated if the accused should have one or more friends on the jury; and on the other hand, the better to protect persons against the influence of unfriendly jurors upon the panel." United States v. Williams, supra. The requirement that twelve concur in the finding of an indictment continued without charge, and thus an upper limit of twenty-three was placed on the grand jury so that at least a majority vote would be required for indictment. Thompson & Merriam, supra, at § 583; Fitts v. Superior Court, 6 Cal.2d 230, 57 P.2d 510 (1936). The common law maximum of 23 and requirement of 12 for indictment were made applicable to federal grand juries by statute, see 13 Stat. 500, discussed in United States v. Williams, supra, and were continued with the adoption of rule 6.

The provision in present rule 6 that the grand jury should consist of at least sixteen, also derived from the statute, most likely originated primarily for the benefit of the prosecutor rather than the defendant. It ensured that the prosecutor could obtain an indictment upon the concurrence of not more than three-quarters (i.e., 12 of 16) of the grand jury. Thus, while it is sometimes said that sixteen are required for a quorum, United States v. Belvin, 46 Fed. 381 (C.C.E.D.Va. 1891), it appears that a defendant may not challenge an indictment concurred in by twelve on the ground that less than sixteen were present. See In re Wilson, 140 U.S. 575 (1891), rejecting defendant's post-conviction objection that he had been indicted by a grand jury of 15, contrary to a territorial statute setting

the size of the grand jury at 17 to 23, because "if the two had been present, and had voted against the indictment, still such opposing votes would not have prevented its finding by the concurrence of the twelve who did in fact vote in its favor." Rule 6(a)(2) expressly provides that an indictment shall not be dimissed because there are less than sixteen legally qualified jurors if twelve or more of those legally qualified voted for indictment. This provision and the Wilson decision are consistent with the prevailing view that, in the absence of a statute making the presence of a certain number of grand jurors mandatory, an indictment may be returned by less than a full grand jury so long as enough remain to constitute the number necessary to concur. See Edwards, The Grand Jury 46 (1906); People v. Dale, 79 Cal.App.2d 370, 179 P.2d 870 (1947); State v. Belvel, 89 Iowa 405, 56 N.W. 545 (1893); State v. Pailet, 139 La. 697, 71 So. 951 (1916); State v. Connors, 233 Mo. 348, 135 S.W. 444 (1911).

There does not appear to be any constitutional obstacle to the reduction of the size of federal grand juries or of the number of jurors who must concur in an indictment. There are a few early state decisions, interpreting state constitutional provisions comparable to the grand jury clause of the Fifth Amendment, holding that neither the size of the grand jury nor the number required to concur in an indictment may be reduced below twelve, State v. Hartley, 22 Nev. 342, 40 P. 372 (1895); State v. Barker, 107 N.C. 913, 12 S.E. 115 (1890). It is fair to conclude, however, that the number twelve is no more a part of the constitutional right to grand jury indictment than it is of the right to a petit jury in criminal and civil cases. See Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970) (criminal cases); Colgrove v. Battin, --- U.S. ---, 93 S.Ct. 2448, 37 L.Ed.2d 522 (1973) (civil cases).

The grand jury "has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). It is "regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962). Given the fact that the petit jury is likewise "a safeguard against arbitrary law enforcement," Williams v. Florida, supra, the considerations which are relevant in determining the size of that jury seem equally relevant with respect to the grand jury. It is important that the number "be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community." Williams v. Florida, supra. If that test is met with a six-person petit jury, as held in Williams, then it would seem to follow that an indictment concurred in by six or more grand jurors, particularly when that number constitutes at least two-thirds of the grand jury, does not violate the Fifth Amendment.

The proposal to reduce the size of federal grand juries from between 23 and 16 to between 13 and 9 is based upon several considerations. One is that the reduction in size will improve the quality of the deliberative process. With a smaller number of grand jurors, responsibility will not be diffused, and the size will be conducive to more active participation by all of the jurors. See Note, 5 U.Mich.J.L. Reform 87, 99-106 (1971). Secondly, the reduction will decrease the number of citizens who will have to absent themselves from their employment and other productive endeavors

for substantial periods of time in order to perform the necessary but demanding responsibilities of a federal grand juror. In addition, the reduction in the size of federal grand juries will result in an appreciable saving of money which would otherwise be spent on the attendance, mileage and substinence of grand jurors. See 1972 Annual Report of the Director of the Administrative Office of the United States Courts 166 (1973), noting that the cost for fiscal year 1972 was $3,085,800, a 5.7% increase over the previous year.

The proposed change continues the concept of a variable membership size for federal grand juries. This approach is fairly common on the state level, see, e.g., Fla. Stat. Ann. § 905.01 (15 to 18); Ill. Rev. Stat. ch. 38, § 112-2 (16 to 23); N.Y. Crim. Pro. Law § 190.05 (16 to 23), although some states set a specific size for the grand jury, see, e.g., Cal. Pen. Code § 888.2 (23 or 19); Colo. Const. art. II, § 23(12); Ore. Const. art. VII, § 5(7). The variable size approach has the advantage that if a jury of the maximum size is initially selected, then if some jurors are later excused from the panel or are absent during the consideration of certain cases because of illness or other reason, there is no need for them to be replaced. It avoids the type of mechanical error held to invalidate an indictment in State v. Vincent, 91 Md. 718, 47 A. 1036 (1900), where an indictment found by a jury of 22 persons, where state law required 23, was subject to attack even though more than 12 had voted for indictment.

Nine has been selected as the lower limit of the variable membership. Taking account of the considerations expressed in Williams v. Florida, supra (that the number be such as to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility of obtaining a representative cross section of the community), it is an appropriate number. Given the requirement discussed below that two-thirds of the jurors concur

in the indictment, it ensures that no indictment may be returned without the concurrence of at least six jurors. Thirteen has been selected as the upper limit, as if that number is selected, then (as is now true) there may be about a thirty per cent loss before reaching the minimum size. (I.e., a variable membership of 23-16 permits loss of 7, which is 30% of 23; while a variable membership of 13-9 permits loss of 4, which is 31% of 13.)

One incidental consequence of the variable membership approach as heretofore utilized in the federal courts and in the states listed above is that the percentage of jurors needed to indict will vary with the size of the grand jury. For example, under the present federal scheme, where 12 are required to indict and the grand jury may number anywhere from 16 to 23, the percentage required for indictment may vary from 75% to 52%. This consequence appears to be the result of nothing more than historical accident, and is less rational than the proposed approach whereby the percentage is fixed. The two-thirds requirement, which is about midway between the present possibilities, ensures that there will be at least six votes for indictment. Cf. Williams v. Florida and Colgrove v. Battin, supra, and compare Colo. Const. art. II, § 23 (12-man grand jury, 9 must concur in indictment); Ind. Code §§ 35-1-15-1, 35-1-16-1 (6-man, 5 must concur); La. Code Crim. P. arts. 413, 444 (12-man, 9 must concur); Mont. Const. art. II, § 20 (11-man, 8 must concur); Ore. Const. art. VII, § 5 (7-man, 5 must concur); Texas Const. art. 5, § 13 (12-man, 9 must concur); Va. Code §§ 19.1-150, 19.1-157 (5 to 7-man, 4 must concur).

The proposed change in rule 6 (f) would require that at least nine grand jurors be present when an indictment is found and that two-thirds of those present concur in the indictment. This means, for example, that an indictment would be open to challenge if it were concurred in by six jurors but only six, seven, or eight jurors were present. This is contrary to the

position taken in In re Wilson, supra, that an indictment concurred in by the requisite number cannot be challenged on the ground that the grand jury had been reduced below its minimum size. The Wilson rule may have been appropriate when considered with the requirement that 12 concur in the indictment, but with the proposed reduction in the size of the grand jury it is believed desirable that no less than nine be present when an indictment is voted. This better ensures group deliberation, free from outside influence, by a group representative of the community. The proposed change in rule 6(c), requiring that a record be kept of the number of jurors present at and concurring in the finding of every indictment, is to provide a means whereby it can be determined that the requisite number were present and that the number concurring in the indictment were no less than two-thirds of those present.

It must be emphasized that the proposed change in rule 6(f) merely requires the presence of at least nine and a two-thirds vote at the time an indictment is found. No change has been made in the well-established rule that an indictment is not necessarily subject to challenge because some of those present at or voting for the finding of an indictment were absent at some earlier time. See, e.g., United States ex rel. McCann v. Thompson, 144 F.2d 604 (2d Cir. 1944); United States v. Colasurdo, 453 F.2d 585 (2d Cir. 1971); United States v. Armour and Co., 214 F.Supp. 123 (S.D.Cal. 1963). As noted in Thompson: "Since all the evidence adduced before a grand jury--certainly when the accused does not appear--is aimed at proving guilt, the absence of some jurors during some part of the hearings will ordinarily merely weaken the prosecution's case. If what the absentees actually hear is enough to satisfy them, there would seem to be no reason why they should not vote."

The proposed change to rule 6(b)(2) is necessary in light of the fact that the number required to concur in the indictment under rule 6(f) may vary, depending upon the number of grand jurors present. It does not change the present policy, which is that if some of the jurors are not legally qualified, the indictment shall not be dismissed if, deducting those jurors, the required number still voted for indictment. Because of the rejected of the Wilson rule, discussed above, it might well be argued that a corresponding change should be made in rule 6(b)(2), so that it must also be shown that at least nine legally qualified jurors were present when the indictment was found. That approach has been considered but rejected. It is one thing to apply such a strict rule with respect to the rather simple requirement that nine jurors be present, but quite another to apply the same rule with respect to the likely inadvertent presence on the grand jury of one or more persons not legally qualified. While it is true that the legal qualifications are fewer in number than they once were, see 18 U.S.C. § 1865 and compare Castle v. United States, 238 F.2d 131 (8th Cir. 1956), it would nonetheless be unduly severe to quash an indictment because, say, one of the nine persons present was thereafter determined to have had a federal charge pending against him. Similarly, to the extent that rule 6(b)(2) is utilized in cases where the defendant claims that one of the jurors was biased against him, see, e.g., United States v. Anzelmo, 319 F.Supp. 1106 (E.D.La. 1970), which is also unlikely to occur by government design, it should again be sufficient that there are the requisite number of votes for indictment after elimination of the prejudiced juror.

The change in rule 6(f) at line 34 reflects the fact that under the Bail Reform Act of 1966 some persons will be released without requiring bail. See 18 U.S.C. § 3146, § 3148. "The purpose of the last sentence of

Rule 6(f) can only be carried out if it is construed as being applicable to such persons, and a 'no bill' promptly reported in such cases." 1 Wright, Federal Practice and Procedure - Criminal § 110 (1969).

PART ------: RECORDING OF GRAND JURY PROCEEDINGS

At present, the recordation of grand jury proceedings is deemed to be permissive and not mandatory; see United States v. Aloisio, 440 F.2d 705 (7th Cir. 1971), collecting the cases. It is recommended that such recording be required and that rule 6(e) be revised accordingly, as follows:

1 (e) RECORDING AND DISCLOSURE OF PROCEEDINGS.
2 (1) Recording of Proceedings. All testimony and oral state-
3 ments before the grand jury shall be recorded stenographically
4 or by an electronic recording device. An inadvertent failure
5 of any recording to reproduce all or any portion of a proceeding
6 shall not affect the validity of the prosecution. The recording
7 relating to any indictment returned by the grand jury, or any
8 transcript prepared therefrom, shall be filed under seal with the
9 clerk of the court. Where proceedings are electronically recorded
10 and the court authorizes disclosure of all or part of the proceed-
11 ings to a defendant under indictment, the court may, in its
12 discretion, grant or deny the defendant the opportunity to prepare
13 a transcript from such recording at government expense.
14 (2) Secrecy of Proceedings and Disclosure. Disclosure of
15 matters occurring before the grand jury other than its deliberations
16 and the vote of any juror may be made to the attorneys for the
17 government for use in the performance of their duties. For purposes
18 of this subdivision, "attorneys for the government" includes those
19 enumerated in rule 54(c); it also includes such other government
20 personnel as are necessary to assist the attorneys for the govern-
21 ment in the performance of their duties. Otherwise a juror,
22 attorney, interpreter, stenographer, operator of a recording
23 device, or any typist who transcribes recorded testimony may

PART ------: CHALLENGE OF ADEQUACY OR

COMPETENCY OF EVIDENCE PRODUCED BEFORE GRAND JURY

The Supreme Court has declined to adopt a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence. Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956); Lawn v. United States, 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958); United States v. Blue, 384 U.S. 251, 86 S.Ct. 1416, 16 L.Ed.2d 510 (1966). Although some courts and commentators have favored a contrary result, it is believed that the position taken in these cases is sound. Consequently, it is recommended that rule 7 be amended by adding the following:

1 (g) MOTION TO DISMISS INDICTMENT. A motion to dismiss the
2 indictment may not be based on the ground that it is not supported
3 by adequate or competent evidence.

One way in which this issue may arise is when the defendant claims that the indictment is based upon hearsay evidence. Such was the case in Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), a tax evasion case, where the government called 144 witnesses at trial, and as a result of their cross-examination it was established that only three government agents, who had no first-hand knowledge of the transactions in question, had appeared before the grand jury. The defendant then renewed his prior motion to dismiss the indictment, but the court declined to do so. The Supreme Court held that "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act," and emphasized that a contrary rule "would run counter to the whole history of the grand jury institution" and "would result in interminable delay but add nothing to the assurance of a fair trial": "If indictments were to be held open to challenge on the ground that there was

PART ----: SUBPOENA OF DISTANT WITNESS

It is recommended that provision be made for the taking of testimony by deposition from witnesses who otherwise would suffer considerable inconvenience by traveling a great distance to give testimony in person before a grand jury. This could be accomplished by the following addition to rule 6:

1 (h) TESTIMONY BY DEPOSITION. A witness subpoenaed to appear
2 before a grand jury in a district more than 100 miles from his place
3 of residence and in which he is not employed and does not transact
4 business in person, upon prompt motion before the court in the district
5 where the grand jury is sitting or in which he resides, shall be
6 permitted to give his testimony by deposition. The deposition shall
7 be taken by the attorney for the government in the manner provided in
8 civil actions, except that the requirements of secrecy under sub-
9 division (c) of this rule shall apply. The record of the deposition
10 shall be considered by the grand jury, which shall then require the
11 witness to be subpoenaed to appear personally before it only if such
12 appearance is deemed necessary to determine whether an indictment shall
13 be found. Upon prompt motion of the witness, the court in the district
14 where the grand jury is sitting or in which the deposition was taken
15 may quash the second subpoena if, considering the record of the
16 deposition given by the witness, compliance would be unreasonable or
17 oppressive.

Federal grand juries possess nationwide personal jurisdiction over witnesses. A grand jury subpoena may be served "at any place within the United States" if the grand jury is investigating a possible federal offense within its jurisdiction; see rule 17(e)(1). A witness "is not entitled to challenge the authority of the court or of the grand jury,

PART ------: GRAND JURY SECRECY

Present Fed. R. Crim. P. 6(e) deals with secrecy of grand jury proceedings. It allows disclosure "to the attorneys for the government for use in the performance of their duties," forbids disclosure by "a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony" except under limited circumstances when so directed or permitted by the court, and goes on to provide that "no obligation of secrecy may be imposed upon any person except in accordance with this rule." Unauthorized disclosure of grand jury proceedings is not in itself a criminal offense, although many of the disclosures prohibited under Rule 6(e) may be dealt with under the contempt power. See, e.g., In re Summerhayes, 70 Fed. 769 (N.D.Cal. 1895) (grand juror held in contempt for unauthorized disclosure).

It is recommended that unauthorized disclosure of matters occurring before the grand jury be made a criminal offense. This recommendation results from two considerations. One is that unauthorized disclosure is becoming a more serious problem, particularly with regard to grand jury inquiries focusing upon public figures. See, e.g., In re Biaggi, 478 F.2d 489 (2d Cir. 1973); N.Y. Times, May 20, 1973, p. 64, col. 1 (re "leaks" concerning grand jury testimony of Congressman Biaggi); N.Y. Times, Oct. 4, 1973, p. 1, col. 6 (re "leaks" concerning grand jury investigation of Vice-President Agnew).

The "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts" is supported by five compelling reasons: "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury

MEMORANDUM ON SECRECY REQUIREMENT RE GRAND-JURY WITNESSES

A. Federal

Rule 6(e) defines the limited circumstances in which disclosure may be made by "a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony," and goes on to state: "No obligation of secrecy may be imposed upon any person except in accordance with this rule." The Advisory Committee Note reads: "The rule does not impose any obligation of secrecy on witnesses. The existing practice on this point varies among the districts. The seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate." Prior to the adoption of the federal rules, it was deemed to be within the power of a court to impose an oath of secrecy upon a grand jury witness "if the court believes the precaution necessary in the investigation of crime." Goodman v. United States, 108 F.2d 516 (9th Cir. 1939).

B. The States: A Summary

Five states have adopted provisions patterned after federal rule 6(e). See Alaska R. Crim. P. 6(h); Kan. Stat. Ann. § 22-3012; Mont. Rev. Code § 95-1409; S.Dak. Comp. Laws § 23-30-14; Wyo. Stat. § 7-117.8. Thus, because of the express prohibition upon imposing an obligation of secrecy except as provided, it can be said that in these jurisdictions witnesses are under no such obligation.

Provisions have been found in eleven states imposing an obligation of secrecy upon grand jury witnesses. See Ala. Code tit. 30, § 96; Ariz. Rev. Stat. § 21-234; Fla. Stat. Ann. § 905.27; Hawaii Rev. Stat. § 736-1; Ind. Stat. Ann. § 35-1-15-19; La. Code Crim. P. art. 434; Mich. Comp. Laws

PART ------: INVESTIGATORY DEPOSITIONS

It is recommended that the attorney for the government be given the power to subpoena witnesses for purposes of investigation. This recommendation rests upon the conclusion that such a means of investigation is generally preferable, both from the standpoint of the prosecutor and the witness, to use of the grand jury to investigate criminal activity. The grant of subpoena power to the attorney for the government would be essential if the grand jury were abolished or its use severely limited (see Part --- of this Report). However, even if the grand jury continues to be utilized to return indictments, there is still merit in utilizing the procedures set out below where the objective is investigation of possible criminal offenses.

The recommendation is consistent with that recently made by the National Advisory Commission on Criminal Justice Standards and Goals. Standard 12.8 in National Advisory Commission on Criminal Justice Standards and Goals, Courts (1973), reads in part:

"The prosecutor should be given the power, subject to appropriate safeguards, to issue subpenas requiring potential witnesses in criminal cases to appear for questioning. Such witnesses should be subject to contempt penalties for unjustified failure to appear for questioning or to respond to specific questions."

In the commentary thereto, the Commission observes:

"The standard also recommends giving the prosecutor subpena power. This is intended in part to balance the emphasis in Chapter 4, The Litigated Case, on discouraging the use of the grand jury. In many cases, the only advantage of a grand jury proceeding is that it permits the prosecution to subpena witnesses and interrogate them. (See United States v. Hughes, 413 F.2d 1244 (5th Cir. 1969).)

PART ----: OTHER MATTERS CONSIDERED

The Committee has considered several other matters, as to which no change is recommended, either because the present state of the law is deemed adequate or else because whatever changes may occur are thought best left to evolution by court decisions rather than amendment of rules or statutes. These matters are summarized below.

(1) Requiring Prospective Defendant to Appear Before the Grand Jury as a Witness. A person who has been bound over by a magistrate or who is otherwise a potential defendant is treated no differently than any other witness; if he is called by the grand jury, he is required to appear and testify, although like any other witness he may claim his privilege with regard to any particular question that may be incriminating. See e.g., United States v. Friedman, 445 F.2d 1076 (9th Cir. 1971); United States v. Capaldo, 402 F.2d 821 (2d Cir. 1968). On occasion, this state of the law has been criticized. For example, in Jones v. United States, 342 F.2d 863 (D.C. Cir. 1964), four members of the court argued that "mere interrogation before a grand jury may harm the accused as much as mere interrogation at trial," in that the grand jury may draw adverse conclusions from the fact he declines to answer certain questions on Fifth Amendment grounds.

No change is recommended, for these reasons: (a) As noted in United States v. Scully, 225 F.2d 113 (2d Cir. 1955), the considerations which support the rule that a defendant may not be called to testify by the prosecution at his trial "do not apply to the inquisitorial proceedings of a Grand Jury," as that body "is not charged with the duty of deciding innocence or guilt." (b) As pointed out by four members of the court in Jones v. United States, supra, the grand jury's broad right of inquiry should not be impaired by granting a right of nonappearance to a certain class of persons, particularly if that class is defined so

H

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

CHAMBERS OF
ALFONSO J. ZIRPOLI
UNITED STATES DISTRICT JUDGE

May 24, 1974

Honorable J. Edward Lumbard
United States Circuit Judge
United States Courthouse
New York, New York 10007

Dear Ed:

After having had the benefit of the views of your Committee with respect to review of sentences in criminal cases and reform of grand jury procedures thoroughly presented by Judge Webster and Professors Remington and LaFave and following extensive discussion the Committee on the Administration of the Criminal Law offers the following observations for your consideration:

1. Review of Sentences.

In our continuing study of the question of review of sentences imposed by district courts in criminal cases, we are now firmly convinced that unless the judiciary itself makes provision for review of sentences through its rule-making power Congress will enact legislation providing for appellate review of sentences.

Faced with such an alternative we favor the proposed amendment to Rule 35 of the Criminal Rules of Procedure with certain suggested modifications which we have submitted to your advisory committee through Judge Webster and Professor Remington. These suggested modifications are: (1) that the panel of review judges shall consist of one circuit judge and two district judges of the circuit; (2) that membership on the panel shall be rotated in such manner as is practicable in the discretion of the assigning judge; and (3) that the motion to review sentence shall apply to any sentence which may result in imprisonment, regardless of the period thereof.

2. Grand Jury.

Size of Grand Jury. We approve the suggested reduction in the number of grand jurors (preferably not less than nine nor more than fifteen) provided proper recognition is given to the need to resolve special geographic problems that exist in certain districts. See in re May 1972 San Antonio Grand Jury, 356 F. Supp. 522. Any change in the size of the grand jury calls for a revision of 18 U.S.C. § 3321 and we are prepared to recommend the revision suggested by your committee. The mechanics for such statutory revision and change in Rule 6, should be so timed that each becomes effective on the same date.

Rule 6(e). Reporting of Grand Jury Proceedings. We recognize that the responsibility of amending Rule 6(e) of the Federal Rules of Criminal Procedure relative to the recording and disclosure of testimony before the grand jury rests primarily with your advisory committee, yet we express serious reservation as to the wisdom of providing the alternative of electronic recording.

Rule 7(g). Again while the suggested amendment of Rule 7 by the addition of subparagraph (g) is the responsibility of your committee, we respectfully recommend that Rule 7(g) should not be adopted. It is not a precept that should be codified by rule or statute. It should be left to case law. See United States v. Calandra, ___U.S.___(Jan. 8, 1974). We feel that this would be a matter that could be better handled by an advisory committee note and thus avoid conflict with the principle that an indictment shall be returned only upon showing of probable cause that a federal offense has been committed.

Making unauthorized disclosure an offense. We reviewed the suggested statute found on page 32 of Professor LaFave's report which would make it an offense to knowingly disclose matters appearing

8/74

I

REPORT OF THE
ADVISORY COMMITTEE ON CRIMINAL RULES
CONCERNING
THE FEDERAL GRAND JURY

This Report by the Advisory Committee on Criminal Rules is concerned with the operation of the federal grand jury system. Recommendations are made for certain changes, which may be accomplished by additions to or amendment of statutes and rules of court, that it is believed would make the system more fair and efficient in its operation. The Committee has only given attention to those changes which could be accomplished by rule or statute consistent with the existing provisions of the Fifth Amendment. Consequently, no view is taken here with respect to H.J.Res. 46, 94th Cong., 1st Sess., which proposes an amendment to the Constitution that would (i) bar grand jury indictment, (ii) permit holding a person to answer upon an information; and (iii) permit Congress to legislate concerning investigatory grand juries.

The Committee presents four affirmative recommendations in this Report. They are: (1) that 18 U.S.C. § 3321 and Fed.R.Crim.P. 6 be revised to provide that federal grand juries be reduced in size so as to consist of nine to thirteen members and that concurrence by two-thirds of the members be required for an indictment; (2) that Fed.R.Crim.P. 6 be revised to make the recordation of grand jury proceedings mandatory rather than permissive; (3) that Fed.R.Crim.P. 7 be revised to provide [illegible] that a motion to dismiss an indictment may not be [illegible] the ground that it is not supported by adequate or competent

PART ONE: SIZE OF THE GRAND JURY

It is recommended that federal grand juries be reduced in size so as to consist of nine to thirteen members and that concurrence by two-thirds of the members be required for an indictment. This would require revision of 18 U.S.C. § 3321 as follows:

1 Every grand jury impaneled before any district court shall
2 consist of not less than nine ~~sixteen~~ nor more than thirteen ~~twenty-~~
3 ~~three~~ persons. If less than nine ~~sixteen~~ of the persons summoned
4 attend, they shall be placed on the grand jury, and the court shall
5 order the marshal to summon, either immediately or for a day fixed,
6 from the body of the district, and not from the bystanders, a
7 sufficient number of persons to complete the grand jury. Whenever
8 a challenge to a grand juror is allowed, and there are not in
9 attendance other jurors sufficient to complete the grand jury, the
10 court shall make a like order to the marshal to summon a sufficient
11 number of persons for that purpose.

In addition, rule 6 would be revised in the following fashion:

1 (a) SUMMONING GRAND JURIES. The court shall order one or more
2 grand juries to be summoned at such times as the public interest
3 requires. The grand jury shall consist of not less than 9 ~~16~~ nor
4 more than 13 ~~23~~ members. The court shall direct that a sufficient
5 number of legally qualified persons be summoned to meet this
6 requirement.
7 (b) OBJECTIONS TO GRAND JURY AND TO GRAND JURORS.
8 * * *
9 (2) Motion to Dismiss. A motion to dismiss the indictment
10 may be based on objections to the array or on the lack of legal

REPORT OF THE COMMITTEE ON THE ADMINISTRATION OF THE CRIMINAL LAW

To the Chief Justice of the United States,
Chairman, and the Members of the
Judicial Conference of the United States

The Committee on the Administration of the Criminal Law consisting of:

Honorable Ruggero J. Aldisert
Honorable Richard B. Austin
Honorable Jean S. Breitenstein
Honorable William B. Bryant
Honorable W. Arthur Garrity, Jr.
Honorable Earl R. Larson
Honorable Lloyd F. MacMahon
Honorable John W. Peck
Honorable Adrian A. Spears
Honorable Alfonso J. Zirpoli, Chairman

met on May 20 and 21, 1974, and after due consideration of the items hereinafter set forth, reports as follows:

Although the Congress has before it a number of bills which are of substantial interest to the Conference and to our Committee, none of these bills, other than the few which we have reported to previous sessions of the Conference, have been referred to us for our recommendations. No action of the Conference is required on any of the items herein reported. The first three were referred to us by other committees for an expression of our views. Those views, herein set forth, have been transmitted to the appropriate committees of this Conference and it is assumed that any recommendations to be

submitted to the Conference on these items will be presented at the proper time. The fourth item is a report for purposes of information on the progress made by the district courts in the disposition of criminal cases under district court plans adopted pursuant to the provisions of Rule 50(b) of the Federal Rules of Criminal Procedure.

ITEM I

Review of Sentences

In our continuing study of the question of review of sentences imposed by district courts in criminal cases, the Committee is now firmly convinced that unless the judiciary itself makes provision for review of sentences through its rule-making power Congress will enact legislation providing for appellate review of sentences.

Faced with such an alternative we favor the proposed amendment to Rule 35 of the Federal Rules of Criminal Procedure with certain suggested modifications which we have submitted to the Advisory Committee on Criminal Rules. These suggested modifications are: (1) that the panel of review judges shall consist of one circuit judge and two district judges of the circuit; (2) that membership on the

panel shall be rotated in such manner as is practicable in the discretion of the assigning judge; and (3) that the motion to review such sentences shall apply to any sentence which may result in imprisonment, regardless of the period thereof.

ITEM II

Grand Jury Reform

At the request of the Chief Justice and the Advisory Committee on the Criminal Rules, we have reviewed the recommendations of the Advisory Committee for improvements in the grand jury process through the rule-making power and have submitted to that committee the comments that hereinafter follow as an expression of our views.

Size of Grand Jury.

We approve the suggested reduction in the number of grand jurors (preferably not less than nine nor more than fifteen, with the concurrence of two-thirds of the members required for return of an indictment) provided proper recognition is given to the need to resolve special geographic problems that exist in certain districts. See *In re May 1972 San Antonio Grand Jury*, 366 F. Supp. 522. Any change in the size of the grand jury calls for an amendment to

Rule 6(a) of the Federal Rules of Criminal Procedure and a revision of Title 18 U.S.C. section 3321. We approve the revisions suggested by the Advisory Committee. The mechanics for such statutory revision and change of Rule 6 should be so timed that each becomes effective on the same date.

Rule 6(e). Reporting Grand Jury Proceedings.

We approve the recommendation that Rule 6(e) of the Federal Rules of Criminal Procedure be amended to require the recording of all testimony and oral statements before the grand jury. We recognize that the responsibility of recommending any amendment to the rule to provide for the recording and disclosure of testimony before the grand jury rests primarily with the Advisory Committee, yet, by divided vote, we express serious reservations as to the wisdom of providing the alternative of electronic recording.

Rule 7(g). Motion to Dismiss.

The Advisory Committee suggests that Rule 7 of the Federal Rules of Criminal Procedure be amended by adding the following:

(g) Motion to Dismiss Indictment.

A motion to dismiss the indictment may not be based upon the ground that it is not supported by sufficient evidence.

Again, while submission of the suggested amendment is the responsibility of the Advisory Committee, we respectfully suggest that Rule 7(g) should not be adopted. It is not a precept that should be codified by rule or statute. It should be left to case law. See United States v. Calandra, 414 U.S. 338 (January 7, 1974). We feel that this is a matter that could be better handled by an advisory committee note and thus avoid conflict with the principle that an indictment shall be returned only upon a showing of probable cause that a federal offense has been committed.

Making Unauthorized Disclosure of Matters Before Grand Jury.

We reviewed the suggested statute found on page 32 of Professor La Fave's report to the Advisory Committee which would make it an offense to knowingly disclose matters appearing before the grand jury. The two considerations which prompted the suggested

statute are (1) unauthorized disclosure is becoming a serious problem, particularly with regard to grand jury inquiries focusing on public figures, and (2) the limited reach of Rule 6(e) of the Federal Rules of Criminal Procedure and the contempt power are not adequate to deal effectively with unauthorized disclosure.

To illustrate the type of statute which would be appropriate the Advisory Committee suggests the following:

(a) Whoever knowingly discloses any matter occurring before any grand jury summoned by a court of the United States, or, with intent that such disclosure be made, commands, induces, entreats, or otherwise attempts to persuade another to make such disclosure, shall be fined not more than $500 or imprisoned not more than six months or both.

(b) Subsection (a) shall not apply to -

(1) disclosure to an attorney for the government for use in the performance of his duties;

(2) disclosure directed or permitted by a court, or

(3) disclosure by a witness who has appeared before such grand jury of any matter concerning which the witness has testified or produced other information before the grand jury.

(c) As used in subsection (b) -

(1) "attorney for the government" includes the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney, and such other governmental personnel as are necessary to assist the attorneys for the government in the performance of their duties.

(2) "disclosure by a witness" includes disclosure by others of matter the witness has previously disclosed when made as a consequence of such disclosure by the witness.

(d) Nothing contained in this section shall be construed to affect the power

of the court to punish any person for contempt for violation of any rule or order of the court.

While we are of the view that the matter of disclosure by witnesses of testimony given before a grand jury should be the subject of further study, it is our present thinking that paragraph (3) of subsection (b) of the above proposed statute should be revised to require witnesses not to disclose matters occurring before a grand jury when specifically directed not to do so by the court. If requested, we are prepared to draft the language to be employed for this suggested revision, otherwise we are pleased to leave it entirely to the discretion of the Advisory Committee.

ITEM III

Voluntary Surrender of Certain Sentenced Offenders to Bureau of Prison Institutions

At the request of the Probation Committee we reviewed its proposed statement of procedures to provide for the voluntary surrender of selected sentenced offenders to the Bureau of Prison Institutions (see Exhibit A attached hereto) and the

proposed implementing legislation (see Exhibit B attached hereto) which would provide a penalty for failure of a convicted person to surrender himself to the Attorney General when ordered to do so by the court. We join in the recommendation of the Probation Committee that the Conference approve the proposed surrender procedures and that it recommend enactment of the proposed implementing legislation.

ITEM IV

Report on the Operation of Rule 50(b) Plans

We respectfully submit as an appendix to this report Exhibit D, a statistical analysis prepared by the Administrative Office of the United States Courts, which, on an accounting system based on individual defendants rather than cases, reflects that in the calendar year 1973 for defendants in all districts the median time interval from the time of the filing of the indictment or information to the date of actual disposition is 3.9 months. For disposition, where there is a dismissal or acquittal the date of dismissal or acquittal is used and for those convicted the date of the actual sentence imposed by the court is used. While this

figure represents a slight increase over the median time for the calendar year 1972 which was 3.7 months, such increase is understandable and was to be expected because of the substantial change in calendar mix that occurred between 1972 and 1973. The major changes in calendar mix were:

(1) The fact that in 1973 more than 2,000 cases of defendants charged with violations of the immigration laws were transferred from the district courts to the magistrates. Prior to such transfer and based upon reports for the fiscal year 1971 (heretofore all accounting was on a fiscal year basis) we know that the median time for the disposition of these cases was only 0.8 months. As a supplement to the report and as Exhibit D-1 we have attached tabulations of time intervals from filing to disposition when all immigration violators are eliminated for both calendar years 1972 and 1973.

(2) The continued growth of drug-related cases from 7,989 in 1972 to 8,181 in 1973. Such cases tend to drive the median time interval upward. Yet with two out of each ten filings comprising

a drug offense, the median time of 3.3 months for marihuana violators and 4.7 months for other drug violators in 1971 is probably on the low side in 1972 and 1973.

(3) Selective Service Act violators, though dropping in filings, still comprise a large segment of the pending case load, many of whom are fugitives, with a resultant overall median time of 6.5 months. The time for filing to disposition for Selective Service Act cases under present recording practices includes all fugitive time. On December 31, 1973, of the 4,473 pending Selective Service Act cases 72 percent were cases wherein the defendants were fugitives.

When one considers that in the median time figure of 3.9 months for the disposition of criminal cases for all defendants we have a built-in period of approximately one month from the time of conviction or plea of guilty or nolo contendere to the time of sentence and further consider that an almost equal period transpires before the United States Attorney secures authorization for dismissal from the Attorney General,

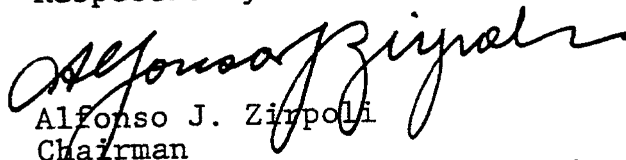
the time limits presently being met for the disposition of criminal cases compares favorably with those advocated by Senator Ervin in S. 754, particularly during the first three years after enactment (see Exhibit C attached hereto).

Because of the change in the case mix between 1972 and 1973, reflected in part above, we feel that it is too early to measure the effectiveness of the 50(b) plans and a more meaningful measure can be made at the close of the calendar year 1974, at which time we can compare 1973 and 1974 by the same controlled standards. We are satisfied that given the "additional resources, personnel and facilities" suggested by Senator Ervin, all of his speedy trial objectives could be fulfilled under the Rule 50(b) plans without the need of additional legislation.

The Committee noted with great interest and with its approval the proposal of the Subcommittee on Judicial Statistics which sets forth specific procedures for the establishment of an inactive suspense docket in each district either by local rule or by a general or administrative practice. The establishment of such inactive suspense dockets would materially and favorably affect the median time

statistics for the disposition of criminal cases.

Respectfully submitted,



Alfonso J. Zirpoli
Chairman
Committee on the Administration
of the Criminal Law

K

REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

HELD AT

WASHINGTON, D.C.

MARCH 7-8, 1974

AND

SEPTEMBER 19-20, 1974

ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

1974

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1975

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temporary excuses (§ 1866(c)(1)),
)(5)) which removes them from con-

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not relate to any specific class or group
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INISTRATION OF THE
LAW

an, presented the report of the
the Criminal Law.

EGISLATION

previous day he had testified
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ong other things would provide
rocess. Judge Zirpoli submitted
operation of provisions of Rule
al Procedure and on his recom-
urge the House Judiciary Com-
til the close of the fiscal year
e the effectiveness of the Rule
on of criminal cases.

NTENCES

the Committee favors the al-
nces provided by the proposed
Rules of Criminal Procedure.
: (1) that the panel of review
district judges; (2) that mem-
ar as is practicable in the dis-
3) that the motion to review
entence which may result in
thereof.

Grand Jury

Judge Zirpoli advised the Conference that his Committee had communicated to the Advisory Committee on Criminal Rules its view that Rule 6(a) of the criminal rules should be revised to reduce the number of grand jurors (preferably not less than nine nor more than 15, with the concurrence of two-thirds required for return of an indictment). The Advisory Committee was also told that the Criminal Law Committee approved a recommendation to amend Rule 6(e) to require the recording of all testimony and oral statements before the grand jury although many members of the Committee expressed serious reservations as to the wisdom of providing the alternative of electronic recording.

The Advisory Committee was also told that the Criminal Law Committee favors amendment of Rule 7(g) to provide that a motion to dismiss the indictment may not be based upon the ground that the indictment is not supported by sufficient evidence. The Committee also favored legislation under study by the Advisory Committee insofar as it would require witnesses not to disclose matters occurring before a grand jury when specifically directed to refrain from such disclosure by the court.

Voluntary Surrender

Judge Zirpoli advised that his Committee, at the request of the Probation Committee, had reviewed the proposed statement of procedures to provide for the voluntary surrender of selected sentenced offenders to the Bureau of Prison's institutions and the proposed implementing legislation and it joined the Probation Committee in recommending Conference approval.

COMMITTEE ON HABEAS CORPUS

The report of the Committee on Habeas Corpus was presented to the Conference by its Chairman, Judge Walter E. Hoffman.

Judge Hoffman advised that the Committee had under consideration, in cooperation with a committee from the Federal Judicial Center, draft legislation dealing with "prisoner cases" filed under Section 1983 of Title 42, United States Code, and related statutes. This matter remains under study and will be the subject of a later report.

L

MEMORANDUM

April 28, 1975

TO: Members of Advisory Committee on Criminal Rules

FROM: Wayne LaFave

SUBJECT: Grand Jury Report

Chairman Rodino of the House Committee on the Judiciary has requested that our grand jury report be submitted to the Committee about the middle of May so that it may be considered in connection with various proposals pending before the Committee. The proposals are contained in H.J.Res. 46; H.R. 1277; and H.R. 2986, all of which are enclosed. In addition, the Judicial Conference Committee on the Administration of the Criminal Law, chaired by Judge Zirpoli, wishes to consider our grand jury report at its meeting in late May. For both of these reasons, it is necessary to circulate a revised version of the report to you at this time.

The enclosed report consists of those portions of the draft approved or approved with revisions at our last meeting. I have added an introduction, specific references to the pending proposals at appropriate points, and also some new material at the end [items (11), (12) and (13) in Part Five]. This latter material, while not in the previous draft, expresses the position taken by the Advisory Committee in concurring in a resolution in opposition to H.R. 8461, 93d Cong., which is quite similar to present H.R. 1277.

Should you have any comments, criticisms or suggestions with respect to the report, I would appreciate receiving them within the next two weeks.

M

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

CHAMBERS OF
ALFONSO J. ZIRPOLI
UNITED STATES DISTRICT JUDGE

May 29, 1975

Honorable J. Edward Lumbard
United States Circuit Judge
United States Court House
New York, New York 10007

Re: Grand Jury

Dear Ed:

We were delighted to have had the benefit of the work and views of the Advisory Committee on Criminal Rules on grand jury procedures expressed through Judge Russell Smith and Professor LaFave at our Denver Committee meeting of May 23. In our consideration of the grand jury items on the agenda we concluded with the following recommendations:

1. Size of the Grand Jury.

We approve the recommendation of your Committee that Title 18 U.S.C. section 3321 and Rule 6 of the Federal Rules of Criminal Procedure be revised to provide that the grand jury be reduced in size (preferably not less than nine and not more than fifteen) and that concurrence by two-thirds of the members thereof be required for an indictment. The mechanics of such statutory revision and change in Rule 6 should be so timed that each becomes effective on the same date. We recommend that section 3321 of Title 18 U.S.C. be revised to read as follows:

> Every grand jury impaneled before any district court shall consist of not less than nine ~~sixteen~~ nor more than fifteen ~~twenty-three~~ persons. If less than nine ~~sixteen~~ of the persons summoned attend, they shall be placed on the grand jury, and the court shall order the marshal to summon either immediately or for a day fixed,

> from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury. Whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose.

The changes in Rule 6 should be as set forth in the Report of your Committee at pages 3 and 4 thereof, with the exception that we would prefer to have the rule read: "The grand jury shall consist of not less than 9 ~~16~~ nor more than 15 ~~23~~ members," rather than "not less than 9 ~~16~~ nor more than 13 ~~23~~ members."

2. Rule 6(e). Recording of Grand Jury Proceedings.

We approve the recommendation of your Committee that Rule 6(e)(1) of the Federal Rules of Criminal Procedure be amended to make the recordation of grand jury proceedings mandatory, but express serious reservation as to the provision which would permit electronic recording as an alternative to stenographic recording (page 13 of your Report).

We also approve the suggested amendment to Rule 6(e)(2) of your Committee relating to the secrecy and disclosure of grand jury proceedings (pages 13 and 14 of your Report).

3. Rule 7(g). Motion to Dismiss Indictment.

While we find nothing particularly objectionable in the recommendation of your Committee reflected at page 21 of the Report which would add subparagraph (g) to Rule 7 of the Federal Rules of Criminal Procedure to provide:

N

MINUTES OF THE MEETING OF
THE ADVISORY COMMITTEE ON
THE FEDERAL CRIMINAL RULES
HELD AT THE LAFAYETTE BUILDING,
ROOM 638, WASHINGTON, D.C.,
ON WEDNESDAY, AUGUST 27 AND
THURSDAY, AUGUST 28, 1975

The meeting was opened at 10:00 a.m. by Judge Lumbard, Chairman of the Advisory Committee, who introduced those in attendance. All of the members of the Advisory Committee were present, with the exception of Judge Gesell and Mr. West. In addition to the reporter, Professor Wayne LaFave, the following persons were also present: Judge Roszel C. Thomsen, Chairman, Committee on Rules of Practice and Procedure; Mr. William E. Foley, Secretary, Committee on Rules of Practice and Procedure; Professor Frank J. Remington, Member, Committee on Rules of Practice and Procedure; Judge Walter E. Hoffman, Director, Federal Judicial Center; Mr. Carl Imlay, General Counsel, Administrative Office; Mr. Hosea M. Ray and Mr. Roger Pauley, Department of Justice; Mr. J. G. Sourwine, Counsel, Senate Judiciary Committee; Mr. Thomas Hutchinson, Counsel, House Judiciary Committee; Mr. Arthur P. Endres, Jr., Counsel, House Judiciary Committee; Judge Alexander Harvey, Representing the Committee on Administration of the Criminal Law (sometimes herein referred to as Judge Zirpoli's Committee).

Rule 43. Modifies the draft rule to require defendant be warned of the consequences of disruption.

I

THE GRAND JURY

The Committee study and report on the grand jury was reviewed in light of the comments and reactions from Judge Zirpoli's Committee.

Part 1. Size of the Grand Jury. The Zirpoli Committee favors a maximum of 15 rather than 13 grand jurors. A motion by Judge Smith, seconded by Judge Robb, to conform our study to this recommendation, was approved.

Part 2. Recording of Grand Jury Proceedings. The Zirpoli Committee concurs in the study but has some reservations about the use of electronic recording. Mr. MacCarthy expressed concern that the government may decline to provide a transcript and instead refer the defendant in all cases to the recording. He argued that it is more expensive to have an appointed attorney listen to the tape than to provide the defendant with a transcript; and that in any event a transcript would be needed for

University of Illinois at Urbana-Champaign

COLLEGE OF LAW · 209 LAW BUILDING · CHAMPAIGN, ILLINOIS 61820 · (217) 333-0931

October 30, 1975

Honorable Alfonso J. Zirpoli
United States Court House
San Francisco, California 94102

Dear Judge Zirpoli:

As I indicated when I spoke with your law clerk earlier today, I have sent on to you a revised version of the report on the grand jury by the Criminal Rules Committee. This revision incorporates the changes summarized in Judge Harvey's letter to you of September 2nd, and also certain editorial changes as a result of my further communications with Judges Lumbard and Smith.

You will note that I have incorporated in our report the report of your committee, as set out in a letter from you to Judge Lumbard dated last May. I have made a few changes and deletions in your report, but only to the extent necessary as a consequence of the revisions in our report which were made after your report was prepared.

We are now at the point where we are ready to have the whole thing retyped in final form for submission to the Judiciary Committee. Before that final step is taken, I thought I should send a copy to you to see if you have any further thoughts, either as to the report of your committee or as to the report of the Criminal Rules Committee.

I would appreciate it very much if I might hear from you (I can be reached at 217-333-4268) when you have had an opportunity to go over the material, so that I might then expedite the retyping and submission to the Judiciary Committee via Bill Foley.

Best Regards,

Wayne R. LaFave
Professor of Law

WRL:ch

Enclosure

cc: Hon. Alexander Harvey II
Hon. J. Edward Lumbard
Hon. Russell E. Smith
Hon. Roszel C. Thomsen
William E. Foley, Esq.

Enclos HJC
attn: Martin H. Belsky
R 2137 Rayburn
20 copies

Crim Rules 17

M E M O R A N D U M

August 1976

SUBJECT: The Grand Jury

TO: Advisory Committee on Criminal Rules

FROM: Wayne R. LaFave

As you will recall, we have been working on a report concerning the federal grand jury at our past several meetings. A draft of the report was tentatively approved as amended at our last meeting. The preliminary draft, reflecting the action taken at our last meeting, was sent to the Committee last November, and thereafter was sent to Congressman Eilberg's subcommittee, before which Judge Smith appeared on July 1.

What remains to be done is for the Committee to approve the final version of the report so that the Judicial Conference may pass on it if it chooses to do so. In addition, there are two recommendations in the report which can be implemented by rule change, and thus we can also proceed with them as two more proposed amendments.

Material on these two matters, recast in the form of proposed amendments with advisory committee notes, are attached.

9

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

ROSZEL C. THOMSEN
CHAIRMAN

WILLIAM E. FOLEY
SECRETARY

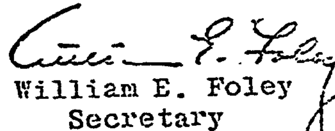
CHAIRMEN OF ADVISORY COMMITTEES
ELBERT P. TUTTLE
CIVIL RULES
J. EDWARD LUMBARD
CRIMINAL RULES
PHILLIP FORMAN
BANKRUPTCY RULES
WILLIAM H. HASTIE
APPELLATE RULES
ALBERT E. JENNER, JR.
RULES OF EVIDENCE

December 8, 1975

TO THE ADVISORY COMMITTEE ON CRIMINAL RULES

Enclosed is a copy of the Grand Jury Report which has been submitted to the House Judiciary Committee.

Sincerely,



William E. Foley
Secretary

cc: Honorable Alfonso J. Zirpoli
Honorable Alexander Harvey II
Honorable Roszel C. Thomsen
Professor Frank J. Remington

(10/29/75 draft)

REPORT
(PRELIMINARY DRAFT)
OF THE
ADVISORY COMMITTEE
ON CRIMINAL RULES
CONCERNING
THE
FEDERAL GRAND JURY

November, 1975

REPORT OF THE ADVISORY COMMITTEE

ON CRIMINAL RULES

CONCERNING

THE FEDERAL GRAND JURY

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This is a preliminary draft of a Report by the Advisory Committee on Criminal Rules concerning the operation of the federal grand jury system. The Report has not yet been approved by the Judicial Conference of the United States, to which it will be presented at the next meeting of the Conference in the Spring of 1976. Attached hereto is an addendum which presents in summary form the additional views of the Committee on the Administration of the Criminal Law of the Judicial Conference.

Recommendations are made in this Report for certain changes by way of additions to or amendment of statutes and rules of court which it is believed would make the grand jury system more fair and efficient in its operation. Although the Committee has given primary emphasis to those changes which could be accomplished by rule or statute consistent with the existing provisions of the Fifth Amendment, Part One of this Report deals with H.J. Res. 46, 94th Cong., 1st Sess., which proposes an amendment to the Constitution.

The Committee presents six affirmative recommendations in this Report. They are: (1) that 18 U.S.C. § 3321 and Fed. R. Crim. P. 6 be revised to provide that federal grand juries be reduced in size so as to consist of nine to fifteen members and that concurrence by two-thirds of the members be required for an indictment; (2) that 18 U.S.C. § 3321 be amended to make it clear that a grand jury may be summoned from the entire district or from any statutory or nonstatutory division or divisions thereof and that a grand jury so impanelled be empowered

to consider offenses alleged to have been committed at any place in the district; (3) that Fed. R. Crim. P. 6 be revised to make the recordation of grand jury proceedings mandatory rather than permissible; (4) that Fed. R. Crim. P. 7 be revised to provide expressly that a motion to dismiss an indictment may not be based on the ground that it is not supported by sufficient or competent evidence; (5) that a statute be enacted making the unauthorized disclosure of grand jury proceedings a criminal offense, and that an appropriate accommodating amendment be made to Fed. R. Crim. P. 6; and (6) that 18 U.S.C. § 3500 be amended to provide for disclosure in advance of trial of the grand jury testimony of witnesses. These six proposals are discussed herein in Parts Two through Seven, respectively, of this Report.

The Committee has also given careful consideration to several other proposals which have been made, including but not limited to those appearing in H.R. 1277, H.R. 2986, H.R. 6006, and H.R. 6207, 94th Cong., 1st Sess. The Committee recommends that these other proposals not be adopted, and specifically does not favor enactment of any of the aforementioned four bills. Although the reasons for rejecting many of the proposals which have been made are detailed in Part Eight of this Report, it may be noted here that opposition to the four bills is primarily based upon the following general considerations: 1) that the proposals with respect to the granting of various rights to grand jury witnesses and the altering of existing procedures

of the grand jury should be preserved. Except in some few special cases where a special statutory method of compelling testimony is provided, the grand jury provides the only means by which the prosecutor may require the attendance of witnesses and compel them to testify under oath. An abolition of the investigatory function of the grand jury would leave the government without any power to summon and examine witnesses under oath in many important areas unless, of course, some alternative investigatory procedure were devised. The Committee is therefore in agreement with so much of Section 2 of the proposed amendment as embodies the principle that the investigatory function of the grand jury not be disturbed.

PART TWO: SIZE OF THE GRAND JURY

It is recommended that federal grand juries be reduced in size so as to consist of nine to fifteen members and that concurrence by two-thirds of the members be required for an indictment. This would require revision of 18 U.S.C. § 3321 as follows:

1 Every grand jury impaneled before any district court
2 shall consist of not less than nine ~~sixteen~~ nor more than
3 fifteen ~~twenty-three~~ persons. If less than nine ~~sixteen~~
4 of the persons summoned attend, they shall be placed on the
5 grand jury, and the court shall order the marshal to summon,
6 either immediately or for a day fixed, from the body of the

7 district, and not from the bystanders, a sufficient
8 number of persons to complete the grand jury. Whenever
9 a challenge to a grand juror is allowed, and there are not
10 in attendance other jurors sufficient to complete the
11 grand jury, the court shall make a like order to the marshal
12 to summon a sufficient number of persons for that purpose.

In addition, rule 6 would be revised in the following fashion:

1 (a) SUMMONING GRAND JURIES. The court shall order one
2 or more grand juries to be summoned at such times as the
3 public interest requires. The grand jury shall consist of
4 not less than 9 ~~16~~ nor more than 15 ~~23~~ members. The court
5 shall direct that a sufficient number of legally qualified
6 persons be summoned to meet this requirement.
7 (b) OBJECTIONS TO GRAND JURY AND TO GRAND JURORS.
8 ***
9 (2) Motion to Dismiss. A motion to dismiss the
10 indictment may be based on objections to the array or
11 on the lack of legal qualifications of an individual
12 juror, if not previously determined upon challenge.
13 It shall be made in the manner prescribed in 28 U.S.C.
14 § 1867(c) and shall be granted under the conditions
15 prescribed in that statute. An indictment shall not
16 be dismissed on the ground that one or more members
17 of the grand jury were not legally qualified if it

18 appears from the record kept pursuant to subdivision
19 (c) of this rule that the requisite number of ~~12 or~~
20 ~~more~~ jurors, after deducting the number not legally
21 qualified, concurred in finding the indictment.
22 (c) FOREMAN AND DEPUTY FOREMAN. The court shall
23 appoint one of the jurors to be foreman and another to be
24 deputy foreman. The foreman shall have power to adminis-
25 ter oaths and affirmations and shall sign all indictments.
26 He or another juror designated by him shall keep a record
27 of the number of jurors present at, and the number
28 concurring in, the finding of every indictment and shall
29 file the record with the clerk of the court, but the record
30 shall not be made public except on order of the court.
31 During the absence of the foreman, the deputy foreman shall
32 act as foreman.
33 ***
34 (f) FINDING AND RETURN OF INDICTMENT. An indictment
35 may be found only if at least 9 jurors are present and
36 two-thirds of those present concur. ~~upon-the-concurrence~~
37 ~~of-12-or-more-jurors.~~ The indictment shall be returned
38 by the grand jury to a judge in open court. If the
39 defendant is in custody or has been released pending action
40 of the grand jury ~~given-bail~~ and the requisite number of
41 ~~12~~ jurors do not concur in finding an indictment, the
42 foreman shall so report to the court in writing forthwith.

The early common law grand jury consisted of twelve persons, all of whom had to concur in the indictment. Thompson & Merriam, Juries §§ 464, 583 (1882); United States v. Williams, 28 F. Cas. 666 (No. 16, 716) (C.C.D. Minn. 1871). Later, however, the size of the grand jury was increased, the purpose being "to prevent, on the one hand, the course of justice from being defeated if the accused should have one or more friends on the jury; and on the other hand, the better to protect persons against the influence of unfriendly jurors upon the panel." United States v. Williams, supra. The requirement that twelve concur in the finding of an indictment continued without change, and thus an upper limit of twenty-three was placed on the grand jury so that at least a majority vote would be required for indictment. Thompson & Merriam, supra, at § 583; Fitts v. Superior Court, 6 Cal.2d 230, 57 P.2d 510 (1936). The common law maximum of 23 and requirement of 12 for indictment were made applicable to federal grand juries by statute, see 13 Stat. 500, discussed in United States v. Williams, supra, and were continued with the adoption of rule 6.

The provision in present rule 6 that the grand jury should consist of at least sixteen, also derived from the statute, most likely originated primarily for the benefit of the government rather than the defendant. It ensured that the prosecutor could obtain an indictment upon the concurrence of not more than three-quarters (i.e., 12 of 16) of the grand jury. Thus, while it is sometimes said that sixteen are

required for a quorum, United States v. Belvin, 46 Fed. 381 (C.C.E.D.Va. 1891), it appears that a defendant may not challenge an indictment concurred in by twelve on the ground that less than sixteen were present. See In re Wilson, 140 U.S. 575 (1891), rejecting defendant's post-conviction objection that he had been indicted by a grand jury of 15, contrary to a territorial statute setting the size of the grand jury at 17 to 23, because "if the two had been present, and had voted against the indictment, still such opposing votes would not have prevented its finding by the concurrence of the twelve who did in fact vote in its favor." Rule 6(a)(2) expressly provides that an indictment shall not be dismissed because there are less than sixteen legally qualified jurors if twelve or more of those legally qualified voted for indictment. This provision and the Wilson decision are consistent with the prevailing view that, in the absence of a statute making the presence of a certain number of grand jurors mandatory, an indictment may be returned by less than a full grand jury so long as enough remain to constitute the number necessary to concur. See Edwards, The Grand Jury 46 (1906); People v. Dale, 79 Cal.App.2d 370, 179 P.2d 870 (1947); State v. Belvel, 89 Iowa 405, 56 N.W. 545 (1893); State v. Pailet, 139 La. 697, 71 So. 951 (1916); State v. Connors, 233 Mo. 348, 135 S.W. 444 (1911).

There does not appear to be any constitutional obstacle to the reduction of the size of federal grand juries or of the

number of jurors who must concur in an indictment. There are a few early state decisions, interpreting state constitutional provisions comparable to the grand jury clause of the Fifth Amendment, holding that neither the size of the grand jury nor the number required to concur in an indictment may be reduced below twelve, State v. Hartley, 22 Nev. 342, 40 P. 372 (1895); State v. Barker, 107 N.C. 913, 12 S.E. 115 (1890). It is fair to conclude, however, that the number twelve is no more a part of the constitutional right to grand jury indictment than it is of the right to a petit jury in criminal and civil cases. See Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893, 26 L.Ed.2d 446 (1970) (criminal cases); Colgrove v. Battin, 413 U.S. 149, 93 S. Ct. 2448, 37 L.Ed.2d 522 (1973) (civil cases).

The grand jury "has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). It is "regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused ... to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569

(1962). Given the fact that the petit jury is likewise "a safeguard against arbitrary law enforcement," Williams v. Florida, supra, the considerations which are relevant in determining the size of that jury seem equally relevant with respect to the grand jury. It is important that the number "be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community." Williams v. Florida, supra. If that test is met with a six-person petit jury, as held in Williams, then it would seem to follow that an indictment concurred in by six or more grand jurors, particularly when that number constitutes at least two-thirds of the grand jury, does not violate the Fifth Amendment.

..e proposal to reduce the size of federal grand juries from between 23 and 16 to between 15 and 9 is based upon several considerations. One is that the reduction in size will improve the quality of the deliberative process. With a smaller number of grand jurors, responsibility will not be diffused, and the size will be conducive to more active participation by all of the jurors. See Note, 5 U.Mich.J.L. Reform 87, 99-106 (1971). Secondly, the reduction will decrease the number of citizens who will have to absent themselves from their employment and other productive endeavors for substantial periods of time in order to perform the necessary but

demanding responsibilities of a federal grand juror. In addition, the reduction in the size of federal grand juries will result in an appreciable saving of money which would otherwise be spent on the attendance, mileage and substinence of grand jurors. See 1972 Annual Report of the Director of the Administrative Office of the United States Courts 166 (1973), noting that the cost of grand jurors for fiscal year 1972 was $3,085,800, a 5.7% increase over the previous year. At least in some districts, the requirements of the Speedy Trial Act of 1974, 18 U.S.C. § 3161(b), will in the future result in the calling of grand juries at more frequent intervals than formerly.

The proposed change continues the concept of a variable membership size for federal grand juries. This approach is fairly common on the state level, see, e.g., Fla. Stat. Ann. § 905.01 (15 to 18); Ill. Rev. Stat. ch. 38, § 112-2 (16 to 23); N.Y. Crim. Pro. Law § 190.05 (16 to 23) although some states set a specific size for the grand jury, see, e.g., Cal. Pen. Code § 888.2 (23 or 19); Colo. Const. art. II, § 23(12); Ore. Const. art. VII, §5(7). The variable size approach has the advantage that if a jury of the maximum size is initially selected, then if some jurors are later excused from the panel or are absent during the consideration of certain cases because of illness or other reason, there is no need for them to be replaced. It avoids the type of mechanical error held to invalidate an indictment in State v. Vincent, 91 Md. 718, 47 A. 1036 (1900),

where an indictment found by a jury of 22 persons, where state law required 23, was subject to attack even though more than 12 had voted for indictment.

Nine has been selected as the lower limit of the variable membership. Taking account of the considerations expressed in Williams v. Florida, supra (that the number be such as to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility of obtaining a representative cross section of the community), it is an appropriate number. Given the requirement discussed below that two-thirds of the jurors concur in the indictment, it ensures that no indictment may be returned without the concurrence of at least six jurors. Fifteen has been selected as the upper limit, as that number provides an adequate "cushion" of 6 jurors more than the minimum required and thus ensures against a grand jury being unable to indict because of the illness or other justified absence of some of its members.

One incidental consequence of the variable membership approach as heretofore utilized in the federal courts and in the states listed above is that the percentage of jurors needed to indict will vary withthe size of the grand jury. For example, under the present federal scheme, where 12 are required to indict and the grand jury may number anywhere from 16 to 23, the percentage required for indictment may vary from 75% to 52%. This consequence appears to be the result of nothing more

than historical accident, and is less rational than the proposed approach whereby the percentage is fixed. The two-thirds requirement, which is about midway between the present possibilities, ensures that there will be at least six votes for indictment. Cf. Williams v. Florida and Colgrove v. Battin, supra, and compare Colo. Const. art. II, § 23 (12-man grand jury, 9 must concur in indictment); Ind. Code §§ 35-1-15-1 35-1-16-1 (6-man, 5 must concur); La. Code Crim. P. arts. 413, 444 (12-man, 9 must concur); Mont. Const. art. II, §20 (11-man, 8 must concur); Ore. Const. art. VII, § 5 (7-man, 5 must concur); Texas Const. art. 5, § 13 (12-man, 9 must concur); Va. Code §§ 19.1-150, 19.1-157 (5 to 7-man, 4 must concur).

The proposed change in rule 6 (f) would require that at least nine grand jurors be present when an indictment is found and that two-thirds of those present concur in the indictment. This means, for example, that an indictment would be open to challenge if it were concurred in by six jurors but only six, seven, or eight jurors were present. This is contrary to the position taken in In re Wilson, supra, that an indictment concurred in by the requisite number cannot be challenged on the ground that the grand jury had been reduced below its minimum size. The Wilson rule may have been appropriate when considered with the requirement that 12 concur in the indictment,

but with the proposed reduction in the size of the grand jury it is believed desirable that no less than nine be present when an indictment is voted. This better ensures group deliberation, free from outside influence, by a group representative of the community. The proposed change in rule 6(c), requiring that a record be kept of the number of jurors present at and concurring in the finding of every indictment, is to provide a means whereby it can be determined that the requisite number were present and that the number concurring in the indictment were no less than two-thirds of those present.

It must be emphasized that the proposed change in rule 6(f) merely requires the presence of at least nine and a two-thirds vote at the time an indictment is found. No change has been made in the well-established rule that an indictment is not necessarily subject to challenge because some of those present at or voting for the finding of an indictment were absent at some earlier time. See, e.g., United States ex rel. McCann v. Thompson, 144 F.2d 604 (2d Cir. 1944); United States v. Colasurdo, 453 F.2d 585 (2d Cir. 1971); United States v. Armour and Co., 214 F.Supp. 123 (S.D.Cal. 1963). As noted in Thompson: "Since all the evidence adduced before a grand jury--certainly when the accused does not appear--is aimed at proving guilt, the absence of some jurors during some part of the hearings will ordinarily merely weaken the prosecution's case. If what the absentees actually hear is enough to

satisfy them, there would seem to be no reason why they should not vote."

The proposed change to rule 6(b)(2) is necessary in light of the fact that the number required to concur in the indictment under rule 6(f) may vary, depending upon the number of grand jurors present. It does not change the present policy, which is that if some of the jurors are not legally qualified, the indictment shall not be dismissed if, deducting those jurors, the required number still voted for indictment. Because of the rejection of the Wilson rule, discussed above, it might well be argued that a corresponding change should be made in rule 6(b)(2), so that it must also be shown that at least nine legally qualified jurors were present when the indictment was found. That approach has been considered but rejected. It is one thing to apply such a strict rule with respect to the rather simple requirement that nine jurors be present, but quite another to apply the same rule with respect to the likely inadvertent presence on the grand jury of one or more persons not legally qualified. While it is true that the legal qualifications are fewer in number than they once were, see 18 U.S.C. § 1865 and compare Castle v. United States, 238 F.2d 131 (8th Cir. 1956), it would nonetheless be unduly severe to quash an indictment because, say, one of the nine persons present was thereafter determined to have had a federal charge pending against him. Similarly, to the extent that rule 6(b)(2) is utilized in cases where the defendant claims that one of the

jurors was biased against him, see, e.g., United States v. Anzelmo, 319 F.Supp. 1106 (E.D.La. 1970), which is also unlikely to occur by government design, it should again be sufficient that there are the requisite number of votes for indictment after elimination of the prejudiced juror.

The change in rule 6(f) at line 34 reflects the fact that under the Bail Reform Act of 1966 some persons will be released without requiring bail. See 18 U.S.C. § 3146, § 3148. "The purpose of the last sentence of Rule 6(f) can only be carried out if it is construed as being applicable to such persons, and a 'no bill' promptly reported in such cases." 1 Wright, Federal Practice and Procedure - Criminal § 110 (1969).

PART THREE: SUMMONING THE GRAND JURY

It is recommended that it be expressly provided by statute that a grand jury may be summoned from the entire district or from any division or divisions thereof and that such a grand jury may indict for any offense committed in the district. This could best be accomplished by amendment of 18 U.S.C. § 3321, previously set out, by adding the following sentence to the end of the section:

1 A grand jury may be summoned from the entire district,
2 or from any statutory or nonstatutory division or divisions
3 thereof, and a grand jury so impanelled shall be empowered
4 to consider offenses alleged to have been committee at any
5 place in the district.

ADDENDUM:

REPORT OF THE COMMITTEE ON THE ADMINISTRATION OF THE CRIMINAL LAW

[Note: An earlier draft of the Report of the Advisory Committee on Criminal Rules, not including what are now Parts One, Three, and Seven of the Report and referring to H.R. 1277 and H.R. 2986 but not H.R. 6006 and H.R. 6207, was considered by the Committee on the Administration of the Criminal Law of the Judicial Conference. The Report of the latter Committee, as contained in a letter from Judge Alfonso J. Zirpoli to Judge J. Edward Lumbard, is set out below.]

1. Size of the Grand Jury.

We approve the recommendation of your Committee that Title 18 U.S.C. section 3321 and Rule 6 of the Federal Rules of Criminal Procedure be revised to provide that the grand jury be reduced in size to not less than nine and not more than fifteen and that concurrence by two-thirds of the members thereof be required for an indictment. The mechanics of such statutory revision and change in Rule 6 should be so timed that each becomes effective on the same date.

R

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

ROSZEL C. THOMSEN
CHAIRMAN

WILLIAM E. FOLEY
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
ELBERT P. TUTTLE
CIVIL RULES
J. EDWARD LUMBARD
CRIMINAL RULES
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APPELLATE RULES
ALBERT E. JENNER, JR.
RULES OF EVIDENCE

October 19, 1976

TO THE CHAIRMAN, REPORTER, AND MEMBERS OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Enclosed are the minutes of the August 26-27, 1976 meeting of the Advisory Committee on Criminal Rules which has been prepared by Judge Nielsen.

Sincerely,

William E. Foley
Secretary

cc: Standing Committee

Judge Lumbard pointed out that plea bargains should not be reviewable nor should probation or suspended sentences. Judge McCree moved that all sentences be subject to review except negotiated plea sentences. This motion was seconded but lost six to seven.

Judge McCree moved to exclude any sentence of fine only. This motion was seconded but lost four to eight, with one abstaining.

A discussion then ensued as to the proper standard as to whether it should be "a substantial basis for questioning the propriety of the sentence" or "clearly unreasonable" or "abuse of discretion."

It was then suggested that in the commentary to the proposed rule it should be made plain that it would be proper to have district judges on the screening panel.

Question 10. Should there be the power of enhancement? Advisory Committee: 8 yes, 4 no; Standing Committee: 4 yes, 2 no.

At this point the Committee adjourned to resume its meeting at 9 a.m. on August 27, 1976.

* * *

<u>August 27, 1976</u>.

Professor LaFave reported briefly upon the status of the rules that we had sent forward to the Standing Committee at our last meeting.

Judge Smith reported on the grand jury proposals before Congress, stating there were many bad proposals before the Eilberg Subcommittee in the House, and he suggested that he go over the bills and circulate them to the Committee so we can vote on them at our next meeting.

Mr. Pauley stated that the Department of Justice agrees with Judge Smith on the bills having many bad provisions and that they will give the Committee the Department of Justice position on all of the bills.

Mr. Hutchison advised the Committee that there would probably be no legislation involving the grand jury through Congress this year.

January 10, 1977

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MEMORANDUM

TO: MEMBERS OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

FROM: RUSSELL E. SMITH
Chairman of the Subcommittee on the Grand Jury System

As I indicated at our last meeting, I believe that we should modify our report on the grand jury to make quite specific the Committee's feeling on the provisions of several bills introduced in the 94th Congress.

I recommend that the report remain as it is in Parts One through Seven, inclusive, and the Addendum, with this exception:

I would add, on page 35, before the final paragraph beginning with the word "Applying" the following paragraphs:

The objection to the exclusionary rule is succinctly stated in the case of Elkins v. United States, 364 U.S. 206 at 216-17 (1960), as follows:

> The exclusionary rule has for decades been the subject of ardent controversy. The arguments of its antagonists and of its proponents have been so many times marshalled as to require no lengthy elaboration here. Most of what has been said in opposition to the rule was distilled in a single Cardozo sentence -- "The criminal is to go free because the constable has blundered." People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587. The same point was made at somewhat greater length in the often quoted words of Professor Wigmore: "Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you both go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else." 8 Wigmore, Evidence (3d ed. 1940), § 2184.

MEMORANDUM

January 10, 1977

TO: MEMBERS OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

FROM: RUSSELL E. SMITH
Chairman of the Subcommittee on the Grand Jury System

RE: LAND MINES!

H.R. 6207 § 3 provides:

SEC. 3. Section 3323, chapter 215, title 18, United States Code, is amended to read as follows:

"(a) The attorney for the Government, or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn, or summoned in accordance with the law, <u>or that the grand jury is not representative of a fair cross section of the community from which it was drawn</u>, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors or as soon as practicable thereafter and shall be tried by the court." (Emphasis supplied.)

I don't know just what this means. It seems strange to challenge the petit jury on the ground that the grand jury was not properly chosen. It also seems strange to use the term "community" instead of some word, such as "district" or "division." In any event, the idea seems to be that a grand jury must be a fair cross section of the community. That is, of course, the object of the present law. But this bill seems to require something more, <u>i.e.</u>, the establishment of a quota system. I suspect it could be demonstrated that no grand jury ever drawn was a fair cross section of some community. Any method of drawing jurors by the use of readily accessible lists of names will not result in the right proportions of English, Irish, Welch, Germans, Africans, Italians, Danes, Swedes, Mexicans, Norwegians, Jugoslavians, Dutch, French, Puerto Ricans, Blackfeet, Navahos, and

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MINUTES OF THE MEETING OF THE ADVISORY COMMITTEE ON CRIMINAL RULES HELD AT THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, WASHINGTON, D.C., JANUARY 27 AND 28, 1977.

The meeting was called to order at 9:00 a.m., January 27, 1977, by the Chairman, Judge Lumbard. All members were present with the exception of Judge Smith and Judge Robb, who had court commitments. Also in attendance were Judge Roszel Thomsen, Chairman of the Standing Committee on Rules of Practice and Procedure; Judge John Peck, representing the Committee on the Administration of the Criminal Law; Mr. Thomas Hutchison, Counsel, House Subcommittee on Criminal Justice; Mr. Roger Pauley of the Department of Justice; Mr. Mike Mullen and Mr. Ken Feinberg of the Senate Subcommittee on Administrative Practice and Procedure.

I

Rule 35.1 - Appeal of Sentence

The Chairman reported that 76 communications had been received in response to the circulation of proposed Rule 35.1. A hearing conducted by the Committee was held January 13-14, 1977 and a transcript is available. Copies of the proposed Rule were also published in FRD and F.2d advance sheets.

The reporter, Professor Wayne LaFave, then summarized the comments received, which are set forth in more detail in his memorandum of January, 1977. These comments generally fall into two categories: (1) use of the rule-making power versus legislation and (2) suggestions with respect to specific procedures.

Professor Remington favors the use of an in camera procedure combined with the traditional balancing tests.

Judge Kaufman thought we should undertake to prepare a rule dealing with the procedural aspect of this subject. Judge Lumbard thereupon asked Professor Remington to draft a statement for the Standing Committee, to be transmitted after submission to this Committee on January 28. The meeting recessed at 5:00 p.m. and reconvened at 9:00 a.m. on January 28, 1977.

VII

Grand Jury

Professor LaFave called attention to Judge Smith's report on proposed HR 6207 which would amend Section 3323. Concern was expressed about the use of the term "fair cross-section of the community" in the bill. Judge McCree noted that this probably derived from 28 U.S.C. §1863(3). The general view was that the proposals contained in the bill were not necessary. A number of new members of the Committee had not received a copy of the previous report on the grand jury. Mr. Bedell expressed the opinion that putative defendants should not be denied the right to appear before a grand jury. Others expressed a contrary view. It was noted, with respect to the rights of witnesses, that the Committee had previously taken the position that there was no need for counsel in the room and that the Committee favored the use of a Fifth Amendment warning to the witness. It was the consensus of the meeting that nothing further could be done in the absence of Judge Smith and that the matters presented in Judge Smith's report need to be resubmitted to a subcommittee

for further study. The Chairman was thereupon authorized to appoint a new subcommittee able to act as needed.

VIII

Rule 44, Continued

The Committee next considered a revised draft of proposed Rule 44(c) prepared by Professor LaFave and a substitute discussion draft prepared by Judge Webster.

Mr. Bedell noted that money considerations often influence the selection of the same counsel by joint defendants not proceeding in forma pauperis. He suggested that it should be sufficient to make the waiver on the record and in writing, similar to a jury trial waiver. Mr. Bedell thought it appropriate to remind the lawyer of his duty to the court to disclose potential conflicts. Judge Lumbard expressed concern that provisions for waiver might provide an opportunity for an attorney to strong-arm his clients into waiver.

On motion of Judge Nielsen, it was voted to approve the revised draft of 44(c) prepared by Professor LaFave with instructions to revise the commentary to make appropriate reference to the advisability of a proper reccrd of the court's determination which will support a finding of an intelligent and knowing waiver. Judge Lumbard directed that the revised draft and commentary be circulated to the Committee before submitting to the bench and bar.

Agenda Item II E3

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor David A. Schlueter, Reporter**

RE: **Proposed Amendments to Rule 11**

DATE: **September 7, 1997**

For the past several years, the Committee has been examining possible amendments to Rule 11. At the Committee's last meeting in April 1997, it decided to not take any action on the so-called *Hyde* problem, i.e., the decision from the Ninth Circuit, that guilty pleas and sentencing agreements should be treated as a unit. 82 F.3d 319 (9th Cir. 1996). The Supreme Court reversed that court, leaving intact the current rule.

The Committee, however, forwarded to the Standing Committee proposed amendments to Rule 11(a), (c), and (e), which appear elsewhere in the agenda book. At its June 1997 meeting, the Standing Committee approved for publication those proposed amendments. Comments on those proposed changes are due by February 15, 1998.

Additionally, Judge Jensen asked the Rule 11 Subcommittee to continue its review of Rule 11 for any additional problems and suggested changes. Attached are materials from the Subcommittee addressing the issue of what, if any, notice should be given to a defendant of the likely, or proposed sentence.

For your convenience I am also attaching copies of the Supreme Court's decisions in *United States v. Hyde* and *United States v. Watts* (an opinion referenced in Professor Stith's memo and proposal).

United States District Court
Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

Chambers of
George M. Marovich
Judge

August 12, 1997

Hon. Eugene Davis	318-262-6685
Kate Stith	203-432-1148
Henry A. Martin	615-736-5265
Roger A. Pauley	202-514-4042
David A. Schlueter	210-436-3717

Dear Colleagues:

If our recent Chicago weather is an indication, Summer is about over and Fall is upon us. So is our October meeting.

Very frankly, I'm not sure where we are at with our work on Rule 11, and I'm not sure what is on the table. As I recall, a number of things were originally on our plate:

1. The Aguilar issue
2. Notice of waiver of appeal
3. Harris problems
4. Hyde problems
5. Notice of guideline calculation to defendants before they plead guilty

I am not sure what has been decided although I fear that I may have managed to offend everyone on the committee with my strongly held personal view that the term "knowing and voluntary plea" is an oxymoron under the Sentencing Guidelines.

When we met last April, all of these matters were discussed, but I do not know that we reached any conclusions. Also, by letter dated April 7, 1997 (the day we were meeting), Judge Conaboy communicated to Judge Jensen the views of the U.S. Sentencing Commission about some of our proposals. I enclose a copy of that letter herewith.

Always reserving onto myself the right to be wrong, I believe the following is where we are at with these various proposals:

1. Aguilar. The Justice Department's view is that we promulgate a rule prohibiting the practice. The Federal Defender's view is that we promulgate a rule authorizing the practice. The majority view is to leave it alone. I do not know if we adopted any of those views.

2. Waiver of Appeal. I believe we recommended a rule change requiring that defendant be notified in open court of the terms of any provision in a plea agreement waiving the right to appeal or collaterally attack the sentence without providing any specific guidance on the content of the Court's advice.

3. Harris. Proposed amendments have been made to Rule 11(e)(1)(B) and (C) to reflect the impact of the Sentencing Guidelines on guilty pleas and to reflect the Harris problem.

Both subdivisions (e)(1)(B) and (e)(1)(C) would be amended to recognize that a plea agreement may specifically address not only what amounts to an appropriate sentence, but also a sentencing guideline, a sentencing factor, or a policy statement accompanying a sentencing guideline or factor. Under (e)(1)(B) such an agreement is a recommendation. Under (e)(1)(C) it is an agreement between the parties.

The second change to (e)(1)(B) and (C) is intended to make it clear that the two provisions are not to be confused with regard to the defendant's ability to withdraw a plea if the court rejects the agreement.

4. Hyde. We have decided to leave the matter to the U.S. Supreme Court.

5. Notice of Sentencing Calculations before Plea. As I indicated before, there seems to be two possible approaches:

(a) earlier disclosure of the information or

(b) increased opportunity to withdraw the plea.

As I indicated before, option (b) is not much of an option.

Since we last met, a couple of other approaches are worthy of thought. The suggestion in Judge Conaboy's letter that this matter could be handled by requiring that district court judges be required to explain the concept of relevant conduct to a defendant before accepting a guilty plea certainly merits consideration although relevant conduct is only one of the problems. Maybe this is best addressed by improving our Bench Book as to Rule 11 admonishments.

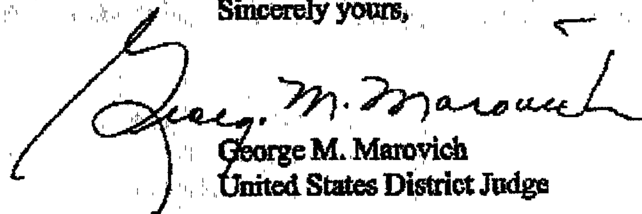
Maybe the problem is already addressed by Rule 32(e) which allows a defendant to withdraw his plea before sentencing if the defendant shows any fair and just reason.

Maybe this is just my personal hangup and that there is no problem, but it seems to me very difficult to say that someone has made a voluntary, knowing, and intelligent waiver without knowing what, in actuality, he or she is facing by way of punishment. Certainly the thinking in Miranda was that you could not waive some right before the authorities told you what the right was.

I suppose if you tell the defendant what the maximum penalty is, then he cannot be heard to complain about any sentence that falls below that maximum. That is certainly a recognized legal theory but it somehow seems to fall short of being fair.

I would appreciate your thoughts and suggestions. I truly want to complete our subcommittee work in this area and come to some conclusions, if that is possible.

Sincerely yours,



George M. Marovich
United States District Judge

mm

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, NE
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(202) 273-4500
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April 7, 1997

Honorable D. Lowell Jensen
United States District Court
Northern District of California
Oakland, California 94612

Dear Judge Jensen:

Thank you for affording the Sentencing Commission an opportunity to comment on changes to Fed.R.Crim.P. 11 (hereafter, Rule 11) proposed by the Criminal Rules Advisory Committee.

I would like to respond to the proposed changes in four parts: (1) the proposed addition of paragraph (6) to subsection (c) requiring that the defendant be informed of provisions in the plea agreement waiving the right to appeal or to collaterally attack the sentence; (2) the proposed addition to Rule (e)(1)(B) and (C), providing that a sentencing range, guideline, sentencing factor, or policy statement may be the subject of the type of plea agreement referenced in those respective provisions; (3) the addition to Rule 11(e)(1)(C) specifying that the plea agreements under that provision "shall be binding on the court if accepted by the court"; and (4) consideration by the Committee of a suggestion with regard to obtaining a knowing and voluntary plea.

(1) Notice of waiver of right to appeal or collaterally attack the sentence

Recognizing the importance of the rights being waived, the Commission fully supports the proposed amendment to require notice to the defendant of the waiver of the right to appeal or collaterally attack the sentence. While we reserve judgment for another day on the policy issues of whether such waivers are advisable, clearly it is in everyone's interest that pleas be based upon a defendant's understanding of any waiver of appellate and collateral attack rights.

(2) Proposed addition to Rule 11(e)(1)(B) and (C) in light of guideline sentencing

We do not oppose the Committee's general desire to consider updating these rules given guideline sentencing, but we have several thoughts on the matter. First a technical point: if it is the intent of the proposed amendment that all guideline application elements and departures can be subject to agreement under these rules, further consideration might be given to how that intent can be stated more clearly. For example, we suggest the Committee consider alternative language along the following lines for both (B) and (C): "... or sentencing range, or that a particular provision of the sentencing guidelines or policy statements, or sentencing factor is or is not applicable to the case...". On a more substantive level, however, we believe policy considerations suggest that while adding such language to Rule 11(e)(1)(B) may have some educative benefits with little downside, similar additions to Rule 11(e)(1)(C), without more, may represent a more substantive change to current practice and may diminish the traditional judicial role in reviewing plea agreements by encouraging more "binding" agreements. We know of no evidence that suggests that more binding agreements are needed. On the other hand, we can appreciate the need for parallelism between the two provisions.

Accordingly, if the proposed language is added, we recommend that accompanying Advisory Notes emphasize the traditional judicial role in reviewing plea agreements and the provisions in Policy Statement 6B1.2 (Standards for Acceptance of Plea Agreements) that detail the Commission's guidance on the exercise of that authority.

(3) Addition to Rule 11(e)(1)(C) specifying such agreements "shall be binding on the court if accepted by the court"

If as a result of the *Harris* decision or other reasons the Committee determines that some change is needed to better distinguish (B) plea agreements from (A) or (C) agreements, we suggest consideration of an alternative approach that focuses more on Rule 11(e)(4). That subsection might be the better place to state explicitly that pleas under Rule 11(e)(1)(A) or (C) that are rejected by the court require that the defendant be given the right to withdraw the guilty plea. This would dovetail with the proposed changes to Rules 11(e)(1)(B) and (C) and further clarify that a defendant who pleads guilty in an agreement pursuant to Rule 11(e)(1)(B) does not have the right to withdraw the plea, should the court fail to follow the recommendation.

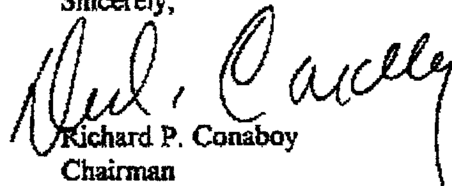
(4) A suggestion with regard to obtaining a knowing and voluntary plea.

Finally, one of our Commissioners has asked me to convey a proposal that district court judges be required to explain the concept of relevant conduct to a defendant before accepting a guilty plea. The concern is that defendants, even though represented by counsel, may not be aware of the broad scope of conduct for which they can be held accountable at sentencing. Furthermore, because the plea hearing precedes the sentencing hearing, and because plea

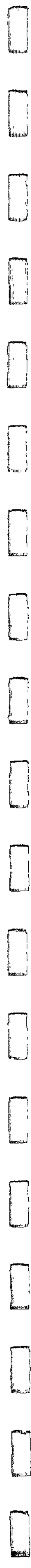
agreements often do not delimit the specific acts on which the defendant's sentencing will be based, defendants may not understand the full consequences of their plea until it is too late to change it. One suggestion is to explain the reach of relevant conduct to defendants at the plea hearing to help ensure that their pleas are knowing and voluntary. Whether such a recommended solution is practical within the context of the Federal Rules of Criminal Procedure is, of course, the prerogative of your Committee.

Thank you again for giving us the opportunity to comment on the amendments under consideration. Please contact John Steer, the Commission's General Counsel, should you wish further clarification of the Commission's position.

Sincerely,



Richard P. Conaboy
Chairman



Yale Law School

KATE STITH
Professor of Law

September 5, 1997

Hon. George M. Marovich	312-408-5141
Hon. Eugene Davis	318-262-6685
Hon. Bill Wilson	501-324-6869
Henry A. Martin	615-736-5265
Roger A. Pauley	202-514-4042
✓David A. Schlueter	210-436-3717

Dear Colleagues:

I advised Dave that I would attempt to shorten and otherwise edit my memorandum of August 28 before it was included in the book to all committee members. As I was doing so, I received the fax from Mary Frances and Roger. So as not to confuse things, I have responded separately to that memorandum. Hence, attached are:

(1) a slightly reworked version of my memo of August 28 (I have deleted the long discussion of *Watts* and otherwise attempted to make the explication clearer, but those of you who read the earlier memo need not read this one), and

(2) a response to the memorandum of Mary Frances and Roger.

Sincerely,

Kate

attach. (8 pages)

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AMENDING RULE 11 TO REQUIRE NOTICE OF SENTENCING FACTORS

Kate Stith

September 5, 1997

A. Introduction. The Sentencing Guidelines have transformed the federal sentencing proceeding from a discretionary proceeding into an adjudicatory proceeding, in which fact-finding is central. Rule 32 has been significantly amended to reflect this transformation. However, Rule 11 was only slightly amended in 1989. As presently written, the Rule fails to acknowledge the adjudicatory nature of the sentencing proceeding to follow.[1] The Rule also curiously fails to acknowledge the mandatory nature of the Sentencing Guidelines.[2]

In the pre-Guidelines era, it was both appropriate and necessary to give the defendant notice only of the statutory restrictions on sentence—that is, the statutory maximum and any statutory minimum sentence. Further notice was neither appropriate nor possible, since there were no further limitations on a judge's sentencing discretion. In the Guidelines era, however, the judge's sentencing decision is highly restricted. If sentencing factors listed in the Guidelines are proven, then the judge *must* take these into account in a particular way in arriving at the sentencing decision. Yet when the defendant pleads guilty, there is no assurance that he has been provided notice of factors that may dramatically affect the mandatory sentencing range.

B. Can We Do Better? The Notes of the Advisory Committee accompanying the 1989 Amendment to Rule 11 conclude that advising the defendant who pleads guilty of the existence of the Guidelines, and of the judge's power in some cases to depart from the Guidelines, is all that is needed to put the defendant and his counsel "on notice of the importance that guidelines may play in sentencing and of the possibility of a departure from those guidelines." The

Advisory Committee believed that further notice—for instance, of "which Guidelines will be important or which grounds for departure might prove to be significant"—is "impracticable, if not impossible." These matters, the Advisory Committee explains, cannot be known "prior to the formulation of a presentence report and resolution of disputed facts" at the sentencing hearing.

The Advisory Committee's position that sentencing facts simply cannot be ascertained prior to a plea of guilty is not entirely consonant with the Sentencing Commission's more recent (1994) "encourage[ment]" to prosecutors to inform the defendant prior to his guilty plea of Guidelines factors "then known" to the prosecutor.[3] Of course, good criminal defense attorneys presumably already sought to learn of such factors. The Sentencing Commission's "encourage[ment]" to prosecutors was an attempt to ensure that no defendant would be unfairly surprised due to neglect by either his defense counsel or the prosecutor. Thus far, the Advisory Committee has not considered amending the Criminal Rules to require what the Sentencing Commission has been recommending since 1994.

C. Recommendation: A Notice of Sentencing Factors. To move matters along, I would propose adopting an amendment to Rule 11 requiring that *at the time a final plea is entered, the government inform the defendant of the sentencing factors the government intends to allege at sentencing.*

This recommendation rests upon an acknowledgment of certain fundamental features of the new sentencing regime: the requirement that the judge impose a sentence on the basis of non-statutory factors (again, a requirement *new* to the Guidelines regime), and the concomitant requirement that probation officers independently ascertain the presence of such factors. This

proposal seeks not to eliminate these requirements of current law, but to provide safeguards for their implementation. It would eliminate the possibility that either the government or an inquisitorial third-party (the probation officer) will make new allegations *after* a defendant has entered his plea of guilty that, if proved, *require* additional punishment.

This Notice of Sentencing Factors would serve a function similar to that performed by formal indictment or information, except that the sentencing notice would concern Guidelines sentencing factors rather than statutory crimes. The government would be permitted to serve and file a superseding Notice of Sentencing Factors at any time prior to entry of a defendant's plea of guilty; this, like the possibility of a superseding indictment or information, would facilitate the plea process by allowing newly-discovered or changed circumstances to be taken into account.

D. What If New Facts Come to Light? The question that arises is how to proceed if the government (or the probation officer) subsequently learns of new facts regarding the defendant or his offense—facts that would require a higher sentence under the Guidelines. Stating the question another way, how would the requirement of Notice be enforced? There are two possible approaches, both of which would require some changes in plea and sentencing practices in the federal courts.

1. *Permitting Withdrawal of Plea.* One possibility is to permit the defendant to withdraw his plea of guilty if, at the time of sentencing, the judge proposes to impose a sentencing enhancement of which the defendant had not received appropriate notice. Rule 32 (e) already provides— and has provided since before the Sentencing Guidelines came into being— that the court may permit withdrawal of a plea of guilty "if the defendant shows any fair and just reason." *If* there were a requirement of a Notice of Sentencing Factors, then failure to provide

Notice might be considered a "fair and just reason" to permit withdrawal of the plea. However, in the absence of any requirement of Notice (*i.e.*, our present situation), no court has held, and no court should hold, that failure to receive notice of sentencing factors gives the defendant a right to withdraw his plea of guilty.

Permitting withdrawal of a plea of guilty is the procedure followed, of course, where there has been a Rule 11(e)(1)(C) agreement and the judge proposes not to sentence in accordance with that agreement. There are few such pleas in federal court. Both before and after the Guidelines, both judges and prosecutors have been reluctant to purport to decide on an appropriate sentence before a presentence report is even prepared. Moreover, there is a troubling lack of finality in Rule 11(e)(1)(C) pleas; in such cases, final acceptance of a plea of guilty has to await preparation of the presentence report and resolution of disputed facts. For these reasons, I would not be in favor of enforcing a requirement of Notice of Sentencing Factors by permitting the defendant to withdraw his plea whenever the sentencing judge proposes to take into account a non-noticed factor.

2. *Permitting Departure on Basis of New Facts*. The most direct way to enforce a notice requirement for all defendants (both those who plead guilty and those who are convicted after trial) would be to provide that the defendant could not be sentenced on the basis of non-noticed factors without his consent. This approach, too, would require some changes in plea and sentencing practices in the federal courts. In particular, the government would be afforded a strong incentive to complete its investigation of a case (and to learn the full extent of a defendant's criminal record) before, rather than after, it enters into a plea agreement—an incentive that seems unobjectionable on its face.

However, absolutely prohibiting consideration of sentencing factors that the government has failed to mention in its notice might well violate the statutory provision implementing the principle of *Williams v. New York*, 337 U.S. 241 (1949). That statute, 18 U.S.C. § 3661, provides that there shall be "no limitation" on the information a judge may take into account at sentencing.[4] In 1997, in *United States v. Watts*, the Supreme Court explicitly invoked this statute in upholding Guidelines enhancements on the basis of conduct (proven at the sentencing hearing) of which the defendant had previously been acquitted.[5]

Quite apart from the issues addressed by the Supreme Court in *United States v. Watts*, it does not seem advisable to adopt a rule categorically prohibiting sentencing judges from considering relevant matters that had not been in the Notice of Sentencing Factors provided to the defendant when he entered his plea. A categorical rule would unduly enhance prosecutorial influence on sentencing, at least for defendants who do not insist upon trial. If non-noticed factors are entirely off-limits to the sentencing judge, then a prosecutor who reaches an agreement with a defense attorney as to which factors shall be in the "Notice" would effectively be deciding the defendant's sentence. Without countervailing authority to reject bargained-for exclusions from the Notice of Sentencing Factors, the sentencing judge would be powerless to disagree with the judgment of the prosecutor.

A better balance between the constitutional value of notice to the defendant and the constitutional value of checks and balances in the criminal justice system would be to limit only the *mandatory* consideration of non-noticed sentencing factors; judges would still be permitted to consider *all* matters, even those not in the Notice of Sentencing Factors, in deciding whether to depart from the Sentencing Guidelines. Under this approach, the defendant's Guidelines range

would be mandatorily enhanced only on the basis of factors about which he had received Notice, but the judge would have discretion to depart from this range on the basis of any information from any source—even when that source is the prosecution itself. This approach would empower the judge to reject bargained-for limited notice, would ensure that the judge may take into account matters he learned at trial or other hearings in the case, and would ensure that no one, including the government and the probation officer, is precluded from bringing newly discovered evidence to the attention of the judge at sentencing.

ENDNOTES

1. Rule 11 still advises the defendant that if he pleads guilty, "there will not be a further trial of any kind." But contested sentencing proceedings under the Guidelines *are* trials of a kind.

2. Under the 1989 Amendment to Rule 11, the defendant is advised only "that the court is required to *consider* any applicable sentencing guidelines but may depart from those guidelines under some circumstances" (emphasis added). This language is, at best, ambiguous about the mandatory nature of the Guidelines and the strict limitations on departure authority.

3. "The Commission encourages the prosecuting attorney prior to the entry of a plea of guilty or nolo contendere under Rule 11 of the Federal Rules of Criminal Procedure to disclose to the defendant the facts and circumstances of the offense and offender characteristics, then known to the prosecuting attorney, that are relevant to the application of the sentencing guidelines. This recommendation, however, shall not be construed to confer upon the defendant any right not otherwise recognized in law." U.S.S.G. § 6B1.2 (Commentary).

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

5. United States v. Watts, 117 S.Ct. 633 (1997) (per curiam).

ADDENDUM TO MEMORANDUM OF SEPTEMBER 5, 1997

Kate Stith
September 5, 1997

I have read with interest the letter from Roger and Mary Frances dated September 3, 1997. Their concerns, in order, are:

1. Notice of sentencing factors is not required for fairness under the Guidelines because it was not required for fairness in the pre-Guidelines era.

2. Such a requirement would turn all pleas into (e)(1)(C)-type pleas, at least from the perspective of the government.

3. Permitting judges to depart on the basis of non-noticed factors would increase disparity because some judges would be more likely to depart than others.

4. Defendants should be sentenced on the basis of facts as of the time of the sentencing hearing, not on the basis of facts known to the government at a prior time.

5. It is defense counsel, not the government, which has an obligation to provide notice to the defendant.

6. A requirement of notice by the prosecutor would denigrate the role of the probation officer and the judge and elevate the role of the prosecutor.

My responses are as follows:

1. As the September 4 memo sought to explain, notice was neither appropriate nor possible in the pre-Guidelines era. But this is a different era. Sentencings are now adjudications.

2. A notice requirement would not turn all pleas into (e)(1)(C) pleas. First, there is no reason to believe that the parties would agree on the content of such notice any more frequently than they now agree on sentencing factors. Second, the judge might or might not find the facts alleged in the notice. Third, even if he does, the judge could depart on the basis of non-noticed factors (and either the government or the probation officer could urge such departure).

3. Judges now differ in their disposition to (a) accept sentencing recommendations, (b) accept (c)(1)(C) pleas, (c) agree with the either party's perspective on relevant sentencing factors, (d) agree with the probation officer's perspective, and (e) depart. The notice proposal would somewhat alter the structure in which judicial variability may occur—channeling such variability into the departure decision—but I doubt that it would increase total disparity.

4. We do not disagree about when sentencing fact-finding should occur—obviously at the sentencing.[1] What we disagree about is when sentencing allegations should be made. The tentative proposal is based on the premise that sentencing factors should be alleged prior to the plea; the government's position is that they need not be alleged until after the plea.

5. Yes, defense counsel has an obligation to try to ascertain what sentencing factors will be alleged. That he has such an obligation does not mean that the other participants should play no role.[2] We do not disagree about counsel's role. What we disagree about is whether pre-plea notice is necessary to fairness. If it is, then it is not enough to know that in some cases it will be provided without any such requirement.

6. The complaint that a notice requirement would unduly enhance the power of the prosecutor does not ring true. The prosecutor already has the power to greatly affect sentence by not alleging certain arguable facts, and, realistically speaking, there is little likelihood of the probation officer "going behind his back" to allege these facts. More importantly, the prosecutor now also has the power to greatly affect sentence by alleging facts that the defendant had not expected or thought relevant at the time he entered his plea. The notice requirement would still permit the judge to learn of facts not noticed. But, by making non-noticed factors a basis for discretionary rather than mandatory sentencing, the prosecutor's strategy would no longer be as determinative as it now is.

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[1] A defendant should be sentenced on the basis of facts proved at the time of the sentencing hearing, just as the trial verdict should be based on the facts proved at the time of trial. But fundamental concepts of due process oeprate to limit which facts are relevant. A defendant indicted for one crime cannot also be convicted at trial of a second crime, even if by the time of trial there exists proof of that second crime. The allegations at the time of indictment limit the power of the fact-finder at trial.

[2] Defense counsel presumably also has an obligation to ascertain the precise crimes that the grand jury has charged. But we don't just leave it to counsel; we require the government to provide such notice. Similarly, defense counsel has an obligation to make sure that if his client pleads guilty, the plea is voluntary. We make sure that defense counsel has done his job by having the judge make a voluntariness determination at a Rule 11 hearing.

The truth is that a notice requirement coupled with discretionary departure power would enhance the procedural rights of a defendant and acknowledge, as does the present system, judicial sentencing authority as a check and balance on all other participants. It would not enhance the power of the prosecutor beyond his current power.

U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

September 3, 1997

The Honorable George M. Marovich
United States District Court
219 South Dearborn Street
Chicago, Illinois 60604

Dear Judge Marovich:

We are in receipt of your letter of August 12, 1997, and generally agree with your summary of the status of the various sentencing issues addressed by our Subcommittee. We also wish to comment on Professor Stith's letter and memorandum of August 28, 1997, which tentatively proposes a system in which the onus would be on the prosecutor to submit, at the time a plea is entered, a binding "Notice of Sentencing Factors" on which the government intends to rely. If new aggravating sentencing factors came to light after a plea was entered, the court would have discretion whether or not to take those factors into account through upward departure.

The Department cannot subscribe to such a system. The proposal is based on the faulty premise that fairness somehow dictates that a defendant who wishes to plead guilty is entitled to know, at least presumptively, what guideline range will be applicable if the court accepts the plea. But notice of the likely penalty, beyond that afforded by the indictment and the maximum sentence authorized by the statutes alleged to have been violated, has never been deemed an element of the guilty plea process either before or after the advent of the guidelines. If the parties wish to incorporate certainty as to the sentence into a plea agreement, they may enter into an agreement under Rule 11(e)(1)(C). Our Committee is also considering, as you know, amending that Rule to permit, in effect, mini-11(e)(1)(C) agreements with respect to the applicability or non-applicability of particular sentencing factors or ranges. The system proposed by Professor Stith, however, would effectively transform, from the government's standpoint, all plea agreements into (e)(1)(C)-type agreements under which the government would be bound by the sentencing facts contained in the pre-plea Notice.

Moreover, Professor Stith's proposal is fundamentally at odds with the Sentencing Reform Act of 1984, the core purpose of which was and is to reduce unwarranted sentencing disparity. Under Professor Stith's proposed system, such disparity would inevitably

be increased because, in those circumstances when later-discovered factors were present, some judges would choose to take them into account while others would not.

In addition, we strongly disagree that what the government believes the facts to be at a particular point in time prior to sentencing should have a presumptively binding effect on the appropriate sentence. Defendants should be sentenced under the guidelines based on what the court determines the defendant did and what criminal history he or she has, and the sentence should not depend on when the government learned of those facts. So far as adequate notice is concerned, defendants have counsel whose responsibility it is (unlike the prosecutor's) to advise their client of the potential sentencing range as well as of any possible bases for departure.

Finally, in addition to heaping on the prosecutor a responsibility vis a vis defense counsel which we believe is misplaced, the proposal would denigrate the role of the probation officer and the court vis a vis the prosecutor in determining the facts on which sentence must be imposed. Often, the prosecutor and the probation officer (and/or the court) will have a legitimate disagreement over whether a particular guideline enhancement or fact is present, or to what degree. Under Professor Stith's proposal as we understand it, the court would not be able to reject the prosecutor's asserted facts if it believed the true facts would result in a higher sentence, except by rejecting the plea itself and possibly precipitating a trial. Fairness does not countenance, much less demand, such a result, which would elevate the prosecutor's role in the sentencing process beyond anything contemplated by the Sentencing Reform Act.

We look forward to seeing you in Monterey and discussing these issues further.

Sincerely,

Mary Frances Harkenrider
Roger A. Pauley

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
600 W. CAPITOL, ROOM 149
LITTLE ROCK, ARKANSAS 72201
(501) 324-6863
FAX (501) 324-6869

BILL WILSON
JUDGE

August 19, 1997

The Honorable George Marovich
U. S. District Court
219 South Dearborn Street
Chicago, Il 60604

Dear George:

I have read, with great interest, your letter,and Judge Conaboy's letter.

Your certainly have not offended the liaison to the Criminal Rules Committee with your opinion that the term "knowing and voluntary plea" is an oxymoron under the Sentencing Guidelines. I am coming more and more to that point of view myself.

I have tried Judge David Dowd approach. He covers the guideline probabilities pretty thoroughly in taking the plea; but, even in going this route, I am sorely afraid that my explanations may cloud rather than clear the defendant's understanding.

As you point out increasing the opportunity to withdraw a plea is not much of an option, but I have become more liberal in allowing withdrawals. At the sentencing hearing, after determining the guideline range, I ask the defendant, as well as her lawyer, whether she understands what I have just done in determining her guidelines. I then ask if, understanding this, she wants to ask me to allow her to withdraw her plea of guilty. If the answer is "yes" (I've only had two), I call a short recess and ask the lawyer and the defendant to confer. Then I ask for the reasons. I have denied the request on both occasions because the reasons were clearly inadequate. One was, "I want to withdraw my plea because I don't want to go to prison." Understandable, but a little short on specificity.

Let me state the obvious, which has been stated by many of us many times before: it is terribly difficult for the judge to explain to the defendant what he is facing if the plea of guilty is accepted — because the guidelines are complex and there are so many factors which may substantially affect the guideline range. These factors often cannot be known, or analyzed correctly, until a full blown presentence report is done (and perhaps an evidentiary hearing on top of that).

Perhaps we could let defendants who anticipate pleading guilty work as paralegals for the probation office for a month or so. This way at least they will know more about the guidelines than the judge.*

I look forward to seeing you in October.

Cordially,

Wm. R. Wilson, Jr.

cc: Chair of the Criminal Rules Committee
Other Members of Committee

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* Just kidding, just kidding!

ports" in any sense of the words.[22] Even when coupled with the tax exemption for certain Maine charities (which is, in truth, no different than a subsidy paid out of the State's general revenues), Maine's property tax would not seem to be a "Duty or Impost on Imports or Exports" within the meaning of the Import–Export Clause. Thus, were we to overrule *Woodruff* and apply the Import–Export Clause to this case, I would in all likelihood sustain this tax under that Clause as well.

UNITED STATES, Petitioner,

v.

Robert E. HYDE.

No. 96–667.

Argued April 15, 1997.

Decided May 27, 1997.

Defendant who had pleaded guilty to several federal fraud counts moved to withdraw his plea after it had been accepted, but before acceptance of plea agreement. The United States District Court for the Northern District of California, Saundra Brown Armstrong, J., denied motion, accepted plea agreement and entered judgment against defendant. Defendant appealed. The United States Court of Appeals for the Ninth Circuit, 92 F.3d 779, reversed and remanded. Government filed petition for writ of certiorari. After granting petition, the Supreme Court, Chief Justice Rehnquist, held that defendant could not withdraw his plea unless he showed "fair and just reason" for doing so.

Reversed.

1. Criminal Law ⚷274(3.1, 9)

Where defendant sought to withdraw his guilty plea after district court had accepted plea but before district court had accepted plea agreement, defendant could not withdraw plea unless he showed "fair and just reason" for doing so. Fed.Rules Cr.Proc. Rules 11(e)(4), 32(e), 18 U.S.C.A.

2. Criminal Law ⚷273(4.1), 273.1(2)

Guilty pleas can be accepted while plea agreements are deferred, and acceptance of the two can be separated in time. Fed.Rules Cr.Proc.Rule 11, 18 U.S.C.A.

3. Criminal Law ⚷274(3.1)

If district court rejects plea agreement after accepting defendant's plea, defendant can then withdraw his or her plea for any reason and does not have to comply with requirement of providing "fair and just reason" for withdrawal. Fed.Rules Cr.Proc. Rules 11(e)(4), 32(e), 18 U.S.C.A.

Syllabus *

Respondent pleaded guilty to several federal fraud counts, pursuant to a plea

22. Even were I to agree with the majority that a particular property tax may be a property tax in name only, see *ante*, at 1597–1598, and even were I to assume that travel across state lines to consume services in another State renders those traveling consumers "imports," it is difficult to characterize the tax at issue here as a duty on imports. It is, rather, as the majority recognizes, a "generally applicable state property tax." *Ante*, at 1594. Maine's grant of an exemption from the tax to some charitable organizations that dispense their charity primarily to Maine residents makes the tax something less than universal, but it does not make the tax, even in practical effect, one that is levied exclusively, or even primarily, on imports. See, *e.g., New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988); *Maryland v. Louisiana*, 451 U.S. 725, 756, 101 S.Ct. 2114, 2134, 68 L.Ed.2d 576 (1981); *License Cases*, 5 How. 504, 576, 12 L.Ed. 256 (1847); cf. *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 821, 109 S.Ct. 1500, 1511, 103 L.Ed.2d 891 (1989) (STEVENS, J., dissenting) (arguing, in an analogous context, that "the fact that a State may elect to grant a preference, or an exemption, to a small percentage of its residents does not make the tax discriminatory").

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

agreement in which the Government agreed to move for dismissal of other charges. The District Court accepted the plea but deferred decision on whether to accept the plea agreement, pending completion of the presentence report. Before sentencing and the court's decision on the plea agreement, respondent sought to withdraw his plea. Finding that he had not provided a "fair and just reason" for withdrawing the plea before sentencing, as required by Federal Rule of Criminal Procedure 32(e), the court denied respondent's request. The court then accepted the plea agreement, entered judgment, and sentenced respondent. The Court of Appeals reversed, holding that if a court defers acceptance of a plea or of a plea agreement, a defendant may withdraw his plea for any or no reason, until the court accepts both the plea and the agreement.

Held: In the circumstances presented here, a defendant may not withdraw his plea unless he shows a "fair and just reason" under Rule 32(e). Nothing in the text of Rule 11, which sets out the prerequisites to accepting a guilty plea and plea agreement, supports the Court of Appeals' holding. That text shows that guilty pleas can be accepted while plea agreements are deferred and the acceptance of the two can be separated in time. The Court of Appeals' requirement that a district court shall not accept a guilty plea without accepting the plea agreement is absent from the list of prerequisites to accepting a plea set out in Rule 11(c) and (d). If a court decides to reject a plea agreement such as the one here, the defendant is given "the opportunity to then withdraw the plea," Rule 11(e)(4), and he does not have to comply with Rule 32(e)'s "fair and just reason" requirement. This provision implements the commonsense notion that a defendant can no longer be bound by an agreement that the court has refused to sanction, and its necessary implication is that if the court has neither rejected nor accepted the agreement, the defendant is not granted the "opportunity" to automatically withdraw his plea. The Court of Appeals' holding contradicts this implication and thus strips Rule 11(e)(4) of any meaning. It also debases the judicial proceeding at which a defendant pleads and the court accepts his plea by allowing him to withdraw his plea simply on a lark. In addition, the holding would allow little, if any, time for the "fair and just reason" standard to apply, for a court's decision to accept a plea agreement is often made at the sentencing hearing. Respondent's arguments—that the "fair and just reason" standard was not meant to apply to guilty pleas conditioned on acceptance of the plea agreement, and that the Advisory Committee Notes to Rule 32(b)(3) support the Court of Appeals' holding—are rejected. Pp. 1632–1636.

92 F.3d 779, reversed.

REHNQUIST, C.J., delivered the opinion for a unanimous Court.

James A. Feldman, for petitioner.

Jonathan D. Soglin, appointed by this Court, Oakland, CA, for respondent.

For U.S. Supreme Court briefs, see:

1997 WL 86307 (Pet.Brief)

1997 WL 156487 (Resp.Brief)

1997 WL 174121 (Reply.Brief)

Chief Justice REHNQUIST delivered the opinion of the Court.

[1] Rule 32(e) of the Federal Rules of Criminal Procedure states that a district court may allow a defendant to withdraw his guilty plea before he is sentenced "if the defendant shows any fair and just reason." After the defendant in this case pleaded guilty, pursuant to a plea agreement, the District Court accepted his plea but deferred decision on whether to accept the plea agreement. The defendant then sought to withdraw his plea. We hold that in such circumstances a defendant may not withdraw his plea unless he shows a "fair and just reason" under Rule 32(e).

A federal grand jury indicted respondent Robert Hyde on eight counts of mail fraud, wire fraud, and other fraud-related crimes. On the morning of his trial, respondent indicated his desire to enter plea negotiations with the Government. Those negotiations produced a plea agreement in which respon-

dent agreed to plead guilty to four of the counts. In exchange, the Government agreed to move to dismiss the remaining four counts and not to bring further charges against respondent for other allegedly fraudulent conduct.

That afternoon, the parties appeared again before the District Court and submitted the plea agreement to the court, along with respondent's "application for permission to enter [a] plea of guilty." After placing respondent under oath, the court questioned him extensively to ensure that his plea was knowing and voluntary, and that he understood the consequences of pleading guilty, including the possibility of a maximum sentence of 30 years. The court asked respondent what he had done, and respondent admitted committing the crimes set out in the four counts. The court then asked the Government to set out what it was prepared to prove, and the Government did so. The court asked respondent whether he was pleading guilty because he was in fact guilty of the crimes set out in the four counts. Respondent said that he was. Finally, the court asked respondent how he pleaded to each count, and respondent stated "guilty."

The District Court concluded that respondent was pleading guilty knowingly, voluntarily, and intelligently, and that there was a factual basis for the plea. The court therefore stated that it was accepting respondent's guilty plea. It also stated that it was deferring decision on whether to accept the plea agreement, pending completion of the presentence report.

One month later, before sentencing and the District Court's decision about whether to accept the plea agreement, respondent filed a motion to withdraw his guilty plea. His motion alleged that he had pleaded guilty under duress from the Government and that his admissions to the District Court had in fact been false. After holding an evidentiary hearing, the court concluded that there was no evidence to support respondent's claim of duress, and that respondent had not provided a "fair and just reason" for withdrawing his guilty plea, as required by Rule 32(e). The court therefore refused to let respondent withdraw his guilty plea. The court then accepted the plea agreement, entered judgment against respondent on the first four counts, dismissed the indictment's remaining four counts on the Government's motion, and sentenced respondent to a prison term of 2½ years.

The Court of Appeals for the Ninth Circuit reversed, holding that respondent had an absolute right to withdraw his guilty plea before the District Court accepted the plea agreement. 92 F.3d 779, 781 (1996). The court reasoned as follows: First, before a district court has accepted a defendant's guilty plea, the defendant has an absolute right to withdraw that plea. *Id.*, at 780 (citing *United States v. Washman*, 66 F.3d 210, 212–213 (C.A.9 1995)). Second, the guilty plea and the plea agreement are " 'inextricably bound up together,' " such that the court's deferral of the decision whether to accept the plea agreement also constitutes an automatic deferral of its decision whether to accept the guilty plea, even if the court explicitly states that it is accepting the guilty plea. *Ibid.* (quoting *United States v. Cordova–Perez*, 65 F.3d 1552, 1556 (C.A.9 1995)). Combining these two propositions, the Court of Appeals held that "[i]f the court defers acceptance of the plea or of the plea agreement, the defendant may withdraw his plea for any reason or for no reason, until the time that the court does accept both the plea and the agreement." *Id.*, at 781.

The Courts of Appeals for the Fourth and Seventh Circuits have reached the opposite conclusion on this issue. *United States v. Ewing*, 957 F.2d 115, 118–119 (C.A.4 1992); *United States v. Ellison*, 798 F.2d 1102, 1106 (C.A.7 1986). We granted certiorari to resolve the conflict, 519 U.S. ——, 117 S.Ct. 759, 136 L.Ed.2d 695 (1997), and now reverse.

[2] To understand why we hold that Rule 32(e) governs here, we must go back to Rule 11, the principal provision in the Federal Rules of Criminal Procedure dealing with the subject of guilty pleas and plea agreements. The Court of Appeals equated acceptance of the guilty plea with acceptance of the plea agreement, and deferral of the plea agreement with deferral of the guilty plea. Noth-

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ing in the text of Rule 11 supports these conclusions. In fact, the text shows that the opposite is true: guilty pleas can be accepted while plea agreements are deferred, and the acceptance of the two can be separated in time.

The prerequisites to accepting a guilty plea are set out in sections (c) and (d) of Rule 11. Section (c) says: "Before accepting a plea of guilty . . . , the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands," numerous consequences of pleading guilty. For example, the court must ensure the defendant understands the maximum possible penalty that he may face by pleading guilty, Rule 11(c)(1), and the important constitutional rights he is waiving, including the right to a trial, Rule 11(c)(3), (4). Section (d) says: "The court shall not accept a plea of guilty . . . without first, by addressing the defendant personally in open court, determining that the plea is voluntary."[1] The opening words of these two sections are important: together, they speak of steps a district court must take "[b]efore accepting a plea of guilty," and without which it "shall not accept a plea of guilty." Based on this language, we conclude that once the court has taken these steps, it may, in its discretion, accept a defendant's guilty plea. The Court of Appeals would read an additional prerequisite into this list: a district court shall not accept a plea of guilty without first accepting the plea agreement. But that "prerequisite" is absent from the list set out in sections (c) and (d), strongly suggesting that no such addition is warranted.

Section (e), which covers plea agreements, also contradicts the Court of Appeals' holding. That section divides plea agreements into three types, based on what the Government agrees to do: in type A agreements, the Government agrees to move for dismissal of other charges; in type B, it agrees to recommend (or not oppose the defendant's request for) a particular sentence; and in type C, it agrees that the defendant should receive a specific sentence. As to type A and type C agreements, the Rule states that "the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report."[2] Rule 11(e)(2). The plea agreement in this case is a type A agreement: the Government agreed to move to dismiss four counts, did not agree to recommend a particular sentence, and did not agree that a specific sentence was the appropriate disposition. The District Court deferred its decision about whether to accept or reject the agreement.

[3] If the court had decided to reject the plea agreement, it would have turned to subsection (e)(4) of Rule 11. That subsection, a critical one for our purposes, provides:

> "If the court rejects the plea agreement, the court shall . . . advise the defendant personally . . . that the court is not bound by the plea agreement, *afford the defendant the opportunity to then withdraw the plea,* and advise the defendant that if the defendant persists in a guilty plea . . . the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement." Rule 11(e)(4) (emphasis added).

Thus, if the court rejects the agreement, the defendant can "then" withdraw his plea for any reason and does not have to comply with Rule 32(e)'s "fair and just reason" requirement. This provision implements the commonsense notion that a defendant can no longer be bound by an agreement that the court has refused to sanction.

Under the Court of Appeals' holding, however, the defendant can withdraw his plea "for any reason or for no reason" even if the district court does not reject the plea agreement, but merely defers decision on it.

1. See also Fed. Rule Crim. Proc. 11(f) (court should not enter judgment on an accepted guilty plea without confirming that the plea has a factual basis).

2. Under the Sentencing Guidelines, a District Court is *required* to defer its decision about whether to accept a type A or type C agreement until after it has reviewed the presentence report, unless the court believes that a presentence report is not required. United States Sentencing Commission, Guidelines Manual § 6B1.1(c) (Nov. 1995) (USSG).

Thus, for the Court of Appeals, the rejection of the plea agreement has no significance: before rejection, the defendant is free to withdraw his plea; after rejection, the same is true. But the text of Rule 11(e)(4) gives the rejection of the agreement a great deal of significance. Only "then" is the defendant granted "the opportunity" to withdraw his plea. The necessary implication of this provision is that if the court has neither rejected nor accepted the agreement, the defendant is not granted "the opportunity to then withdraw" his plea. The Court of Appeals' holding contradicts this implication, and thus strips subsection (e)(4) of any meaning.

Not only is the Court of Appeals' holding contradicted by the very language of the Rules, it also debases the judicial proceeding at which a defendant pleads and the court accepts his plea. After the defendant has sworn in open court that he actually committed the crimes, after he has stated that he is pleading guilty because he is guilty, after the court has found a factual basis for the plea, and after the court has explicitly announced that it accepts the plea, the Court of Appeals would allow the defendant to withdraw his guilty plea simply on a lark. The Advisory Committee, in adding the "fair and just reason" standard to Rule 32(e) in 1983, explained why this cannot be so:

> "Given the great care with which pleas are taken under [the] revised Rule 11, there is no reason to view pleas so taken as merely 'tentative,' subject to withdrawal before sentence whenever the government cannot establish prejudice. 'Were withdrawal automatic in every case where the defendant decided to alter his tactics and present his theory of the case to the jury, the guilty plea would become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim. In fact, however, a guilty plea is no such trifle, but a "grave and solemn act," which is "accepted only with care and discernment."'" Advisory Committee Notes on Fed. Rule Crim. Proc. 32, 18 U.S.C.App., p. 794 (quoting *United States v. Barker*, 514 F.2d 208, 221 (C.A.D.C.1975) (quoting *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468, 25 L.Ed.2d 747 (1970))).

We think the Court of Appeals' holding would degrade the otherwise serious act of pleading guilty into something akin to a move in a game of chess.

The basis for the Court of Appeals' decision was its prior statement in *Cordova-Perez* that "[t]he plea agreement and the [guilty] plea are inextricably bound up together." 65 F.3d, at 1556 (internal quotation marks omitted). This statement, on its own, is not necessarily incorrect. The guilty plea and the plea agreement are "bound up together" in the sense that a rejection of the agreement simultaneously frees the defendant from his commitment to plead guilty. See Rule 11(e)(4). And since the guilty plea is but one side of the plea agreement, the plea is obviously not wholly independent of the agreement.

But the Rules nowhere state that the guilty plea and the plea agreement must be treated identically. Instead, they explicitly envision a situation in which the defendant performs his side of the bargain (the guilty plea) before the Government is required to perform its side (here, the motion to dismiss four counts). If the court accepts the agreement and thus the Government's promised performance, then the contemplated agreement is complete and the defendant gets the benefit of his bargain. But if the court rejects the Government's promised performance, then the agreement is terminated and the defendant has the right to back out of his promised performance (the guilty plea), just as a binding contractual duty may be extinguished by the nonoccurrence of a condition subsequent. See J. Calamari & J. Perillo, Law of Contracts § 11-7, p. 441 (3d ed.1987); 3A A. Corbin, Corbin on Contracts § 628, p. 17 (1960).[3]

3. Respondent argues that it is unfair to bind the defendant to the terms of the plea agreement before the Government is so bound. He therefore argues that, as a policy matter, an interpretation of the Rules that results in such a differential treatment should be rejected. Even if respondent were correct in arguing that the defendant is bound before the Government is bound (a point we do not decide), the fact remains that our task here is not to act as policymaker, deciding how to make the Rules as fair as possible, but rather to determine what the

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If the Court of Appeals' holding were correct, it would also be difficult to see what purpose Rule 32(e) would serve. Since 1983, that Rule has provided: "If a motion to withdraw a plea of guilty . . . is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason." Under the Court of Appeals' holding, the "fair and just reason" standard would only be applicable between the time that the plea agreement is accepted and the sentence is imposed. Since the decision whether to accept the plea agreement will often be deferred until the sentencing hearing, see Rule 11(e)(2); USSG § 6B1.1(c), at which time the presentence report will have been submitted to the parties, objected to, revised, and filed with the court, see Fed. Rule Crim. Proc. 32(b)(6), the decision whether to accept the plea agreement will often be made at the same time that the defendant is sentenced. This leaves little, if any, time in which the "fair and just reason" standard would actually apply. We see no indication in the Rules to suggest that Rule 32(e) can be eviscerated in this manner, and the Court of Appeals did not point to one.

Respondent defends this cramped understanding of Rule 32(e) by arguing that the "fair and just reason" standard was meant to apply only to "fully accepted" guilty pleas, as opposed to "conditionally accepted" pleas—*i.e.*, pleas that are accepted but later withdrawn under Rule 11(e)(4) if the plea agreement is rejected. He points out that the "fair and just reason" standard was derived from dictum in our pre-Rules opinion in *Kercheval v. United States,* 274 U.S. 220, 224, 47 S.Ct. 582, 583, 71 L.Ed. 1009 (1927), see Advisory Committee Notes on Rule 32, 18 U.S.C.App., p. 794, and that *Kercheval* spoke of a guilty plea as a final, not a conditional, act, see 274 U.S., at 223, 47 S.Ct., at 583 ("A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence"). He then argues that since the Rule 32(e) standard was derived from *Kercheval,* the Rule must also have incorporated the *Kercheval* view that a guilty plea is a final, unconditional act. Thus, since his guilty plea was conditioned on the District Court accepting the plea agreement, the Rule simply does not apply.

We reject this somewhat tortuous argument. When the "fair and just reason" standard was added in 1983, the Rules already provided that the district court could defer decision on whether to accept the plea agreement, that it could then reject the agreement, and that the defendant would then be able to withdraw his guilty plea. Guilty pleas made pursuant to plea agreements were thus already subject to this sort of condition subsequent. Yet neither the new Rule 32(e) nor the Advisory Committee notes accompanying it attempted to draw a distinction between "fully accepted" and "conditionally accepted" guilty pleas. Instead, the Rule simply says that the standard applies to motions to withdraw a guilty plea "made before sentence is imposed." Respondent's speculation that the Advisory Committee, this Court, and Congress had the *Kercheval* view of a guilty plea in mind when Rule 32(e) was amended in 1983 is thus contradicted by the Rules themselves.

Respondent's only other substantial argument in defense of the Court of Appeals' holding relies on an interpretation of the Advisory Committee Notes to Rule 32(b)(3). That Rule, concerning presentence reports, provides: "The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty." This Rule obviously does not deal at all with motions to withdraw guilty pleas, and any comments in the Advisory Committee Notes to this Rule dealing with plea withdrawal could not alter

Rules actually provide. Cf. *Carlisle v. United States,* 517 U.S. ——, ——, 116 S.Ct. 1460, 1466, 134 L.Ed.2d 613 (1996) (district court may not use "inherent supervisory power" to correct perceived unfairness in application of Fed. Rule Crim. Proc. 29(a)'s 7-day time limit for filing motions for judgment of acquittal, if use of the power would "circumvent or conflict with the Federal Rules of Criminal Procedure").

the meaning of Rules 11 and 32(e) as we have construed them.

The judgment of the Court of Appeals is therefore

Reversed.

William Jefferson CLINTON, Petitioner,

v.

Paula Corbin JONES.

No. 95-1853.

Argued Jan. 13, 1997.

Decided May 27, 1997.

Former state employee sued sitting President of the United States alleging that President made "abhorrent" sexual advances while he was Governor of the State of Arkansas, and that her rejection of those advances led to retaliatory punishment by her supervisors. The United States District Court for the Eastern District of Arkansas, Susan Webber Wright, J., 869 F.Supp. 690, denied President's motion to dismiss, but granted president temporary immunity until he left office. Thereafter, President filed motion for stay pending appeal of court's order denying President's motion to dismiss on ground of presidential immunity. The District Court, 879 F.Supp. 86, granted motion. Employee appealed. The Eighth Circuit Court of Appeals, 72 F.3d 1354, Bowman, Circuit Judge, affirmed in part, reversed in part, and dismissed in part. The President petitioned for certiorari. The Supreme Court granted petition, and per Justice Stevens, held that: (1) Constitution does not afford President temporary immunity, in all but the most exceptional circumstances, from civil damages litigation arising out of events that occurred before he took office; (2) doctrine of separation of powers does not require federal courts to stay all private actions against President until he leaves office; and (3) District Court abused its discretion in deferring trial until after President left office.

Affirmed.

Breyer, J., filed concurring opinion.

1. Constitutional Law ⟹46(1)

Doctrine that premature adjudication of constitutional questions should be avoided is applicable to entire federal judiciary, not just to Supreme Court.

2. Constitutional Law ⟹46(1)

Doctrine that premature adjudication of constitutional questions should be avoided comes into play after court has acquired jurisdiction of case.

3. Constitutional Law ⟹46(1)

Federal Courts ⟹452

Doctrine that premature adjudication of constitutional questions should be avoided does not dictate discretionary denial of every certiorari petition raising novel constitutional question.

4. Constitutional Law ⟹46(1), 47

Federal Courts ⟹753

It is Supreme Court's considered practice not to decide abstract, hypothetical or contingent questions, to decide any constitutional question in advance of necessity for its decision, to formulate rule of constitutional law broader than required by precise facts to which it is to be applied, or to decide any constitutional question except with reference to particular facts to which it is to be applied.

5. Constitutional Law ⟹46(1)

It is not the habit of the Supreme Court to decide questions of a constitutional nature unless absolutely necessary to decision of case.

6. United States ⟹50.5(5)

Constitution does not afford President of the United States temporary immunity, in all but the most exceptional circumstances, from civil damages litigation arising out of events that occurred before he took office.

7. Constitutional Law ⟹

Separation of powers
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8. Constitutional Law ⟹

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9. Constitutional Law ⟹

Separation-of-powers
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Const. Art. 3, § 1 et seq.

10. Constitutional Law ⟹

Doctrine of separatio
not require federal courts
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Art. 3, § 1 et seq.

11. Action ⟹68

District Court has br
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12. Action ⟹68

Especially in cases of e
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13. Federal Civil Procedur

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cate where Court of Appeals had only stayed its own mandate).

UNITED STATES

v.

Vernon WATTS.

UNITED STATES

v.

Cheryl PUTRA.

No. 95-1906.

Decided Jan. 6, 1997.

First defendant was convicted in the United States District Court for the Eastern District of California, William B. Shubb, J., of possession of crack cocaine with intent to distribute, and he appealed. The Ninth Circuit Court of Appeals, 67 F.3d 790, affirmed in part, vacated in part, and remanded. Second defendant was convicted in the United States District Court for the District of Hawai'i, Harold M. Fong, Chief Judge, of aiding and abetting possession of cocaine with intent to distribute, and she appealed. The Court of Appeals, 78 F.3d 1386, reversed and remanded for resentencing. Government filed single petition for certiorari, seeking review in both cases. Granting certiorari, the Supreme Court held that sentencing court may consider conduct of which defendant has been acquitted, so long as that conduct has been proved by preponderance of evidence.

Reversed and remanded.

Justice Scalia filed concurring opinion.

Justice Breyer filed concurring opinion.

Justice Stevens filed dissenting opinion.

Justice Kennedy filed dissenting opinion.

1. Criminal Law ⚷986.2(4.1), 1239, 1245(1)

Sentencing court may consider conduct of which defendant has been acquitted, so long as that conduct has been proved by preponderance of evidence; abrogating *United States v. Lanoue,* 71 F.3d 966, 984 (C.A.1 1995). 18 U.S.C.A. § 3661; U.S.S.G. §§ 1B1.3, 1B1.4, 18 U.S.C.A.

2. Criminal Law ⚷1239, 1245(1)

Sentencing Guidelines did not alter sentencing court's discretion to take into account facts introduced at trial relating to other charges, even ones of which defendant has been acquitted. U.S.S.G. §§ 1B1.1 et seq., 1B1.4, 18 U.S.C.A.

3. Criminal Law ⚷1244, 1245(1)

Far from limiting sentencing court's power to consider uncharged or acquitted conduct, statute directing Sentencing Commission to address incremental penalties for multiple offenses simply ensures that, at a minimum, Sentencing Guidelines provide additional penalties when defendants are convicted of multiple offenses. 28 U.S.C.A. § 994(*l*).

4. Criminal Law ⚷1208.6(1)

Double Jeopardy ⚷30

Sentencing enhancements do not punish defendant for crimes of which he was not convicted, but rather increase his sentence because of manner in which he committed crime of conviction. U.S.C.A. Const.Amend. 5.

5. Double Jeopardy ⚷29.1

Double jeopardy is not implicated when sentencing court considers conduct of which defendant has been acquitted. U.S.C.A. Const.Amend. 5.

6. Criminal Law ⚷881(4), 1244

Jury cannot be said to have "necessarily rejected" any facts when it returns general verdict of not guilty, and thus nature of acquittal does not preclude sentencing court, in sentencing for another crime of which defendant was convicted, from considering conduct underlying acquitted charge, so long as that conduct has been proved by preponderance of evidence.

7. Judgment ⚖751

Acquittal in criminal case does not preclude Government from relitigating issue when it is presented in subsequent action governed by lower standard of proof.

PER CURIAM.

[1] In these two cases, two panels of the Court of Appeals for the Ninth Circuit held that sentencing courts could not consider conduct of the defendants underlying charges of which they had been acquitted. *United States v. Watts,* 67 F.3d 790 (C.A.9 1995) ("*Watts*"); *United States v. Putra,* 78 F.3d 1386 (C.A.9 1996) ("*Putra*"). Every other Court of Appeals has held that a sentencing court may do so, if the Government establishes that conduct by a preponderance of the evidence.[1] The Government filed a single petition for certiorari seeking review of both cases, pursuant to this Court's Rule 12.4, to resolve this split. Because the panels' holdings conflict with the clear implications of 18 U.S.C. § 3661, the Sentencing Guidelines, and this Court's decisions, particularly *Witte v. United States,* 515 U.S. ——, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995), we grant the petition and reverse in both cases.

In *Watts,* police discovered cocaine base in a kitchen cabinet and two loaded guns and ammunition hidden in a bedroom closet of Watts' house. A jury convicted Watts of possessing cocaine base with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), but acquitted him of using a firearm in relation to a drug offense, in violation of 18 U.S.C. § 924(c). Despite Watts' acquittal on the firearms count, the District Court found by a preponderance of the evidence that Watts had possessed the guns in connection with the drug offense. In calculating Watts' sentence, the court therefore added two points to his base offense level under United States Sentencing Commission, Guidelines Manual § 2D1.1(b)(1) (Nov.1995) (USSG). The Court of Appeals vacated the sentence, holding that "a sentencing judge may not, 'under *any* standard of proof,' rely on facts of which the defendant was acquitted." 67 F.3d, at 797 (quoting *United States v. Brady,* 928 F.2d 844, 851, and n. 12 (C.A.9 1991), abrogated on other grounds, *Nichols v. United States,* 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994)) (emphasis added in *Watts*). The Government argued that the District Court could have enhanced Watts' sentence without considering facts "necessarily rejected" by the jury's acquittal on the § 924(c) charge because the sentencing enhancement did not require a connection between the firearm and the predicate offense, whereas § 924(c) did. The court rejected this argument, stated that both the enhancement and § 924(c) involved such a connection, and held that the District Court had impermissibly "reconsider[ed] facts that the jury necessarily rejected by its acquittal of the defendant on another count." 67 F.3d, at 796.

In *Putra,* authorities had videotaped two transactions in which Putra and a codefendant (a major drug dealer) sold cocaine to a government informant. The indictment charged Putra with, among other things, one count of aiding and abetting possession with intent to distribute one ounce of cocaine on May 8, 1992, and a second count of aiding and abetting possession with intent to distribute five ounces of cocaine on May 9, 1992, both in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. The jury convicted Putra on the first count but acquitted her on the second. At sentencing, however, the District

1. *United States v. Boney,* 977 F.2d 624, 635–636 (C.A.D.C.1992); *United States v. Mocciola,* 891 F.2d 13, 16–17 (C.A.1 1989) (criticized in dicta in *United States v. Lanoue,* 71 F.3d 966, 984 (C.A.1 1995)); *United States v. Rodriguez–Gonzalez,* 899 F.2d 177, 180–182(CA2), cert. denied, 498 U.S. 844, 111 S.Ct. 127, 112 L.Ed.2d 95 (1990); *United States v. Ryan,* 866 F.2d 604, 608–609 (C.A.3 1989); *United States v. Isom,* 886 F.2d 736, 738–739 (C.A.4 1989); *United States v. Juarez–Ortega,* 866 F.2d 747, 748–749 (C.A.5 1989) *(per curiam); United States v. Milton,* 27 F.3d 203, 208–209 (C.A.6 1994), cert. denied, 513 U.S. ——, 115 S.Ct. 741, 130 L.Ed.2d 642 (1995); *United States v. Fonner,* 920 F.2d 1330, 1332–1333 (C.A.7 1990); *United States v. Dawn,* 897 F.2d 1444, 1449–1450 (C.A.8), cert. denied, 498 U.S. 960, 111 S.Ct. 389, 112 L.Ed.2d 400 (1990); *United States v. Coleman,* 947 F.2d 1424, 1428–1429 (C.A.10 1991), cert. denied, 503 U.S. 972, 112 S.Ct. 1590, 118 L.Ed.2d 307 (1992); *United States v. Averi,* 922 F.2d 765, 765–766 (C.A.11 1991) *(per curiam).*

Court found by a preponderance of the evidence that Putra had indeed been involved in the May 9 transaction. The District Court explained that the second sale was relevant conduct under USSG § 1B1.3, and it therefore calculated Putra's base offense level under the Guidelines by aggregating the amounts of both sales. As in *Watts*, the Court of Appeals vacated and remanded for resentencing. Reasoning that the jury's verdict of acquittal manifested an "explicit rejection" of Putra's involvement in the May 9 transaction, the Court of Appeals held that "allowing an increase in Putra's sentence would be effectively punishing her for an offense for which she has been acquitted." 78 F.3d, at 1389. The panel explained that it was imposing "a judicial limitation on the facts the district court may consider at sentencing, beyond any limitation imposed by the Guidelines." *Ibid.* Then-Chief Judge Wallace dissented, arguing that the panel's "sweeping language contradicts the Guidelines, our practice prior to enactment of the Guidelines, decisions of other circuits, and recent Supreme Court authority." *Id.*, at 1390.

We begin our analysis with 18 U.S.C. § 3661, which codifies the longstanding principle that sentencing courts have broad discretion to consider various kinds of information. The statute states:

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

We reiterated this principle in *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), in which a defendant convicted of murder and sentenced to death challenged the sentencing court's reliance on information that the defendant had been involved in 30 burglaries of which he had not been convicted. We contrasted the different limitations on presentation of evidence at trial and at sentencing: "Highly relevant—if not essential—to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Id.*, at 247, 69 S.Ct., at 1083 (footnote omitted); see *Nichols, supra*, at 747, 114 S.Ct., at 1928 (noting that sentencing courts have traditionally and constitutionally "considered a defendant's past criminal behavior, even if no conviction resulted from that behavior") (citing *Williams, supra*); *BMW of North America, Inc. v. Gore*, 517 U.S. ——, —— n. 19, 116 S.Ct. 1589, 1597 n. 19, 134 L.Ed.2d 809 (1996) ("A sentencing judge may even consider past criminal behavior which did not result in a conviction") (citing *Williams, supra*). Neither the broad language of § 3661 nor our holding in *Williams* suggests any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing. Indeed, under the pre-Guidelines sentencing regime, it was "well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted." *United States v. Donelson*, 695 F.2d 583, 590 (C.A.D.C.1982) (Scalia, J.).

[2] The Guidelines did not alter this aspect of the sentencing court's discretion. " '[V]ery roughly speaking, [relevant conduct] corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment.' " *Witte, supra*, at ——, 115 S.Ct., at 2207 (quoting *United States v. Wright*, 873 F.2d 437, 441 (C.A.1 1989) (Breyer, J.)). Section 1B1.4 of the Guidelines reflects the policy set forth in 18 U.S.C. § 3661:

> "In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. *See* 18 U.S.C. § 3661."

Section 1B1.3, in turn, describes in sweeping language the conduct that a sentencing court may consider in determining the applicable guideline range. The commentary to that section states: "Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination

of the applicable guideline sentencing range." USSG § 1B1.3 comment., backg'd. With respect to certain offenses, such as Putra's drug conviction, USSG § 1B1.3(a)(2) requires the sentencing court to consider "all acts and omissions ... that were part of the same course of conduct or common scheme or plan as the offense of conviction." Application Note 3 explains that "[a]pplication of this provision does not require the defendant, in fact, to have been convicted of multiple counts." The Note also gives the following example:

> "[W]here the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales."

Accordingly, the Guidelines conclude that "[r]elying on the entire range of conduct, regardless of the number of counts that are alleged *or on which a conviction is obtained*, appears to be the most reasonable approach to writing workable guidelines for these offenses." USSG § 1B1.3 comment., backg'd (emphasis added).

[3] Although the dissent concedes that a district court may properly consider "evidence adduced in a trial that resulted in an acquittal" when choosing a particular sentence within a guideline range, it argues that the court must close its eyes to acquitted conduct at earlier stages of the sentencing process because the "broadly inclusive language of § 3661" is incorporated only into § 1B1.4 of the Guidelines. This argument ignores § 1B1.3 which, as we have noted, directs sentencing courts to consider all other related conduct, whether or not it resulted in a conviction. The dissent also contends that because Congress instructed the Sentencing Commission, in 28 U.S.C. § 994(*l*), to ensure that the Guidelines provide incremental punishment for a defendant who is convicted of multiple offenses, it could not have meant for the Guidelines to increase a sentence based on offenses of which a defendant has been acquitted. *Post*, at 640. The statute is not, however, "cast in restrictive or exclusive terms." *United States v. Ebbole*, 917 F.2d 1495, 1501 (C.A.7 1990). Far from limiting a sentencing court's power to consider uncharged or acquitted conduct, § 994(*l*) simply ensures that, at a minimum, the Guidelines provide additional penalties when defendants are convicted of multiple offenses. *Ibid.* If we accepted the dissent's logic, § 944(*l*) would prohibit a district court from considering acquitted conduct for any sentencing purposes, whether for setting the guidelines range or for choosing a sentence within that range—a novel proposition that the dissent itself does not defend. *Post*, at 643. In short, we are convinced that a sentencing court may consider conduct of which a defendant has been acquitted.

[4, 5] The Court of Appeals' position to the contrary not only conflicts with the implications of the Guidelines, but it also seems to be based on erroneous views of our double jeopardy jurisprudence. The Court of Appeals asserted that, when a sentencing court considers facts underlying a charge on which the jury returned a verdict of not guilty, the defendant " 'suffer[s] punishment for a criminal charge for which he or she was acquitted.' " *Watts*, 67 F.3d. at 797 (quoting *Brady*, 928 F.2d, at 851). As we explained in *Witte*, however, sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction. 515 U.S., at ——, 115 S.Ct., at 2207–2208. In *Witte*, we held that a sentencing court could, consistent with the Double Jeopardy Clause, consider uncharged cocaine importation in imposing a sentence on marijuana charges that was within the statutory range, without precluding the defendant's subsequent prosecution for the cocaine offense. We concluded that "consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." *Id.*, at ——, 115 S.Ct., at 2207. Rather, the defendant is "punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment. . . ." *Id.*, at

——, 115 S.Ct., at 2207–2208; see also *Nichols,* 511 U.S., at 747, 114 S.Ct., at ——.

[6] The Court of Appeals likewise misunderstood the preclusive effect of an acquittal, when it asserted that a jury "rejects" some facts when it returns a general verdict of not guilty. *Putra,* 78 F.3d, at 1389 (quoting *Brady, supra,* at 851). The Court of Appeals failed to appreciate the significance of the different standards of proof that govern at trial and sentencing. We have explained that "acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt." *United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 361, 104 S.Ct. 1099, 1104, 79 L.Ed.2d 361 (1984). As then-Chief Judge Wallace pointed out in his dissent in *Putra,* it is impossible to know exactly why a jury found a defendant not guilty on a certain charge.

> "[A]n acquittal is not a finding of any fact. An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt. Without specific jury findings, no one can logically or realistically draw any factual finding inferences. . . ." 78 F.3d, at 1394.

Thus, contrary to the Court of Appeals' assertion in *Brady, supra,* at 851, the jury cannot be said to have "necessarily rejected" any facts when it returns a general verdict of not guilty.

[7] For these reasons, "an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." *Dowling v. United States,* 493 U.S. 342, 349, 110 S.Ct. 668, 672, 107 L.Ed.2d 708 (1990). The Guidelines state that it is "appropriate" that facts relevant to sentencing be proved by a preponderance of the evidence, USSG § 6A1.3 comment., and we have held that application of the preponderance standard at sentencing generally satisfies due process. *McMillan v. Pennsylvania,* 477 U.S. 79, 91–92, 106 S.Ct. 2411, 2418–2419, 91 L.Ed.2d 67 (1986); *Nichols, supra,* at 747–748, 114 S.Ct., at ——. We acknowledge a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence.[2] The cases before us today do not

2. See *McMillan,* 477 U.S., at 88, 106 S.Ct., at 2417 (upholding use of preponderance standard where there was no allegation that the sentencing enhancement was "a tail which wags the dog of the substantive offense"); *Kinder v. United States,* 504 U.S. 946, 948–949, 112 S.Ct. 2290, 2291–2292, 119 L.Ed.2d 214 (1992) (White, J., dissenting from denial of certiorari) (acknowledging split); *United States v. Kikumura,* 918 F.2d 1084, 1102 (C.A.3 1990) (holding that clear-and-convincing standard is implicit in 18 U.S.C. § 3553(b), which requires a sentencing court to "find" certain facts in order to justify certain large upward departures; not reaching the due process issue); *United States v. Gigante,* 39 F.3d 42, 48 (C.A.2 1994), as amended, 94 F.3d 53, 56 (1996) (not reaching due process issue; "In our view, the preponderance standard is no more than a *threshold* basis for adjustments and departures, and the weight of the evidence, at some point along a continuum of sentence severity, should be considered with regard to both upward adjustments and upward departures. . . . Where a higher standard, appropriate to a substantially enhanced sentence range, is not met, the court should depart downwardly"); *United States v. Lombard,* 72 F.3d 170, 186–187 (C.A.1 1995) (authorizing downward departure in "an unusual and perhaps a singular case" that may have "exceeded" constitutional limits, where acquitted conduct calling for a "enormous" sentence enhancement "is itself very serious conduct," "where the ultimate sentence is itself enormous, and where the judge is seemingly mandated to impose that sentence"); see also *United States v. Townley,* 929 F.2d 365, 369 (C.A.8 1991) ("At the very least, *McMillan* allows for the possibility that the preponderance standard the Court approved for garden variety sentencing determinations may fail to comport with due process where, as here, a sentencing enhancement factor becomes 'a tail which wags the dog of the substantive offense.'") (quoting *McMillan, supra,* at 88, 106 S.Ct., at 2417); *United States v. Restrepo,* 946 F.2d 654, 656, n. 1 (C.A.9 1991) (en banc) (suggesting that clear and convincing evidence might be required for extraordinary upward adjustments or departures), cert. denied, 503 U.S. 961, 112 S.Ct. 1564, 118 L.Ed.2d 211 (1992); *United States v. Lam Kwong-Wah,* 966 F.2d 682, 688 (C.A.D.C.) (same), cert. denied, 506 U.S. 901, 113 S.Ct. 287, 121 L.Ed.2d 213 (1992); *United States v. Trujillo,* 959 F.2d 1377, 1382(CA7) (same), cert. denied, 506 U.S. 897, 113 S.Ct. 277, 121 L.Ed.2d 204 (1992). But see *United States v. Washington,* 11 F.3d 1510, 1516 (C.A.10 1993) ("At least as concerns making guideline calculations the issue of a higher than a preponderance standard is foreclosed in this circuit"), cert. de-

present such exceptional circumstances, and we therefore do not address that issue. We therefore hold that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.

Accordingly, the Court of Appeals erred in both cases before us today. In *Putra,* the jury simply found that the prosecution had not proved the defendant's complicity in the May 9 sale beyond a reasonable doubt. The acquittal sheds no light on whether a preponderance of the evidence established Putra's participation in that transaction. Likewise, in *Watts,* the jury acquitted the defendant of using or carrying a firearm during or in relation to the drug offense. That verdict does not preclude a finding by a preponderance of the evidence that the defendant did, in fact, use or carry such a weapon, much less that he simply *possessed* the weapon in connection with a drug offense.

The petition for certiorari is granted, the judgments of the Court of Appeals are reversed, and the cases are remanded for further proceedings consistent with this opinion. Respondent Putra's motion to proceed *in forma pauperis* is granted. The motion of Morris L. Whitman for leave to file a brief as *amicus curiae* is granted.

It is so ordered.

Justice SCALIA, concurring.

I do not agree with the assertion in Justice BREYER'S concurrence that there is no obstacle to the Commission's reversing today's outcome by mandating disregard of the information we today hold it proper to consider. Title 28 U.S.C. § 994(b)(1) requires the Guidelines to be "consistent with all pertinent provisions of title 18, United States Code." In turn, 18 U.S.C. § 3661 provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." In my view, neither the Commission nor the courts have authority to decree that information which would otherwise justify enhancement of sentence or upward departure from the Guidelines, may not be considered for that purpose (or may be considered only after passing some higher standard of probative worth than the Constitution and laws require) if it pertains to acquitted conduct. If the Commission believes that the rules of evidence and proof established by the Constitution and laws are inadequate, it may of course recommend changes to the Congress, cf. 28 U.S.C. § 994(w).

Justice BREYER, concurring.

I join the Court's *per curiam* opinion while noting that it poses no obstacle to the Commission itself deciding whether or not to enhance a sentence on the basis of conduct that a sentencing judge concludes did take place, but in respect to which a jury acquitted the defendant.

In telling judges in ordinary cases to consider "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction," United States Sentencing Commission, Guidelines Manual § 1B1.3(a)(2)(Nov.1995)(USSG), the Guidelines recognize the fact that before their creation sentencing judges often took account, not only of the precise conduct that made up the offense of conviction, but of certain related conduct as well. And I agree with the Court that the Guidelines, as presently written, do not make an exception for related conduct that was the basis for a different charge of which a jury acquitted that defendant. To that extent, the Guidelines' policy rests upon the logical possibility that a sentencing judge and a jury, applying different evidentiary standards, could reach different factual conclusions.

This truth of logic, however, is not the only pertinent policy consideration. The Commission in the past has considered whether the Guidelines should contain a specific exception to their ordinary "relevant conduct" rules that would instruct the sentencing judge not

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Justice STEVENS

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to base a sentence enhancement upon acquitted conduct. United States Sentencing Commission, Sentencing Guidelines for United States Courts, 57 Fed.Reg. 62832 (1992) (proposed USSG § 1B1.3(c)). Given the role that juries and acquittals play in our system, the Commission could decide to revisit this matter in the future. For this reason, I think it important to specify that, as far as today's decision is concerned, the power to accept or reject such a proposal remains in the Commission's hands.

Justice STEVENS, dissenting.

"The Sentencing Reform Act of 1984 revolutionized the manner in which district courts sentence persons convicted of federal crimes." *Burns v. United States,* 501 U.S. 129, 132, 111 S.Ct. 2182, 2184, 115 L.Ed.2d 123 (1991). The goals of rehabilitation and fairness served by individualized sentencing that formerly justified vesting judges with virtually unreviewable sentencing discretion have been replaced by the impersonal interest in uniformity and retribution.[1] Strict mandatory rules have dramatically confined the exercise of judgment based on a totality of the circumstances. "While the products of the Sentencing Commission's labors have been given the modest name 'Guidelines,' ... they have the force and effect of laws, prescribing the sentences criminal defendants are to receive. A judge who disregards them will be reversed." *Mistretta v. United States,* 488 U.S. 361, 413, 109 S.Ct. 647, 676, 102 L.Ed.2d 714 (1989) (SCALIA, J., dissenting).

I

In 1970, during the era of individualized sentencing, Congress enacted the statute now codified as 18 U.S.C. § 3661 to make it clear that otherwise inadmissible evidence could be considered by judges in the exercise of their sentencing discretion. The statute, however, did not tell the judge how to weigh the significance of any of that evidence. The judge was free to rely on any information that might shed light on a decision to grant probation, to impose the statutory maximum, or to determine the precise sentence within those extremes. Wisdom and experience enabled the judge to give appropriate weight to uncorroborated hearsay or to evidence of criminal conduct that had not resulted in a conviction. Even if convinced that a jury had erroneously acquitted a defendant, the judge was not required to ignore the evidence of guilt. At the same time, however, he or she was free to discount the significance of that evidence if mitigating circumstances—perhaps the same facts that persuaded the jury that an acquittal was appropriate—were present. Like a jury in a capital case, the judge could exercise discretion "to dispense mercy on the basis of factors too intangible to write into a statute," *Gregg v. Georgia,* 428 U.S. 153, 222, 96 S.Ct. 2909, 2947, 49 L.Ed.2d 859 (1976) (White, J., concurring in judgment).

Although the Sentencing Reform Act of 1984 has cabined the discretion of sentencing judges, the 1970 statute remains on the books. As was true when it was enacted, § 3661 does not speak to questions concerning the relevance or the weight of any item of evidence. That statute is not offended by provisions in the Guidelines that proscribe reliance on evidence of economic hardship, drug or alcohol dependence, or lack of guidance as a youth, in making certain sentencing decisions. See *Koon v. United States,* 518 U.S. ——, ——, 116 S.Ct. 2035, 2044, 135 L.Ed.2d 392 (1996). Conversely, that statute does not command that any particular weight—or indeed that any weight at all—be given to evidence that a defendant may have committed an offense that the prosecutor failed to prove beyond a reasonable doubt. In short, while the statute that introduces the Court's analysis of these cases, *ante,* at 635, does support its narrow holding that sentencing courts may sometimes "consider conduct of the defendants underlying other charges of which they had been acquitted,"

1. Compare *Williams v. New York,* 337 U.S. 241, 247–248, 69 S.Ct. 1079, 1083–1084, 93 L.Ed. 1337 (1949) ("Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence"), with 28 U.S.C. § 994(k) (rejecting rehabilitation as a goal of imprisonment) and 18 U.S.C. § 3553(a)(2) (stating that punishment should serve retributive, deterrent, educational and incapacitative goals).

ante, at 634, it sheds no light on whether the district judges' application of the Guidelines in the manner presented in these cases was authorized by Congress, or is allowed by the Constitution.

A closer examination of the interaction among § 3661, the other provisions of the Sentencing Reform Act, and the Guidelines demonstrates that the role played by § 3661 is of a narrower scope than the Court's opinion suggests. The Sentencing Reform Act was enacted primarily to address Congress' concern that similar offenders convicted of similar offenses were receiving "an unjustifiably wide range of sentences." S.Rep. No. 98–225, p. 38 (1983). It therefore created the Sentencing Commission (or Commission) and directed it to draft Guidelines that would cabin the discretion of all judges—those who were too harsh as well as those who were too lenient. See 28 U.S.C. § 991(b)(1)(B). While the abolition of parole indicates that the new rules were generally intended to increase the minimum levels of punishment, see 18 U.S.C. §§ 3624(a) and (b), they also confined the judges' authority to impose the maximum sentences authorized by statute. The central mechanism that Congress promulgated to avoid disparate sentencing in typical cases is a requirement that for any sentence of imprisonment in the Guidelines, "the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months," 28 U.S.C. § 994(b)(2). The determination of which of these narrow ranges a particular sentence should fall into is made by operation of mandatory rules, but within the particular range, the judge retains broad discretion to set a particular sentence.

By their own terms, the Guidelines incorporate the broadly inclusive language of § 3661 only into those portions of the sentencing decision in which the judge retains discretion.

United States Sentencing Commission, Guidelines Manual § 1B1.4 (Nov.1995) provides:

> "In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. *See* 18 U.S.C. § 3661."

Thus, as in the pre-Guidelines sentencing regime, it is in the area in which the judge exercises discretion that § 3661 authorizes unlimited access to information concerning the background, character, and conduct of the defendant. When the judge is exercising such discretion, I agree that he may consider otherwise inadmissible evidence, including evidence adduced in a trial that resulted in an acquittal. But that practice, enshrined in § 3661 and USSG § 1B1.4, sheds little, if any, light on the appropriateness of the District Courts' application of USSG § 1B1.3, which defines relevant conduct for the purposes of determining the Guidelines range within which a sentence can be imposed.

II

The issue of law raised by the sentencing of Cheryl Putra involved the identification of the offense level that determined the range within which the judge could exercise discretion. Because she was a first offender with no criminal history, that range was based entirely on the offense or offenses for which she was to be punished. She was found guilty of aiding and abetting the intended distribution of one ounce of cocaine on May 8, 1992, but not guilty of participating in a similar transaction involving five ounces of cocaine on May 9, 1992. *United States v. Putra,* 78 F.3d 1386, 1387 (C.A.9 1996). If the guilty verdict provided the only basis for imposing punishment on Ms. Putra, the Guidelines would have required the judge to impose a sentence of no less than 15 months in prison and would have prohibited him from imposing a sentence longer than 21 months.

If Putra had been found guilty of also participating in the 5 ounce transaction on May 9, 1992, the Guidelines would have required that both the minimum and the maximum sentences be increased; the range would have been between 27 and 33 months. As the District Court applied the Guidelines, precisely the same range resulted from the

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acquittal as would have been dictated by a conviction. Notwithstanding the absence of sufficient evidence to prove guilt beyond a reasonable doubt, the alleged offense on May 9 led to the imposition of a sentence six months longer than the maximum permitted for the only crime that provided any basis for punishment.[2]

In my judgment neither our prior cases nor the text of the statute warrants this perverse result. And the vigor of the debate among judges in the courts of appeals on this basic issue belies the ease with which the Court addresses it, without hearing oral argument or allowing the parties to fully brief the issues.[3]

III

The Court relies principally on three cases—*Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949); *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986); and *Witte v. United States*, 515 U.S. ——, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995)—to justify its outcome. In each instance, the reliance is misplaced.

For three reasons, *Williams* cannot support the result in these cases. First, it dealt with the exercise of the sentencing judge's discretion within the range authorized by law, rather than with rules defining the range within which discretion may be exercised. Second, "[t]he accuracy of the statements made by the judge as to appellant's background and past practices was not challenged by appellant or his counsel, nor was the judge asked to disregard any of them or to afford appellant a chance to refute or discredit any of them by cross-examination or otherwise." *Williams*, 337 U.S., at 244, 69 S.Ct., at 1081–1082. The precise question here—the burden of proof applicable to sentencing facts—was thus not before the Court in that case. Third, its rationale depended largely on agreement with an individualized sentencing regime that is significantly differ-

2. The circumstances surrounding Vernon Watts' sentencing were somewhat different from those involved in Putra's sentencing. Watts was acquitted of the crime of using a firearm in relation to a drug offense, in violation of 18 U.S.C. § 924(c), but was found guilty of certain drug crimes. *United States v. Watts*, 67 F.3d 790, 793 (C.A.9 1995). The sentencing judge enhanced Watts' base offense level by two points, pursuant to USSG § 2D1.1(b)(1), after concluding that the defendant's "possession" of the firearm in connection with the crime had been proved by a preponderance of the evidence. 67 F.3d, at 797–798. Because the "use" of a firearm and its "possession" are not identical, the judge may not have relied on facts necessarily rejected by the jury in concluding that the sentencing enhancement was appropriate. I nevertheless believe that the enhancement was inappropriate because it was based on conduct that the judge found only by a preponderance of the evidence. Since Watts' base offense level was increased by this evidence, I believe it should have been proved beyond a reasonable doubt.

3. Although the Court's decision suggests that the approach taken by the Ninth Circuit in these cases breaks from settled law in every other Circuit, the opinion ignores the fact that respected jurists all over the country have been critical of the interaction between the Sentencing Guidelines' mechanical approach and the application of a preponderance of the evidence standard to so-called relevant conduct. See, *e.g*, *United States v. Silverman*, 976 F.2d 1502, 1519, 1527 (C.A.6 1992) (Merritt, C. J., dissenting); *Id.*, at 1533 (Martin, J., dissenting); *United States v. Concepcion*, 983 F.2d 369, 389, 396 (C.A.2 1992) (Newman, C. J., concurring) ("A just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal"); *United States v. Galloway*, 976 F.2d 414, 436 (C.A.8 1992) (Bright, J. dissenting, joined by Arnold, C. J., Lay, J., and McMillian, J.); *United States v. Restrepo*, 946 F.2d 654, 663 (C.A.9 1991) (Pregerson, J., dissenting, joined by Hug, J.); *Id.*, at 664 (Norris, J., dissenting, joined by Hug, J., Pregerson, J., and D.W. Nelson, J.). Cf. *United States v. Lanoue*, 71 F.3d 966, 984 (C.A.1 1995) ("Although it makes no difference in this case, we believe that a defendant's Fifth and Sixth Amendment right to have a jury determine his guilt beyond a reasonable doubt is trampled when he is imprisoned (for any length of time) on the basis of conduct of which a jury has necessarily acquitted him"). See also Martin, The Cornerstone Has No Foundation: Relevant Conduct in Sentencing and the Requirements of Due Process, 3 Const. L.J. 25, 34–36 (1993); Beale, Procedural Issues Raised by Guidelines Sentencing: The Constitutional Significance of the "Elements of the Sentence," 35 Wm. & Mary L.Rev. 147, 157–158 (1993); Herman, The Tail that Wagged the Dog: Bifurcated Fact–Finding under the Federal Sentencing Guidelines and the Limits of Due Process, 66 S. Cal. L.Rev. 289 (1992); Heaney, The Reality of Guidelines Sentencing: No End to Disparity, 28 Am.Crim. L.Rev. 161, 208–220 (1991).

ent from the Guidelines system. "*Williams* was decided in the context of a sentencing 'system that focuse[d] on subjective assessments of rehabilitative potential....' Saltzburg, [Sentencing Procedures: Where Does Responsibility Lie?, 4 Fed. Sent. Rep. 248, 250 (1992)]." *United States v. Wise,* 976 F.2d 393, 409 (C.A.8 1992) (Arnold, C. J., concurring in part and dissenting in part). As this Court has acknowledged, see *Burns,* 501 U.S., at 132, 111 S.Ct., at 2184, the Guidelines wrought a dramatic change in sentencing processes, replacing the very system that justified *Williams* with a rigid system in which "[f]or most defendants in the federal courts, sentencing is what the case is really about." *Wise,* 976 F.2d, at 409.

Even more than *Williams,* this Court, like all of the Circuits that have adopted the same approach as the District Courts in these cases, relies primarily on the misguided five-to-four decision in *McMillan v. Pennsylvania,* 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). For the reasons stated in my dissent in that case, *id.,* at 95–104, 106 S.Ct., at 2421–2425, I continue to believe that it was incorrectly decided and that its holding should be reconsidered. Even accepting its holding that the Constitution does not require proof beyond a reasonable doubt to establish a sentencing factor that increases the minimum sentence without altering the maximum, however, there are at least two reasons why *McMillan* does not dictate the outcome of these cases.

In *McMillan,* as in these cases, the defendant's minimum sentence was enhanced on the basis of a fact proved by a preponderance of the evidence. But in *McMillan,* the maximum was unchanged; the sentence actually imposed was within the range that would have been available to the judge even if the enhancing factor had not been proved. In these cases, however, the sentences actually imposed were higher than the Guidelines would have allowed without evidence of the additional offenses. The *McMillan* opinion pointedly noted that the Pennsylvania statute had not altered "the maximum penalty for the crime committed" and operated "solely to limit the sentencing courts' discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." *Id.,* at 87–88, 106 S.Ct., at 2417. Given the Court's acknowledged "inability to lay down any 'bright line' test" that would define the limits of its holding, *id.,* at 91, 106 S.Ct., at 2419, and its apparent assumption that a sentencing factor should not be allowed to serve as a "tail which wags the dog of the substantive offense," *id.,* at 88, 106 S.Ct., at 2417; see also *ante,* at 637, n. 2, the holding should not be extended to allow a fact proved by only a preponderance to increase the entire range of penalties within which the sentencing judge may lawfully exercise discretion.[4]

Moreover, *McMillan* addressed only the constitutionality of a statute the meaning of which was perfectly clear. Nothing in the text of the Sentencing Reform Act of 1984 even arguably mandates the result that the District Courts reached in these cases. Indeed, as Justice BREYER points out in his separate concurrence, *ante,* at 638–639, the Sentencing Commission unquestionably has the authority to disallow the consideration of acquitted conduct. Similarly, the Commission could have chosen to set the burden of proof for sentencing proceedings at beyond a reasonable doubt without running afoul of the enabling legislation. Given the lack of a contrary command in the statute itself, as well as the complete absence of any pre-1984 precedent for establishing the range of a permissible sentence on the basis of a fact proved only by a preponderance of the evidence, the *McMillan* opinion which was announced in 1986 can shed no light on the meaning of the 1984 Act.

Nor does the Court's decision in *Witte v. United States,* 515 U.S. ——, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995), dictate the answer to the question presented by these cases. I continue to disagree with the conclusion reached by the Court in *Witte,* that the Dou-

4. I recognize that the shift from one Guideline range to a higher range does not produce a sentence beyond the statutory maximum. It does, however, mandate a sentence that is above the maximum that the judge would have had the legal authority to impose absent consideration of the "relevant conduct."

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ble Jeopardy Clause does not prohibit convicting and sentencing an individual for conduct that has been decisive in determining the individual's offense level for a previous conviction. But that is a different issue from the one here. The opinion in *Witte*, carefully and repeatedly, confined the Court's holding to the double jeopardy context. *Id.*, at ——, 115 S.Ct., at 2205 (defendant in this case "is punished, for double jeopardy purposes, only for the offense of which the defendant is convicted"); *id.*, at ——, 115 S.Ct., at 2206 (disputed practice is not "punishment for that conduct within the meaning of the Double Jeopardy Clause"); *id.*, at ——, 115 S.Ct., at 2208 (practice "constitutes punishment only for the offense of conviction for purposes of the double jeopardy inquiry"). What is at issue in these cases is not whether a defendant is being twice punished or prosecuted for the same conduct, but whether her initial punishment has been imposed pursuant to rules that are authorized by the statute and consistent with the Constitution.

IV

Putra's case involves "multiple offenses." She was charged with several offenses and received a sentence that was based on the judge's conclusion that she was guilty of each of these multiple offenses even though she had in fact been found guilty of only one offense. It is therefore appropriate to consider what the Sentencing Reform Act has to say about "multiple offenses."

In 28 U.S.C. § 994(*l*) Congress specifically directed the Commission to ensure that the Guidelines included incremental sentences for multiple offenses. That subsection provides:

> "The Commission shall insure that the Guidelines promulgated . . . reflect—
>
> "(1) the appropriateness of imposing an incremental penalty for each offense in a case *in which a defendant is convicted of*—
>
> "(A) *multiple offenses* committed in the same course of conduct . . . ; and
>
> "(B) *multiple offenses* committed at different times . . ." (Emphasis added.)

It is difficult to square this explicit statutory command to impose incremental punishment for each of the "multiple offenses" of which a defendant "is convicted" with the conclusion that Congress intended incremental punishment for each offense of which the defendant has been acquitted.[5] The Court, however, appears willing to read the statute's treatment of multiple offenses as though it authorized an incremental penalty for each offense for which the defendant was indicted if she is convicted of at least one such offense. The fact that the text of the statute expressly authorizes such incremental punishment "for each offense" only when a "defendant is convicted of . . . multiple offenses" conveys a far different message to thoughtful judges.[6]

In my opinion the statute should be construed in the light of the traditional requirement that criminal charges must be sus-

5. Courts upholding the Guidelines' relevant conduct provisions and their application in cases such as these have tended to focus their attention exclusively on those provisions in the statute that direct courts and the Commission to consider the "nature and circumstances of the offense" in determining an appropriate sentence. 18 U.S.C. § 3553(a)(1); see also 28 U.S.C. § 994(d). In § 994(d), Congress granted the Sentencing Commission the authority to "consider whether [certain enumerated factors], among others, have any relevance," in establishing Guidelines for offenses. Some courts have concluded that the inclusion of the qualifier "among others" in this provision indicated that Congress intended the Commission to include anything it felt was relevant to the sentencing decision. See, *e.g., United States v. Galloway*, 976 F.2d at 420–421; *United States v. Thomas*, 932 F.2d 1085, 1089 (C.A.5 1991), cert. denied *sub nom. Pullock v. United States*, 502 U.S. 895, 112 S.Ct. 264, 116 L.Ed.2d 217, and *Samuels v. United States*, 502 U.S. 962, 112 S.Ct. 428, 116 L.Ed.2d 447 (1992).

But this provision cannot be read separately from the rest of the statute. The clear congressional directive concerning sentencing for "multiple offenses" must be read as an important limit on the "othe[r]" factors that can be considered relevant to determination of an offense level.

6. Some judges have concluded, in large part because of this provision, that the Guidelines' relevant conduct rules are outside the scope of the authority Congress granted to the Commission. See *Galloway*, 976 F.2d, at 430–431 (Beam, J., dissenting); *United States v. Davern*, 970 F.2d 1490, 1507 (C.A.6 1992) (Merritt, C.J. dissenting).

tained by proof beyond a reasonable doubt. That requirement has always applied to charges involving multiple offenses as well as a single offense. Whether an allegation of criminal conduct is the sole basis for punishment or merely one of several bases for punishment, we should presume that Congress intended the new sentencing Guidelines that it authorized in 1984 to adhere to longstanding procedural requirements enshrined in our constitutional jurisprudence. The notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to that jurisprudence.

I respectfully dissent.

Justice KENNEDY, dissenting.

A case can be made for summary reversal here, based on such factors as the conflict between the rationale of the Court of Appeals for the Ninth Circuit and the rationale of this Court in *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), and, to a lesser extent, in *Witte v. United States*, ––– U.S. ––––, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995); the conflict the Ninth Circuit created, without considering *en banc* its departure from the rule followed in all other circuits; and the lack of any clear authority to constrain the sentencing judge as the Court of Appeals seeks to do.

On the other hand, it must be noted the case raises a question of recurrent importance in hundreds of sentencing proceedings in the federal criminal system. We have not decided a case on this precise issue, for it involves not just prior criminal history but conduct underlying a charge for which the defendant was acquitted. At several points the per curiam opinion shows hesitation in confronting the distinction between uncharged conduct and conduct related to a charge for which the defendant was acquitted. The distinction ought to be confronted by a reasoned course of argument, not by shrugging it off.

At the least it ought to be said that to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal, concerns noted by Justice Stevens and the other federal judges to whom he refers in his dissent. If there is no clear answer but to acknowledge a theoretical contradiction from which we cannot escape because of overriding practical considerations, at least we ought to say so. Finally, as Justice Stevens further points out, the effect of the Sentencing Reform Act of 1984 on this question deserves careful exploration. This is illustrated by the fact that Justices Scalia and Breyer each find it necessary to issue separate opinions setting forth differing views on the role of the Sentencing Commission.

For these reasons the case should have been set for full briefing and consideration on the oral argument calendar. From the Court's failure to do so, I dissent.

Johnny Lynn OLD CHIEF, Petitioner,

v.

UNITED STATES.

No. 95–6556.

Argued Oct. 16, 1996.

Decided Jan. 7, 1997.

Defendant was convicted in the United States District Court for the District of Montana, Paul G. Hatfield, J., of being a felon in possession of a firearm, using or carrying a firearm during the commission of a violent crime, and assault with a dangerous weapon. Defendant appealed. The Ninth Circuit Court of Appeals affirmed. Defendant sought certiorari. After granting certiorari, the Supreme Court, Justice Souter, held that: (1) district court abuses its discretion when it spurns defendant's offer to admit to evidence of prior conviction element of offense and instead admits full record of prior judgment of conviction when name or nature

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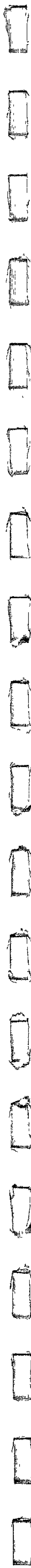

Agenda Item II E4

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition: Proposal to Amend**

DATE: **September 10, 1997**

Attached is a proposal from the Department of Justice to the effect that Rule 12.2 be amended to specifically reflect the ability of the trial court to order a mental examination under 18 U.S.C. § 4247. The letter is fairly self-explanatory re the reasons offered to support the amendment.

I have attached a copy of the *Davis* case, referenced in the Department's letter and also copies of §§ 4241, 4242 and 4247.

Please note that the letter also includes a recommendation to amend Rule 32 concerning the same subject matter. That point is addressed in a separate memo *infra*.

U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

JUL 15 1997

The Honorable D. Lowell Jensen
Judge of the United States District Court
Northern District of California
1301 Clay Street, 4th Floor
Oakland, CA 94612

Dear Judge Jensen:

I am writing to request that the Advisory Committee on Criminal Rules consider amending the Rules relating to mental examinations of defendants in two respects: (1) to clarify that Rule 12.2(c) permits a court to order, on motion of the government, a mental examination of a defendant who gives notice of an intent under Rule 12.2(b) to introduce expert testimony in support of a defense of mental condition bearing on the issue of guilt; and (2) to extend the Rules to permit a court to order a government-requested mental examination of a defendant when it appears that the defendant will offer expert testimony as to mental condition at sentencing.

On the first issue, the lower courts are now in conflict. Until recently, the courts had construed Rule 12.2(c) as including not only situations in which a defendant has given notice under Rule 12.2(a) of an intent to rely on expert evidence to prove a defense of insanity, but also those in which notice was given under Rule 12.2(b). However, the law is currently in some disarray as a result of United States v. Davis, 93 F.3d 1286 (6th Cir. 1996). There the court held that, because Rule 12.2(c) only authorizes the court to order a mental examination "pursuant to 18 U.S.C. 4241 or 4242," which relates to competency and sanity examinations, and not under 18 U.S.C. 4247, the general provision regarding psychiatric and psychological examinations, the Rule does not permit a court to order a mental examination in the situation addressed by Rule 12.2(b). The court indicated in dicta, however, that a trial court nevertheless had inherent authority to order a noncustodial examination in proper circumstances, which it declined to define. See also, following Davis, United States v. Akers, 945 F. Supp. 1442 (D. Colo. 1996).

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We believe it is patently unfair, and contrary to the truth-seeking function of a criminal trial, to permit only the defendant to be able to undergo a mental examination by an expert of his or her choice and to offer such evidence on the issue of guilt, without affording the government the opportunity for an independent (and if necessary custodial) examination of the defendant by its own expert. Such a result is contrary to Section 4.05(1) of the Model Penal Code, on which the drafters of Rule 12.2(c) expressly relied in the Advisory Committee Note.

The court in Davis was troubled by what it regarded as a serious constitutional question involving self-incrimination whether a defendant could be made to undergo a government-requested mental examination in light of Estelle v. Smith, 451 U.S. 454 (1981), where the court held that the government's use at the capital sentencing phase of a doctor's testimony arising from a court-ordered competency examination violated the defendant's Fifth Amendment privilege because he was not advised of his right to remain silent and that his statements could be used against him at sentencing. But as the Advisory Committee Note to Rule 12.2(c) observes, Estelle itself intimates that a defendant can be required to submit to a mental examination when his silence may deprive the government of the only effective means it has of controverting his proof on an issue that the defendant himself interjects. See 451 U.S. at 465. Moreover, the Estelle opinion emphasized that the defendant in that case "introduced no psychiatric evidence, nor had he indicated that he might do so." 451 U.S. at 466.

Subsequent decisions, both of the Supreme Court and of the courts of appeals, have uniformly construed Estelle narrowly and have found a waiver of Fifth Amendment self-incrimination rights when the defendant has opted to introduce expert testimony at trial as to mental condition. E.g., Powell v. Texas, 492 U.S. 680, 683-4 (1989); Buchanan v. Kentucky, 483 U.S. 402, 421-4 (1987); Presnell v. Zant, 959 F.2d 1524, 1533 (11th Cir. 1992); Williams v. Lynaugh, 809 F.2d 1063, 1068 (5th Cir.), cert. denied, 481 U.S. 1008 (1987); Vardas v. Estelle, 715 F.2d 206, 209 (5th Cir. 1983), cert. denied, 465 U.S. 1104 (1984); United States v. Madrid, 673 F.2d 1114, 1119-21 (10th Cir. 1982). See also United States v. Vest, 905 F. Supp. 651, 653 (W.D. Mo. 1995)(finding waiver of Estelle at the capital penalty phase when a "defendant elects, with the advice of counsel, to put his mental status into issue"); United States v. Haworth, 942 F. Supp. 1406 (D.N.M. 1996)(same).

Rule 12.2(c), of course, only allows the introduction and use against the defendant of any statements made by the defendant during a mental examination when the defendant has introduced testimony on an issue respecting mental condition. The Rule thus embodies the triggering or waiver principle first hinted at in Estelle v. Smith and relied on in subsequent similar situations

by the cases cited above. In sum, we do not share the Davis court's belief that the constitutional issue is a serious or difficult one, and we urge that the Rule be amended to clarify the power of a trial court to do justice "in an appropriate case" by granting the government's request for an independent, and if necessary custodial, mental examination of the defendant, when the defendant gives notice of an intent to rely on expert testimony of his or her mental condition on the issue of guilt.

One relatively simple way to accomplish this, suggested by the Davis opinion itself, would be to amend the first sentence of Rule 12.2(c) to reference not only 18 U.S.C. 4241 and 4242 but also 18 U.S.C. 4247. The pertinent sentence would then read: "In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. 4241, 4242, or 4247."

A second way that we think the Rules should be amended to permit a court-ordered mental examination of a defendant involves sentencing proceedings. The Rules nowhere authorize a court-ordered mental examination of the defendant relating to sentencing. This is a gap that should be remedied.

For example, defendants in capital proceedings, in a significant percentage of federal cases, have sought mental examinations with a view toward offering expert evidence relating to mental disease or condition in mitigation at the sentencing phase. See, e.g., United States v. Vest, supra; United States v. Haworth, supra; see also, setting forth as mitigating factors, 18 U.S.C. 3592(a)(1)(impaired capacity), (a)(6)(severe mental or emotional disturbance). Likewise in noncapital sentencing proceedings, to which the sentencing guidelines apply, defendants may sometimes wish to offer expert evidence stemming from mental examinations in an effort to persuade the court to depart downward in unusual cases. See Guideline 5H1.3 (mental condition not "ordinarily" relevant); but compare Guideline 5K2.13 (diminished capacity relevant in some cases). In both instances, the government should be able to obtain a court-ordered mental examination by another expert, for the same kind of fairness reasons as undergird Rule 12.2(c).

Leaving aside the question whether defendants should be required, as in Rule 12.2(a) and (b), to give some form of timely notice of an intention to offer such expert testimony (both Vest and Haworth granted government motions to so require, apparently in the exercise of inherent authority),[1] if it appears that they

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[1] In order to clarify the law and prevent future litigation, we believe the Rules should also be amended to require adequate notice of an intention to offer expert testimony at the sentencing phase.

intend to do so, the trial judge should be able to order that the defendant undergo a mental examination by another expert. See Vest, supra, 905 F. Supp. at 653: "If a defendant elects to present mitigation testimony addressing his mental status, then ... [u]nless the government is allowed to conduct its own mental health examination, it may be deprived 'of the only effective means it has of controverting ... proof on an issue that [defendant has chosen to] interject into the case.'", quoting from Estelle. In sum, in order to promote fairness and avoid future litigation, the Rules should be amended to permit court-ordered mental examinations of defendants when appropriate in sentencing proceedings, both capital and noncapital.

Your and the Committee's consideration of these matters is appreciated.

Sincerely,

(signed) John C. Keeney

John C. Keeney
Acting Assistant Attorney General

charges of which Comer was acquitted. However, we AFFIRM Comer's conviction and sentence in all other respects.

UNITED STATES of America, Plaintiff–Appellee,

v.

Margaret Knape DAVIS, Defendant–Appellant.

No. 96–1156.

United States Court of Appeals, Sixth Circuit.

Argued March 29, 1996.

Decided Aug. 26, 1996.

Defendant was charged with wire fraud, uttering, possessing counterfeit and forged securities, and conspiracy to defraud. The United States District Court for the Western District of Michigan, Richard A. Enslen, Chief Judge, entered order compelling that defendant be committed for 45–day period of psychiatric and psychological examination. Defendant appealed. The Court of Appeals, Wells, J., sitting by designation, held that: (1) commitment order fell within narrow class of cases reviewable on interlocutory appeal under collateral order doctrine; (2) defendant's assertion of mental incapacity at time of offense did not permit district court to commit her for examination of her present competency; (3) district court lacked authority to order commitment for mental examination based only on defendant's notice of intent to offer defenses of diminished capacity or mental disease or defect or incapacity to form specific intent; but (4) district court had inherent authority to order reasonable and noncustodial examination of defendant's mental condition at time of offense, after defendant had consented to examination and therefore waived privilege against self-incrimination.

Reversed and remanded.

1. Criminal Law ⟹1023(2, 3)

Final judgment rule is strictly applied to ensure prompt adjudication of criminal charges, but collateral order doctrine permits interlocutory appeal from narrow class of nonfinal orders which finally determine claims of right separable from, and collateral to, rights asserted in action, which are too important to be denied review and too independent of cause itself to require that appellate consideration be deferred until whole case is adjudicated.

2. Criminal Law ⟹1023(3)

To come within collateral order doctrine's narrow exception to final judgment rule, order must, at minimum, conclusively determine disputed question, must resolve important issue completely separate from merits of action, and must be effectively unreviewable on appeal from final judgment.

3. Criminal Law ⟹1023(3)

Order for 45–day period of commitment for psychiatric and psychological examination fell within narrow class of cases reviewable on interlocutory appeal under collateral order doctrine, in light of circumstances that order conclusively determined there would be examination of defendant's competency to stand trial and government's entitlement to examination of defendant's mental state at time of offense, that such issues were completely independent from issue of defendant's guilt or innocence of crimes charged, and that loss of liberty occasioned by commitment and forced intrusion from examination would be completely unreviewable by time of final judgment.

4. Mental Health ⟹434

Defendant's assertion of mental incapacity at time of offense did not permit or require district court to commit her for examination of her present competency, absent evidence to support finding of reasonable cause to believe defendant was incompetent; although defendant was under psychiatric care, motion for reconsideration of commit-

ment order included letter from defendant's treating psychiatrist who concluded defendant was competent. 18 U.S.C.A. § 4241(a).

5. Mental Health ⚷434

Even if defendant requests competency examination, district court has independent obligation to determine whether there is reasonable cause to question competency before ordering examination, particularly when order subjects defendant to involuntary commitment.

6. Mental Health ⚷434

Statute requiring district court to order psychiatric or psychological examination of defendant on motion of government upon defendant's filing of notice to rely on insanity defense did not permit or require court-ordered examination by government regarding defendant's mental condition at time of alleged offense when defendant gave notice of her intent to rely on expert testimony on that subject. 18 U.S.C.A. § 4242; Fed.Rules Cr. Proc.Rule 12.2(a, b), 18 U.S.C.A.

7. Mental Health ⚷435

Rule providing that court could, in appropriate case, order mental examination of defendant pursuant to statutes authorizing examination of competency to stand trial if there is reasonable cause to question competency or to respond to claim of insanity did not authorize district court to order 45-day commitment for psychiatric and psychological examination based only on defendant's notice of intent to offer defenses of diminished capacity or mental disease or defect or incapacity to form specific intent, in light of Fifth Amendment concerns which would arise from compelled, custodial pretrial examination of defendant concerning her mental state at time of alleged offense which was element of crime on which government bore burden of proof. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. §§ 4241, 4242; Fed.Rules Cr. Proc.Rule 12.2(c), 18 U.S.C.A.

8. Mental Health ⚷434

District court had inherent authority to order examination of defendant concerning her mental condition at time of offense, provided examination would be both reasonable and noncustodial, where defendant had consented to examination and therefore waived privilege against self-incrimination. U.S.C.A. Const.Amend. 5.

Michael A. MacDonald, Asst. U.S. Attorney (argued and briefed), Office of the U.S. Attorney for the Western District of Michigan, Grand Rapids, MI, for Plaintiff-Appellee.

Mayer Morganroth (briefed), Morganroth & Morganroth, Southfield, MI, Nathan Z. Dershowitz (argued), Dershowitz & Eiger, New York City, for Defendant-Appellant.

Before: NORRIS and SUHRHEINRICH, Circuit Judges, WELLS,* District Judge.

WELLS, District Judge.

This is an interlocutory appeal from a decision of the district court requiring defendant-appellant, Margaret Knape Davis, to self-surrender at Federal Medical Center ("FMC") Carswell in Fort Worth, Texas, for a forty-five day period of psychiatric and psychological examination. We conclude the district court lacked authority to order the commitment and examination of the defendant under either Criminal Rule 12.2(c) or 18 U.S.C. §§ 4241 and 4242. However, under the circumstances of this case, we hold the district court has the inherent authority to order a reasonable non-custodial examination of the defendant concerning her mental condition at the time of the offense. Therefore, we **REVERSE** the district court's order and **REMAND** this case for further proceedings.

I. History of Proceedings

Defendant is charged in fourteen counts of a fifteen count superseding indictment filed November 28, 1995. The superseding indictment charges her with wire fraud, uttering, possessing counterfeit and forged securities, and conspiracy to defraud, based on events which occurred between 1992 and 1995.

* The Honorable Lesley Brooks Wells, United States District Judge for the Northern District of Ohio, sitting by designation.

On December 21, 1995, defendant gave notice that she intended "to offer the defenses of diminished capacity and/or mental disease and/or defect and/or incapacity to form specific intent" pursuant to Fed.R.Crim.P. 12.2(b). Five days later, the government filed a motion to commit the defendant for a pretrial psychiatric examination for competency and insanity, and to review the conditions of the defendant's bond. In response to this motion, defendant stated she had no objection to a sanity or a competency examination, but objected to commitment for that purpose.

At a pretrial conference on January 5, 1996, the district court heard oral argument regarding the government's motion to commit the defendant for psychiatric examination. In an oral ruling, the district court stated, "[t]here is no question but that the government is entitled to a mental examination of the defendant pursuant to Rule 12.2 of the Federal Rules of Criminal Procedure and 18 U.S.C. 4242," noting that "[t]he defendant does not ... even challenge that." "The issue," said the district court, "is whether the defendant must or may be placed in custody for the purpose of conducting an evaluation for a period of at least 45 days." The court further noted it was "looking for some evaluation which would consider both issues of competence to stand trial and the issue of her mental capacity."

The government had stated three reasons for requesting commitment: "economics," "the nature of the crime itself," and "obtaining an equal field regarding the ability to watch [the defendant] around the clock." The district court stated it was "impressed with the economics argument, but not as impressed with it as ... with the other two arguments made":

> I am more persuaded by the argument made that the examination has to be cognizant of the fact that the claim of diminished capacity covers a long period of time and specific periods of time, which based on my experience with psychologists in the past has been difficult to do.... [The government] is entitled to have an input, medical input, and Ph.D. psychological input regarding the diminished capacity of defendant over a period that might go as far back as 1988, but at least goes back as far as three years.
>
> More importantly, it seems to me that the government seeks a level playing field. Mr. Morganroth [defendant's counsel], to his credit, admits that he would call the treating psychiatrist. It is clearly reasonable to this Court that a jury would be impressed by a treating psychiatrist, and that the psychiatrist who treats her or sees her, evaluates her on an outpatient basis won't have the same ability.
>
> The Court believes that the Justice Department is entitled to some close observation of this defendant on an around-the-clock basis, and with teams that include both psychologists and psychiatrists.
>
> * * * *
>
> I am going to order that she be committed for 45 days pursuant to the statute for the reasons that I have set forth....

The district court ordered the defendant to surrender voluntarily at FMC Carswell, Texas, on January 22, 1996, for a forty-five day period of psychiatric and psychological examination.

Defendant moved the district court to reconsider its involuntary commitment order or to stay the order for twenty-one days to permit the defendant to seek appellate review. Attached to the motion was a letter from the defendant's treating psychiatrist, Steven H. Berger, M.D., who stated, among other things, that in his judgment the defendant "understands (1) the nature of the charges against her, (2) the possible consequences if found guilty, and (3) the role that her attorneys have in representing her in her defense."

The district court denied the motion to reconsider, but granted the motion for a stay until February 12, 1996, to allow the defendant to appeal to this Court. Following oral argument in this matter, this Court stayed the order of commitment pending this appeal.

II. Jurisdiction

The district court's commitment order was not a "final order" appealable under 28

U.S.C. § 1291. The government therefore contends this Court lacks jurisdiction over this appeal.

[1, 2] In criminal cases in particular, the final judgment rule is strictly applied to ensure the prompt adjudication of criminal charges. *Flanagan v. United States,* 465 U.S. 259, 264–65, 104 S.Ct. 1051, 1054–55, 79 L.Ed.2d 288 (1984). However, the collateral order doctrine permits an interlocutory appeal from a narrow class of non-final orders which "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). To come within this "narrow exception," the order must, "at a minimum," meet three criteria:

> First, it "must conclusively determine the disputed question"; second, it must "resolve an important issue completely separate from the merits of the action"; third, it must be "effectively unreviewable on appeal from a final judgment."

Flanagan, 465 U.S. at 265, 104 S.Ct. at 1055.

[3] An order of commitment for psychiatric examination easily satisfies the requirements of the collateral order doctrine. First, the order here conclusively determines (a) there should be an examination of the defendant's competency to stand trial, and (b) the government is entitled to an examination of the defendant's mental state at the time of the offense. While the district court order did not finally decide the defendant's competency or mental capacity at the time of the offense, the decisions reached are sufficiently conclusive to have been relied upon by the district court in ordering a forty-five day period of involuntary commitment, a serious consequence itself. *United States v. Weissberger,* 951 F.2d 392, 396 (D.C.Cir.1991). These issues are completely independent from the issue of the defendant's guilt or innocence of the crimes charged. Finally, the loss of liberty occasioned by the commitment for examination, and the forced intrusion of a court-ordered psychiatric examination, are completely unreviewable by the time of final judgment. Appellate review after final judgment would be available only if the defendant is found guilty, and even then, no effective relief could be provided for her loss of liberty during the period of commitment. *United States v. Weissberger,* 951 F.2d 392, 396 (D.C.Cir.1991); *United States v. Gold,* 790 F.2d 235, 239 (2d Cir.1986) (discussing unreviewability of an order of commitment); *see United States v. White,* 887 F.2d 705, 707 (6th Cir.1989) (implicitly recognizing proper exercise of jurisdiction over appeal from order of commitment to determine competency).

Therefore, the district court's order of commitment falls within that narrow class of cases reviewable on interlocutory appeal under the collateral order doctrine, and this Court has jurisdiction over the instant appeal. We now turn to the merits of the defendant's appeal.

III. Law and Analysis

Defendant presents three issues for review. First, defendant argues that a defendant who gives notice of her intent to present psychiatric evidence of her mental state at the time of the offense is not subject to pretrial commitment for examination under Fed.R.Crim.P. 12.2(c) or under 18 U.S.C. § 4242, because those provisions only authorize psychiatric examination concerning the defendant's *sanity,* which is not at issue here. Second, defendant claims the district court erred by ordering her committed for a competency examination, because there was no evidence in the record to support a determination of reasonable cause to question the defendant's competency, nor was there any showing that commitment was necessary to perform a competency examination. Finally, defendant asserts her involuntary commitment for forty-five days violates her fifth amendment right to due process.

A. *Competency Examination*

We first address defendant's contention that the district court erred by committing her for a competency examination. The government moved the district court for an ex-

amination of the defendant's competency, asserting the defendant's notice of intent to present expert testimony regarding her mental state provided reasonable cause to question her competency. Based on the government's motion, the district court ordered defendant committed for a "psychiatric and psychological examination for her competency to stand trial." The government has not responded to defendant's argument that this order was erroneous.

[4] The district court could order a competency examination only if it found "reasonable cause to believe" the defendant was incompetent. 18 U.S.C. § 4241(a). There was little evidence in the record to support such a finding here. The defendant's assertion of "mental incapacity" at the time of the offense did not permit or require an examination of her present competency. Although there is some suggestion in the record that the defendant is currently under psychiatric care, even if she were mentally ill, "[i]t does not follow that because a person is mentally ill he is not competent to stand trial." *Newfield v. United States,* 565 F.2d 203, 206 (2d Cir.1977), *cited with approval in United States v. Collins,* 949 F.2d 921, 925 (7th Cir.1991).

[5] Defendant's lack of objection to a competency examination does not justify the order. Even if the defendant herself requests an examination, the district court has an independent obligation to determine whether there is reasonable cause to question her competency before ordering an examination, particularly when the order subjects the defendant to involuntary commitment. *Collins,* 949 F.2d at 925. The district court here erred by ordering a competency examination without first finding reasonable cause to believe the defendant was incompetent.

The district court did not address the competency examination at all in his ruling on the defendant's motion for reconsideration, despite the attached letter from the defendant's treating psychiatrist, who concluded she was competent. Even if we assume the district court had reasonable cause to question the defendant's competency when it issued its order of commitment, this new evidence required at a minimum that the district court weigh the competing evidence and determine whether reasonable cause continued to exist. Absent a reasonable ground to question the treating psychiatrist's conclusion, the district court was not justified in continuing to question defendant's competency.

Therefore, the district court erred by denying the motion for reconsideration with respect to the order for a competency evaluation.

B. *Examination Regarding Mental State at the Time of the Offense*

More complex issues are presented by the defendant's argument that the district court lacked authority to commit her for an examination of her mental state at the time of the offense. Defendant asserts that neither 18 U.S.C. § 4242 nor Fed.R.Crim.P. 12.2 authorizes a district court to order such an examination. Defendant further argues the compulsion of a court order, particularly one that restrains the defendant's liberty by committing her or him for the purpose of examination, raises serious constitutional issues which militate against implication of the power under the Criminal Rules.

For purposes of analysis, it is important to separate the questions (a) whether the district court was authorized to order any examination at all, and (b) whether the district court was authorized to order the kind of examination it did. Logically, the second question cannot be reached until the first question is answered affirmatively. More important, the statutory and constitutional concerns raised by the two questions are distinct.

The question whether the district court was authorized to order *any* examination raises, most conspicuously, the question whether there is any statutory or other authority for compelling an examination, and whether a compelled examination may implicate the defendant's Fifth Amendment right against self-incrimination,[1] as well as her

1. The Fifth Amendment right against self-incrimination is raised because the defendant is com-

Sixth Amendment rights to counsel[2] and to compel witnesses in her favor.[3]

The circumstances under which an examination can be ordered, and the time, place, and manner of conducting the examination, raise due process concerns about the appropriate limitations on the government's power to restrain the defendant's liberty in order to conduct the examination.

1. *Authority to Order Examination of a Defendant Who Gives Notice of Intent to Present Expert Testimony Regarding Her Mental Condition at the Time of the Alleged Offense.*

We first confront the question whether the district court was authorized to order *any* examination of the defendant under the circumstances of this case. The parties have suggested two provisions which might authorize a court-ordered psychiatric examination of the defendant's mental condition at the time of the offense, 18 U.S.C. § 4242 and Rule 12.2. In light of our conclusion that neither the rule nor the statute authorizes a court-ordered examination, we also consider the courts' inherent authority to order an examination.

a. *Authority Under 18 U.S.C. § 4242.*

[6] Clearly, the defendant could not be committed for the purpose of conducting a psychological or psychiatric examination pursuant to 18 U.S.C. § 4242.[4] Section 4242 *requires* a district court to order a psychiatric or psychological examination of the defendant on the motion of the government "[u]pon the filing of a notice, as provided in Rule 12.2[(a)] of the Federal Rules of Criminal Procedure, that the defendant intends to rely on the defense of *insanity*." (Emphasis added.)

Defendant did not give notice of her intent to rely on the defense of insanity, and disclaims any such intent. Rather, she gave notice of her intent "to introduce expert testimony relating to a mental disease or defect or any other mental condition ... bearing on the issue of guilt." Fed.R.Crim.P. 12.2(b).

Section 4242 neither permits nor requires a court-ordered examination by the government regarding the defendant's "mental condition" at the time of the alleged offense when the defendant gives notice of her intent to rely on expert testimony on that subject. *See United States v. Marenghi,* 893 F.Supp. 85, 99 (D.Me.1995).

b. *Authority Under Criminal Rule 12.2(c).*

[7] The government argues Rule 12.2(c) of the Federal Rules of Criminal Procedure authorized the court-ordered examination. The structure of the rule is critical to the government's argument, so the full text of Rule 12.2 is set forth in the margin.[5] The

pelled to provide testimonial evidence against herself on an element of the crime—her mental state. *See Estelle v. Smith,* 451 U.S. 454, 461–69, 101 S.Ct. 1866, 1872–76, 68 L.Ed.2d 359 (1981), and discussion *infra.*

2. The Sixth Amendment right to counsel may be raised because the court-ordered examination is arguably a "critical stage" of the proceedings at which the defendant should be permitted to have counsel present if she desires. *See Estelle v. Smith,* 451 U.S. 454, 470–71, 101 S.Ct. 1866, 1876–77, 68 L.Ed.2d 359 (1981).

3. The Sixth Amendment right to compel witnesses in the defendant's favor is raised by the potential sanction under Fed. R.Crim. P. 12.2(d) if the defendant refuses to submit to a court-ordered examination: exclusion of her expert testimony regarding her mental condition.

4. Indeed, the government does not argue that the examination of the defendant here was permitted by § 4242. The *potential* applicability of that statute has been raised by the *defendant,* perhaps prompted by concern that the statute might be considered applicable because of the related nature of the defenses of insanity and diminished capacity. The government has not responded to defendant's argument that § 4242 does not authorize a court-ordered psychiatric examination of the defendant here. Rather, it bases its assertion of a right to examination solely on Fed. R.Crim.P. 12.2(c).

5. Fed.R.Crim.P. 12.2 provides:

(a) **Defense of Insanity.** If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as

government argues the identical syntactic structure of the first sentences of subdivisions (a) and (b) implies that notice of either an insanity defense or an intent to introduce psychiatric evidence of mental condition at the time of the offense may present an "appropriate case" for a court-ordered examination under subdivision (c). Furthermore, the government asserts, the separate sanction provided in subdivision (d), which allows the district court to exclude expert testimony if the defendant fails "to give notice when required by subdivision (b)" or "to submit to an examination when ordered under subdivision (c)," makes little sense if the only possible examination is for insanity. Finally, the government contends the stated purpose of the notice requirement—to avoid delay—implicitly assumes the government is entitled to conduct its own expert examination of the defendant before trial.

The essence of the government's argument is as follows: A defendant who gives notice of intent to introduce expert testimony may be "an appropriate case" under Rule 12.2(c), which would permit the court to order "an examination pursuant to 18 U.S.C. 4241 or 4242." While it may be possible to read Rule 12.2(c) in this fashion, to base this conclusion on the similar *syntactic* structure of subdivisions (a) and (b) is misleading. The similarity between the first sentences of subdivision (a) and (b) only concerns the timing and manner in which the defendant is required to give notice to the government. Similarities regarding such mechanics do not demonstrate an intent that the subject of the notice should be treated similarly for all purposes under the rule.

On the other hand, the *facts* of which the defendant is required to give notice under subdivisions (a) and (b) differ, in a highly significant way. Subdivision (a) directs the defendant to give notice of his or her intent "to rely upon the defense of insanity," while subdivision (b) directs the defendant to give notice of her or his intent "to introduce expert testimony. . . ." As Congress has already recognized in 18 U.S.C. § 4242, an insanity defense will necessarily put in issue a very specific question regarding the defendant's mental condition at the time of the offense,[6] and will therefore require that the government be permitted to examine the defendant on request.[7] By contrast, the intro-

a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(b) Expert Testimony of Defendant's Mental Condition. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) Mental Examination of Defendant. In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. 4241 or 4242. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.

(d) Failure to Comply. If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt.

(e) Inadmissibility of Withdrawn Intention. Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

6. Whether "at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality of the wrongfulness of his acts." 18 U.S.C. § 17(a).

7. The constitutional issues involved in compelled examinations regarding insanity are themselves not entirely resolved. *See United States v. Byers,* 740 F.2d 1104 (D.C.Cir.1984). These issues are not before the Court today, however. To the extent relevant to this analysis, the Court will assume the constitutionality of compelled examinations regarding insanity.

duction of expert testimony regarding a mental condition, disease, or defect does not particularly suggest the need for an examination of the defendant, let alone require it.

The kinds of expert testimony which could be presented regarding the defendant's mental condition may vary widely. For example, the defendant may seek to present expert testimony about the effects of mental retardation or a developmental disability. The expert testimony could concern a psychiatric disorder such as schizophrenia or paranoia. Expert testimony may generally describe the effects of a particular condition, relying on other evidence to establish the defendant suffered from that condition, or it may particularly concern the defendant, based on examination or observation.

The Advisory Committee Notes to the 1983 revision of Rule 12.2(b) make clear that the rule was intended to require the defendant to provide notice of any of these kinds of expert testimony. But unlike a claim of insanity, a mental condition, disease or defect requires a case by case analysis to determine whether a psychiatric or psychological examination of the defendant will be necessary for the government fairly to rebut the defendant's expert evidence.

It could be argued that Congress included the phrase "in an appropriate case" for this very reason. However, the rule's specific reference to 18 U.S.C. §§ 4241 and 4242 inhibits such an interpretation. These statutes apply only in specific circumstances. Section 4241 provides for an examination of the defendant's competency to stand trial (if there is reasonable cause to question the defendant's competency); section 4242 requires an examination regarding a claim of insanity, at the government's request. If the Supreme Court or Congress had intended Rule 12.2(c) to permit examinations in a broader array of cases, why did it not permit the court to order an examination "in an appropriate case" "pursuant to 18 U.S.C. § 4247," the general provision regarding psychiatric and psychological examinations? Why refer to both § 4241 and § 4242, when a reference to one or the other would more clearly demonstrate which set of procedures Congress intended to be applicable?

It is more reasonable to conclude that the intent of the first sentence Rule 12.2(c) was to permit the court to consider the potential applicability of § 4241 and 4242 in connection with required notices regarding mental conditions. While a suggestion of mental disease or defect at the time of the alleged offense does not itself permit or require a competency examination, for example, a history of mental disease is a factor the court should consider along with other factors such as the nature of the disease and the court's own observations. A notice of intent to assert an insanity defense will require the court to order an examination at the government's request.

Some federal courts have ordered psychiatric examinations pursuant to Rule 12.2(c) or have suggested that such an examination would be appropriate when a defendant gives notice of intent to present expert testimony regarding her or his mental condition. *See, e.g., United States v. Stackpole,* 811 F.2d 689, 697 (1st Cir.1987); *United States v. Buchbinder,* 796 F.2d 910, 915 (7th Cir.1986) (finding the government had been prejudiced by lack of notice of the defendant's intent to present expert testimony because it "did not have sufficient time prior to trial to have the defendant examined by its own expert witnesses"); *United States v. Halbert,* 712 F.2d 388 (9th Cir.1983); *United States v. Vega-Penarete,* 137 F.R.D. 233 (E.D.N.C.1991); *United States v. Banks,* 137 F.R.D. 20 (C.D.Ill.1991); *cf. United States v. Rauer,* 963 F.2d 1332, 1334 (10th Cir.1992) (noting that the district court had ordered psychiatric examination pursuant to Rule 12.2(c) and 18 U.S.C. § 4242 following defendant's notice pursuant to Rule 12.2(b)). The reasoning of some of these cases bears examination.

While noting that 18 U.S.C. §§ 4241 and 4242 only authorize psychiatric testing to determine competency or sanity, the district courts in *Vega-Penarete* and *Banks* each proceeded to examine whether Rule 12.2(c) "authorizes a court to order psychiatric evaluation of a defendant who intends to rely on a mental incapacity defense other than insanity." *Banks,* 137 F.R.D. at 21. Because a straight reading of the rule did not provide an answer, the courts turned to the Advisory

Committee Notes accompanying the rule, and concluded it was "apparent that the drafters of Rule 12.2(c) intended to allow the government to examine a defendant who intends to rely upon expert testimony regarding a mental condition." *Banks*, 137 F.R.D. at 22; *Vega-Penarete*, 137 F.R.D. at 235. The Advisory Committee Notes on which these courts relied state, in pertinent part:

> Because it is possible that the defendant will submit to examination by an expert of his own other than a psychiatrist, it is necessary to recognize that it will sometimes be appropriate for defendant to be examined by a government expert other than a psychiatrist.

This commentary addresses the *kinds* of expert testimony the defendant might seek to introduce, and the *kind* of expert examination the government might seek, not the circumstances under which a defendant could be compelled to submit to an examination. We therefore conclude this commentary provides no insight into the question whether Rule 12.2(c) was intended to permit the court to order an examination of a defendant who gives notice of an intent to introduce expert testimony regarding her or his mental condition at the time of the alleged offense.

The commentary to the 1983 revision of Rule 12.2(b) provides a more telling analysis of the purpose of Rule 12.2(b)'s notice requirement and its impact on the question whether Rule 12.2(c) should be read to permit the government to compel an examination of the defendant:

> ... in all circumstances in which the defendant plans to offer expert testimony concerning his mental condition at the time of the crime charged, advance disclosure to the government will serve "to permit adequate pretrial preparation, to prevent surprise at trial, and to avoid the necessity of delays during trial." 2 *ABA Standards for Criminal Justice* 11-55 (2d 1980). Thus, while the district court in *United States v. Hill*, 481 F.Supp. 558 (E.D.Pa.1979), incorrectly concluded that present rule 12.2(b) covers testimony by a psychologist bearing on the defense of entrapment, the court quite properly concluded that the government would be seriously disadvantaged by lack of notice. This would have meant that the government would not have been equipped to cross-examine the expert, that any expert called by the government would not have had an opportunity to hear the defense expert testify, and the government would not have had the opportunity to conduct the kind of investigation needed to acquire rebuttal testimony on defendant's claim that he was especially susceptible to inducement. Consequently, rule 12.2(b) has been expanded....

Notes of Advisory Committee on Rules, 1983 Revision to Rule 12.2(b).

The commentary notably does not suggest the government would be prejudiced if it were not given sufficient notice to enable it to examine the defendant. As the commentary implies, the government can prepare to meet expert defense evidence in a variety of ways, including the retention of a government expert to attend at trial and assist the government in cross-examination, and review of evidence relied upon by the defense expert. Thus, the need for advance notice of expert evidence does not imply a court-ordered examination of the defendant is intended or appropriate. The commentary to Rule 12.2(b) does not demonstrate the drafters intended the notice to prompt a court-ordered examination of the defendant under Rule 12.2(c).

A portion of the commentary to Rule 12.2(c) may explain the lack of any discussion in the commentary to Rule 12.2(b) regarding an examination of the defendant's mental condition at the time of the offense:

> The last sentence of subdivision (c) has been amended to more accurately reflect the Fifth Amendment considerations at play in this context. See *Estelle v. Smith*, 451 U.S. 454[, 101 S.Ct. 1866, 68 L.Ed.2d 359] (1981), holding that self-incrimination protections are not inevitably limited to the guilt phase of a trial and that the privilege, when applicable, protects against use of defendant's statement and also the fruits thereof, including expert testimony based upon defendant's statements to the expert. *Estelle* also *intimates* that "a defendant can be required to submit to a sanity examination" *and presumably some*

other forms of mental examination, when "his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case." (Emphasis added.)

Notes of Advisory Committee on Rules, 1983 Amendment to Rule 12.2(c).

We find it unlikely that the Supreme Court or Congress intended the first sentence of Rule 12.2(c) to resolve, *sub silentio,* the Fifth Amendment concerns arising from a compelled, custodial pretrial examination of a criminal defendant concerning her or his mental state at the time of the alleged offense—an element of the crime which the government bears the burden of proving.[8]

For these reasons, we conclude that Rule 12.2(c) did not authorize the district court to order the examination of the defendant regarding her mental condition at the time of the alleged offense.

c. *Inherent Authority.*

[8] While neither Rule 12.2(c) nor 18 U.S.C. §§ 4241 and 4242 authorizes a district court to order a custodial pretrial examination of the defendant concerning his or her mental state at the time of the offense, the statutes and rule do not displace extant inherent authority to order a reasonable, non-custodial examination of a defendant under appropriate circumstances. The extent of this authority of course must be determined on a case by case basis. As intimated above, serious—and as yet undecided—constitutional questions are presented. Under the particular circumstances of this case, however, where the defendant has consented to an examination (and therefore waived the privilege against self-incrimination), the Court need not decide these constitutional issues. The district court here has inherent authority to order an examination of the defendant, provided the examination is both reasonable and non-custodial.

We recognize our ruling leaves the district court without detailed guidance for its determinations regarding the terms of the examination. We do so advisedly. The proper parameters of the courts' inherent authority can only be determined based on concrete cases or controversies, after development of the factual and legal issues at the district court level.

2. *Due Process*

Because the Court finds no authority for the district court's order committing the defendant for psychiatric or psychological ex-

8. The defendant's statements to the government expert during the examination are unquestionably "testimonial." *Estelle; also see Pennsylvania v. Muniz,* 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990). Although court-ordered examinations regarding insanity have generally been found not to violate the Fifth Amendment, the fact that the defendant's mental state is an element of the crime which the government must prove may differentiate a defendant's expert evidence about her or his mental condition from a claim of insanity for purposes of determining whether a compelled pretrial examination of the defendant violates the Fifth Amendment privilege against self-incrimination.

The defendant who claims insanity interjects a new issue into the proceedings on which he or she bears the burden of proof. 18 U.S.C. § 17. The privilege is not violated by an examination, because the examination does not concern an element of the crime. *See Estelle v. Smith,* 451 U.S. 454, 465, 101 S.Ct. 1866, 1874, 68 L.Ed.2d 359 (1981). The limited purpose of the examination concomitantly restricts the use the government can make of it. The results of the examination can only be used to rebut defendant's expert evidence. *Estelle* teaches that a defendant's compelled testimony before a government expert, and the fruits of the examination (i.e., the expert's conclusions), cannot be used against the defendant in the government's case-in-chief.

When the defendant claims "diminished capacity," however, he or she seeks to undercut the government's proof of an element of the offense. Therefore, any compelled examination will necessarily involve self-incrimination. *Estelle,* 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359. While Rule 12.2(c) would prohibit the government from introducing the incriminating statements (or expert testimony based on them) unless the defendant introduces testimony regarding mental condition, the existence of an exclusionary rule will not easily justify a compelled examination in the first place. Exclusion is a remedy for a constitutional violation; the defendant should not be precluded from preventing the constitutional violation from occurring.

The issue squarely presented by a government request to examine the defendant regarding his or her mental state at the time of the offense is whether the defendant waives the privilege against self-incrimination by giving notice of intent to introduce expert evidence on that subject. Criminal Rule 12.2 was not intended to resolve this constitutional issue, and we need not and do not decide the issue here.

amination regarding her mental state at the time of the alleged offense, we need not address the subsidiary question whether such an examination violates the defendant's due process rights.

Our ruling today does not preclude the government from examining the defendant pursuant to a voluntary agreement among the parties. An agreed examination may, in fact, be of benefit to a defendant; the government's expert may well agree with his or her defense following the examination. Such a voluntary arrangement could, of course, alleviate the constitutional concerns inherent in a court-ordered examination.

IV. Conclusion

For the foregoing reasons, we find the district court erred by failing to reconsider and vacate its order committing the defendant for purposes of determining her competency to stand trial. We find no authority for the district court's order committing the defendant for purposes of conducting an examination of her mental state at the time of the offense. However, the district court has the inherent authority to order a reasonable, non-custodial examination of the defendant under the circumstances of this case. Accordingly, the district court's order is **REVERSED** and this case is **REMANDED** for further proceedings not inconsistent with this opinion.

CHAPTER 313—OFFENDERS WITH MENTAL DISEASE OR DEFECT

Sec.	
4241.	Determination of mental competency to stand trial.
4242.	Determination of the existence of insanity at the time of the offense.
4243.	Hospitalization of a person found not guilty only by reason of insanity.
4244.	Hospitalization of a convicted person suffering from mental disease or defect.
4245.	Hospitalization of an imprisoned person suffering from mental disease or defect.
4246.	Hospitalization of a person due for release but suffering from mental disease or defect.
4247.	General provisions for chapter.
[4248.	Omitted.]

§ 4241. Determination of mental competency to stand trial

(a) Motion to determine competency of defendant.—At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) Psychiatric or psychological examination and report.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

(2) for an additional reasonable period of time until—

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

(e) Discharge.—When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial. Upon discharge, the defendant is subject to the provisions of chapter 207.

(f) Admissibility of finding of competency.—A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

(As amended Oct. 12, 1984, Pub.L. 98–473, Title II, § 403(a), 98 Stat. 2057.)

§ 4242. Determination of the existence of insanity at the time of the offense

(a) Motion for pretrial psychiatric or psychological examination.—Upon the filing of a notice, as provided in Rule 12.2 of the Federal Rules of Criminal Procedure, that the defendant intends to rely on the defense of insanity, the court, upon motion of the attorney for the Government, shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(b) Special verdict.—If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules of Criminal Procedure on motion of the defendant or of the attorney for the Government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find the defendant—

(1) guilty;

(2) not guilty; or

(3) not guilty only by reason of insanity.

(As amended Oct. 12, 1984, Pub.L. 98–473, Title II, § 403(a), 98 Stat. 2059.)

§ 4243. Hospitalization of a person found not guilty only by reason of insanity

(a) Determination of present mental condition of acquitted person.—If a person is found not guilty only by reason of insanity at the time of the offense charged, he shall be committed to a suitable facility until such time as he is eligible for release pursuant to subsection (e).

(b) Psychiatric or psychological examination and report.—Prior to the date of the hearing, pursuant to subsection (c), the court shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing.—A hearing shall be conducted pursuant to the provisions of section 4247(d) and shall take place not later than forty days following the special verdict.

(d) Burden of proof.—In a hearing pursuant to subsection (c) of this section, a person found not guilty only by reason of insanity of an offense involving bodily injury to, or serious damage to the property of, another person, or involving a substantial risk of such injury or damage, has the burden of proving by clear and convincing evidence that his release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect. With respect to any other offense, the person has the burden of such proof by a preponderance of the evidence.

(e) Determination and disposition.—If, after the hearing, the court fails to find by the standard specified in subsection (d) of this section that the person's release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility until—

(1) such a State will assume such responsibility; or

(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care

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This document has been amended. Use UPDATE.
See SCOPE for more information.

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART III--PRISONS AND PRISONERS
CHAPTER 313--OFFENDERS WITH MENTAL DISEASE OR DEFECT
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Current through P.L. 105-22, approved 6-27-97

§ 4247. General provisions for chapter

(a) Definitions.--As used in this chapter--
(1) "rehabilitation program" includes--
(A) basic educational training that will assist the individual in understanding the society to which he will return and that will assist him in understanding the magnitude of his offense and its impact on society;
(B) vocational training that will assist the individual in contributing to, and in participating in, the society to which he will return;
TEXT (a) (1) (C)
(C) drug, alcohol, and other treatment programs that will assist the individual in overcoming his psychological or physical dependence; and
(D) organized physical sports and recreation programs; and
(2) "suitable facility" means a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant.
(b) Psychiatric or psychological examination.--A psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a licensed or certified psychiatrist or psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner shall be designated by the court, except that if the examination is ordered under section 4245 or 4246, upon the request of the defendant an additional examiner may be selected by the defendant. For the purposes of an examination pursuant to an order under section 4241, 4244, or 4245, the court may commit the person to be examined for a reasonable period, but not to exceed thirty days, and under section 4242, 4243, or 4246, for a reasonable period, but not to exceed forty- five days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241, 4244, or 4245, and not to exceed thirty days under section 4242, 4243, or 4246, upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.
(c) Psychiatric or psychological reports.--A psychiatric or psychological report ordered pursuant to this chapter shall be prepared by the examiner

designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the Government, and shall include--

(1) the person's history and present symptoms;

(2) a description of the psychiatric, psychological, and medical tests that were employed and their results;

(3) the examiner's findings; and

(4) the examiner's opinions as to diagnosis, prognosis, and--

(A) if the examination is ordered under section 4241, whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

(B) if the examination is ordered under section 4242, whether the person was insane at the time of the offense charged;

(C) if the examination is ordered under section 4243 or 4246, whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another;

(D) if the examination is ordered under section 4244 or 4245, whether the person is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility; or

(E) if the examination is ordered as a part of a presentence investigation, any recommendation the examiner may have as to how the mental condition of the defendant should affect the sentence.

(d) Hearing.--At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

(e) Periodic report and information requirements.--(1) The director of the facility in which a person is hospitalized pursuant to--

(A) section 4241 shall prepare semiannual reports; or

(B) section 4243, 4244, 4245, or 4246 shall prepare annual reports concerning the mental condition of the person and containing recommendations concerning the need for his continued hospitalization. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct. A copy of each such report concerning a person hospitalized after the beginning of a prosecution of that person for violation of section 871, 879, or 1751 of this title shall be submitted to the Director of the United States Secret Service. Except with the prior approval of the court, the Secret Service shall not use or disclose the information in these copies for any purpose other than carrying out protective duties under section 3056(a) of this title.

(2) The director of the facility in which a person is hospitalized pursuant to section 4241, 4243, 4244, 4245, or 4246 shall inform such person of any rehabilitation programs that are available for persons hospitalized in that facility.

(f) Videotape record.--Upon written request of defense counsel, the court may order a videotape record made of the defendant's testimony or interview upon which the periodic report is based pursuant to subsection (e). Such videotape record shall be submitted to the court along with the periodic report.

(g) Habeas corpus unimpaired.--Nothing contained in section 4243 or 4246 precludes a person who is committed under either of such sections from establishing by writ of habeas corpus the illegality of his detention.

(h) Discharge.--Regardless of whether the director of the facility in which a person is hospitalized has filed a certificate pursuant to the provisions of subsection (e) of section 4241, 4244, 4245, or 4246, or subsection (f) of section 4243, counsel for the person or his legal guardian may, at any time during such person's hospitalization, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility, but no such motion may be filed within one hundred and eighty days of a court determination that the person should continue to be hospitalized. A copy of the motion shall be sent to the director of the facility in which the person is hospitalized and to the attorney for the Government.

(i) Authority and responsibility of the Attorney General.--The Attorney General--

(A) may contract with a State, a political subdivision, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this chapter;

(B) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 4243 or 4246;

(C) shall, before placing a person in a facility pursuant to the provisions of section 4241, 4243, 4244, 4245, or 4246, consider the suitability of the facility's rehabilitation programs in meeting the needs of the person; and

(D) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this chapter and in the establishment of standards for facilities used in the implementation of this chapter.

(j) This chapter does not apply to a prosecution under an Act of Congress applicable exclusively to the District of Columbia or the Uniform Code of Military Justice.

(B) by adding at the end the following new subsection:
"(h) DEFINITION.--As used in this chapter the term "State" includes the District of Columbia.".

<< 18 USCA S 4247 >>

(2) Section 4247(a) is amended--
(A) in paragraph (1)(D) by striking "and" after the semicolon;
(B) in paragraph (2) by striking the period and inserting "; and"; and
(C) by adding at the end the following new paragraph:
"(3) 'State' includes the District of Columbia.".
(3) Section 4247(j) of title 18, United States Code, is amended by striking "This chapter does" and inserting "Sections 4241, 4242, 4243, and 4244 do".

SEC. 11205. LIABILITY FOR AND LITIGATION AUTHORITY OF CORRECTIONS TRUSTEE.

(a) LIABILITY.--The District of Columbia shall defend any civil action or proceeding brought in any

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Agenda Item II E 5

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor David A. Schlueter, Reporter**

RE: **Rule 23. Trial by Jury or by the Court: Legislative Proposal to Reduce Size of Jury**

DATE: **September 10, 1997**

In his oral report to the Committee at its April 1997 meeting, Mr. Rabiej informed the Committee that the Omnibus Crime Control Act of 1997 (S.3) contained a proposed amendment to Rule 23(b) which would provide for six person juries. It was the consensus of the Committee that this item should be placed on the agenda for the October 1997 meeting for discussion.

Attached are: (1) a letter from Judge Stotler, Chair of the Standing Committee, to Senator Hatch regarding various provisions in the Act which would amend the Rules of Criminal Procedure and Evidence and (2) a copy of pertinent pages from the proposed legislation.

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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D. LOWELL JENSEN
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

June 17, 1997

Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch:

Six sections of the *Omnibus Crime Control Act of 1997* (S. 3) affect the rulemaking process, including five provisions that directly amend the Federal Rules of Practice and Procedure. On behalf of the Judicial Conference's Rules Committees, I had previously written to the House and Senate Judiciary Committees opposing two of the sections, which were included in earlier pending legislation. Additionally, the provisions of §§ 501, 502, 503, and 713 of the Act will be considered by either the Criminal or Evidence Rules Advisory Committee, as appropriate, at their fall meetings. Finally, a proposal to amend Rule 35(b) of the Criminal Rules (related to § 821 of the Act) has already been approved by the Advisory Committee on Criminal Rules and will be considered by the Standing Rules Committee at its June 19-20, 1997 meeting. For these reasons, I urge you and your colleagues on the Senate Judiciary Committee to decline approving these six sections of S. 3.

Composition of the Rules Committees (§ 505 of the Act)

Section 505 of S. 3 would require that the composition of the Appellate, Civil, Criminal, Evidence, and Standing Rules committees of the Judicial Conference include no fewer prosecutors than defenders. Our letter of August 21, 1995, commented on an identical provision contained in § 504 of the *Violent Crime Control and Law Enforcement Improvement Act of 1995* (S. 3) and § 604 of the *Local Law Enforcement Act of 1995* (S. 816). The following discussion tracks my earlier correspondence.

At its March 1995 session, the Judicial Conference approved the recommendation of the Standing Rules Committee to oppose legislation regulating the composition of committees constituted to advise the Conference and the Chief Justice on the rules governing practice and procedure in the federal courts. Chief Justice Rehnquist had noted in his 1994 year-end report, that "this system (rulemaking) has worked well, and ... Congress should not seek to regulate the composition of rules committees any more than it already has."

Section 505 of S. 3 raises important concerns relating to the Chief Justice's prerogative to appoint members to committees expressly established to provide advice to the Judicial Conference. The rules committees serve in an advisory capacity under the *Rules Enabling Act*, 28 U.S.C. §§ 2071-77. Members of the rules committees are appointed by the Chief Justice and include federal judges, practicing lawyers, law professors, state chief justices, and representatives from the Department of Justice. The tradition of rulemaking has been based on a disinterested expertise, as opposed to decisionmaking controlled by interest-groups. The recommendations of the rules committees have been given great respect and weight among the bench, bar, and academia. No small part of this deference is due to the neutral character of the committees, which is enhanced by a membership that represents a wide cross-section of the bench and bar and reflects the leadership of the federal judges.

Although rendering fair decisions is certainly not the exclusive province of federal judges, they do have the knowledge to act in the best interest of the public those courts serve. Judges are of course lawyers too, with substantial experience on both sides of the bench and many have substantial prosecutorial backgrounds. Placing a premium on the notion of representativeness, i.e., that there ought to be a "seat" on the rules committees for each identifiable faction of the bar, would undermine the integrity of the rulemaking process. Committees would be perceived as promoting self-interested goals rather than the interests of justice.

For these reasons, I urge you and your colleagues to reject a provision mandating a particular composition of the rules committees.

Equalize Number of Peremptory Challenges (§ 501 of the Act)

Under Criminal Rule 24(b), the prosecution is allowed 6 peremptory challenges of prospective petit jurors, while the defense is allowed 10 peremptory challenges in a felony case. Section 501 of S. 3 would amend Rule 24(b) to equalize the number of peremptory challenges available to the prosecution and the defense. On November 10, 1993, we had written to Congressman Schumer and his colleagues on the House Judiciary Subcommittee on Crime and Criminal Justice on a similar provision contained in the *Sexual Assault Prevention Act of 1993* (H.R. 688).

The rules committees' study of proposed amendments to Rule 24(b) goes back to 1973, when the Advisory Committee on Criminal Rules recommended that the number of peremptory challenges be fixed at five for each side in a felony case. The proposal was submitted to Congress later in 1976 after the Judicial Conference and the Supreme Court had approved the amendments. But Congress rejected the amendments. (Pub. L. No. 95-78 (1977).) The Senate Judiciary Committee noted in its report that: "Of all the proposed amendments, it (equalization of peremptory challenges) probably drew the most vigorous criticism in the House hearing and in correspondence received by this Committee." Senate Report No. 95-354, p. 9 (July 25, 1977).

The Senate Judiciary Committee was particularly concerned with the voir dire procedures and the claimed inability of counsel to ferret out biased prospective jurors.

In March 1990, the Advisory Committee on Criminal Rules again published for public comment proposed amendments to Rule 24(b) equalizing the number of peremptory challenges. Although the comments received were essentially adverse, the advisory committee nonetheless recommended that the proposed amendments be approved for submission to the Judicial Conference. The Standing Rules Committee, however, rejected unanimously the recommendation. The following arguments in favor of retaining the present rule were considered persuasive by the Standing Rules Committee:

- The defense's additional peremptory challenges are needed to offset the availability of the government's overwhelming resources to examine prospective jurors.
- The defendant has little control over the voir dire process that is exercised often by the judge in many trials.
- The defense's greater number of peremptory challenges represents a historical right.
- The committee was mindful of the Congressional rejection of a similar proposal in 1977.
- No convincing data was provided to demonstrate that the amendment was necessary.

This background discloses that over time the rules committees' position on equalizing peremptory challenges has changed. In part, the committees' views were based on deference to the perceived will of Congress on this subject. The Advisory Committee on Criminal Rules considered but declined to act on this subject most recently in 1993; nonetheless, it has now placed the matter on the agenda for its October 1997 meeting. I respectfully request that § 501 be withdrawn pending renewed consideration by the advisory committee.

Amendments of Evidence Rule 404(a) (§ 503 of the Act)

Section 503 would amend Evidence Rule 404(a) of the Federal Rules of Evidence to provide that "if an accused offers evidence of a pertinent character trait of the victim of the crime, evidence of a pertinent character trait of the accused" may be offered by the prosecution.

Under current law, the defendant does not necessarily open the door to his own character by proffering evidence about the character of the victim. The Advisory Committee on Evidence Rules discussed the proposal at its April 1997 meeting. A majority of the committee was favorably disposed to the general concept, although several expressed concern with the details on how the provision would work. For example, would the introduction by the accused of evidence, which only slightly involved a victim's character trait, permit the wholesale introduction of the defendant's character traits? The advisory committee has placed the proposal at the top of the

agenda for its meeting in October 1997. Under these circumstances, I respectfully request that section 503 be withdrawn pending consideration by the advisory committee.

Amendments of Evidence Rule 404(b) (§ 713 of the Act)

Section 713 would amend Evidence Rule 404(b) of the Federal Rules of Evidence to include "disposition toward a particular individual" among the valid purposes for admitting evidence of a person's uncharged misconduct. The Advisory Committee on Evidence Rules considered this proposal on a preliminary basis at its April 1997 meeting. Reservations were expressed by some committee members on the advisability of amending Rule 404(b) to add another permissible purpose to a list that is universally recognized as non-exclusive. The concern was that by adding another permissible purpose to the rule, courts might get the wrong impression and exclude evidence of uncharged misconduct if offered for a purpose that does not happen to be on the list.

The advisory committee will study the matter further, and has placed the proposal on the agenda for its October 1997 meeting. In preparation for that meeting, the reporter to the advisory committee will survey the case law to determine whether evidence of "disposition toward another" has been wrongly excluded in any reported cases. I respectfully request that § 713 be withdrawn pending consideration of that proposal by the advisory committee.

Six-Person Juries in Criminal Cases (§ 502 of the Act)

Section 502 would amend Rule 23(b) of the Federal Rules of Criminal Procedure to permit a six-person jury in a criminal case on the request of the defendant and with the approval of the government and the court. The Advisory Committee on Criminal Rules was advised of the proposal in the pending legislation. Neither the advisory committee nor the Judicial Conference has taken a position on it. Several members of the advisory committee expressed concern that such a change should first be considered under the rulemaking process. The advisory committee decided to consider the proposal at its October 1997 meeting, and I request that § 713 be withdrawn pending its review.

Reduction of Sentence for Substantial Assistance (§ 821)

Section 821 would amend Rule 35(b) of the Federal Rules of Criminal Procedure to permit consideration of a defendant's "substantial assistance in an investigation *of any offense or* the prosecution of another person who has committed an offense" when reviewing a motion to reduce sentence under this rule. The Advisory Committee on Criminal Rules published in August 1996 proposed amendments clarifying Rule 35(b) that would permit a court to consider both pre-sentence and post-sentence assistance provided by the defendant in determining whether to reduce the sentence. The proposed amendments will be considered by the Standing Rules Committee at its June 19-20, 1997, meeting for submission to the Judicial Conference and later to the Supreme Court for their consideration. The committee was advised of the pending

legislation, but decided not to take any action on it. Under these circumstances, I request that legislation be stayed until the judiciary's consideration of changes to Rule 35(b) has been completed and the provision is brought before the Congress in the regular course of the rulemaking process.

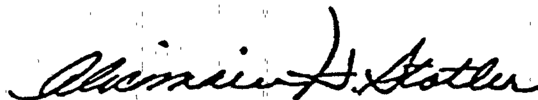
Conclusion

The Judicial Conference of the United States strongly supports and promotes the integrity of the rulemaking process as prescribed by the *Rules Enabling Act*. (28 U.S.C. §§ 2071-77.) The Act establishes a partnership between the courts and Congress designed to handle the daily business of the courts, which are matters of concern to all branches of the Government. This partnership has worked well.

The general rules of practice and procedure affect the daily business of the courts. The rules have evolved over time and now form an intricate, interlocking whole. Changes in one rule can have unforeseen and unintended consequences affecting other rules. Widespread opportunity to comment by those who work daily with the rules and meticulous care in drafting by experts in the area — as envisioned under the *Rules Enabling Act* — are the hallmarks of the rulemaking process.

Both the courts and Congress have a clear duty in rulemaking. The genius of the *Rules Enabling Act* rulemaking process is that it accords to each branch of Government its proper role in this shared endeavor. I hope that the cooperation on rulemaking between the Congress and the Judiciary will continue to remain strong.

Sincerely yours,



Alicemarie H. Stotler
United States District Judge

cc: Committee on the Judiciary,
United States Senate

105TH CONGRESS
1ST SESSION

S. 3

IN THE SENATE OF THE UNITED STATES

Mr. HATCH (for himself ______ ______ ______) introduced the following bill; which was read twice and referred to the Committee on ______

Mr. LOTT
Mr. ABRAHAM
Mr. ALLARD
Mr. ASHCROFT
Mr. CRAIG
Mr. D'AMATO
Mr. DeWINE
Mr. DOMENICI
Mr. ENZI
Mr. FAIRCLOTH
Mr. GORTON
Mr. GRAMS
Mr. GRASSLEY
Mr. HAGEL
Mr. HELMS
Mr. HUTCHINSON
Mr. KYL
Mr. MURKOWSKI
Mr. NICKLES
Mr. ROBERTS
Mr. SMITH
Mr. THOMAS
Mr. THURMOND
Mr. WARNER
Mr. COVERDELL

A BILL

To provide for fair and accurate criminal trials, reduce violent juvenile crime, promote accountability by juvenile criminals, punish and deter violent gang crime, reduce the fiscal burden imposed by criminal alien prisoners, promote safe citizen self-defense, combat the importation, production, sale, and use of illegal drugs, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**
4 (a) SHORT TITLE.—This Act may be cited as the
5 "Omnibus Crime Control Act of 1997".

1 receives the training offered, whichever comes
2 first.".

3 **SEC. 424. SELF DEFENSE FOR VICTIMS OF ABUSE.**

4 Section 922(s)(1)(B) of title 18, United States Code,
5 is amended—
6 (1) by striking "the transferee has" and insert-
7 ing "the transferee—
8 "(i) has"; and
9 (2) by adding at the end the following: "or
10 "(ii) is named as a person protected
11 under a court order described in subsection
12 (g)(8).".

13 TITLE V—CRIMINAL 14 PROCEDURE IMPROVEMENTS

15 Subtitle A—Equal Protection for 16 Victims

17 **SEC. 501. THE RIGHT OF THE VICTIM TO AN IMPARTIAL**
18 **JURY.**

19 Rule 24(b) of the Federal Rules of Criminal Proce-
20 dure is amended by striking "the government is entitled
21 to 6 peremptory challenges and the defendant or defend-
22 ants jointly to 10 peremptory challenges" and inserting
23 "each side is entitled to 10 peremptory challenges".

24 **SEC. 502. JURY TRIAL IMPROVEMENTS.**

25 (a) JURIES OF 6.—

1 (1) IN GENERAL.—Rule 23(b) of the Federal
2 Rules of Criminal Procedure is amended—
3 (A) by striking "JURY OF LESS THAN
4 TWELVE. JURIES" and inserting the following:
5 "(b) NUMBER OF JURORS.—
6 "(1) IN GENERAL.—Except as provided in sub-
7 section (2), juries"; and
8 (B) by adding at the end the following:
9 "(2) JURIES OF 6.—Juries may be of 6 upon
10 request in writing by the defendant with the ap-
11 proval of the court and the consent of the govern-
12 ment.".
13 (2) ALTERNATE JURORS.—Rule 24(c) of the
14 Federal Rules of Criminal Procedure is amended by
15 inserting after the first sentence the following: "In
16 the case of a jury of 6, the court shall direct that
17 not more than 3 jurors in addition to the regular
18 jury be called and impanelled to sit as alternate ju-
19 rors.".
20 (b) CAPITAL CASES.—Section 3593(b) of title 18,
21 United States Code, is amended by striking the last sen-
22 tence and inserting the following: "A jury impanelled pur-
23 suant to paragraph (2) may be made of 6 upon request
24 in writing by the defendant with the approval of the court
25 and the consent of the government. Otherwise, such jury

1 shall be made of 12, unless, at any time before the conclu-
2 sion of the hearing, the parties stipulate, with the approval
3 of the court, that it shall consist of a lesser number.".

4 **SEC. 503. REBUTTAL OF ATTACKS ON THE CHARACTER OF**
5 **THE VICTIM.**

6 Rule 404(a)(1) of the Federal Rules of Evidence is
7 amended by inserting before the semicolon the following:
8 ", or, if an accused offers evidence of a pertinent trait
9 of character of the victim of the crime, evidence of a perti-
10 nent trait of character of the accused offered by the pros-
11 ecution".

12 **SEC. 504. USE OF NOTICE CONCERNING RELEASE OF OF-**
13 **FENDER.**

14 Section 4042(b) of title 18, United States Code, is
15 amended by striking paragraph (4).

16 **SEC. 505. BALANCE IN THE COMPOSITION OF RULES COM-**
17 **MITTEES.**

18 Section 2073 of title 28, United States Code, is
19 amended—

20 (1) in subsection (a)(2), by adding at the end
21 the following: "On each such committee that makes
22 recommendations concerning rules that affect crimi-
23 nal cases, including the Federal Rules of Criminal
24 Procedure, the Federal Rules of Evidence, the Fed-
25 eral Rules of Appellate Procedure, the Rules Govern-

Agenda Item II E 6A

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor David A. Schlueter, Reporter**

RE: **Rule 24(b). Proposals to Equalize Peremptory Challenges**

DATE: **September 8, 1997**

There is apparently pending legislation in the Crime Control Act which would equalize the number of peremptory challenges. At its last meeting the Committee briefly discussed the issue and decided to put the matter on the agenda for the upcoming meeting in Monterrey.

I am attaching some memos from 1990 and 1991 which may assist the Committee in its discussion. As those memos indicate, the Advisory Committee proposed an amendment to Rule 24(b) which would have equalized the number of peremptory challenges for the prosecution and the defense. The proposed amendment was approved by the Standing Committee for public comment but when it reviewed the proposal in February 1991, it rejected the amendment. Since then, there has been no attempt to revisit the issue by either the Advisory Committee or Standing Committee. Indeed, the Standing Committee's rejection of the proposal has generally been used to convince Congress not to amend Rule 24(b).

The attached memos include a copy of the proposed amendment and Committee Note and a summary of the public comments on the proposed changes.

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

June 17, 1997

Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch:

Six sections of the *Omnibus Crime Control Act of 1997* (S. 3) affect the rulemaking process, including five provisions that directly amend the Federal Rules of Practice and Procedure. On behalf of the Judicial Conference's Rules Committees, I had previously written to the House and Senate Judiciary Committees opposing two of the sections, which were included in earlier pending legislation. Additionally, the provisions of §§ 501, 502, 503, and 713 of the Act will be considered by either the Criminal or Evidence Rules Advisory Committee, as appropriate, at their fall meetings. Finally, a proposal to amend Rule 35(b) of the Criminal Rules (related to § 821 of the Act) has already been approved by the Advisory Committee on Criminal Rules and will be considered by the Standing Rules Committee at its June 19-20, 1997 meeting. For these reasons, I urge you and your colleagues on the Senate Judiciary Committee to decline approving these six sections of S. 3.

Composition of the Rules Committees (§ 505 of the Act)

Section 505 of S. 3 would require that the composition of the Appellate, Civil, Criminal, Evidence, and Standing Rules committees of the Judicial Conference include no fewer prosecutors than defenders. Our letter of August 21, 1995, commented on an identical provision contained in § 504 of the *Violent Crime Control and Law Enforcement Improvement Act of 1995* (S. 3) and § 604 of the *Local Law Enforcement Act of 1995* (S. 816). The following discussion tracks my earlier correspondence.

At its March 1995 session, the Judicial Conference approved the recommendation of the Standing Rules Committee to oppose legislation regulating the composition of committees constituted to advise the Conference and the Chief Justice on the rules governing practice and procedure in the federal courts. Chief Justice Rehnquist had noted in his 1994 year-end report, that "this system (rulemaking) has worked well, and ... Congress should not seek to regulate the composition of rules committees any more than it already has."

Section 505 of S. 3 raises important concerns relating to the Chief Justice's prerogative to appoint members to committees expressly established to provide advice to the Judicial Conference. The rules committees serve in an advisory capacity under the *Rules Enabling Act*, 28 U.S.C. §§ 2071-77. Members of the rules committees are appointed by the Chief Justice and include federal judges, practicing lawyers, law professors, state chief justices, and representatives from the Department of Justice. The tradition of rulemaking has been based on a disinterested expertise, as opposed to decisionmaking controlled by interest-groups. The recommendations of the rules committees have been given great respect and weight among the bench, bar, and academia. No small part of this deference is due to the neutral character of the committees, which is enhanced by a membership that represents a wide cross-section of the bench and bar and reflects the leadership of the federal judges.

Although rendering fair decisions is certainly not the exclusive province of federal judges, they do have the knowledge to act in the best interest of the public those courts serve. Judges are of course lawyers too, with substantial experience on both sides of the bench and many have substantial prosecutorial backgrounds. Placing a premium on the notion of representativeness, i.e., that there ought to be a "seat" on the rules committees for each identifiable faction of the bar, would undermine the integrity of the rulemaking process. Committees would be perceived as promoting self-interested goals rather than the interests of justice.

For these reasons, I urge you and your colleagues to reject a provision mandating a particular composition of the rules committees.

Equalize Number of Peremptory Challenges (§ 501 of the Act)

Under Criminal Rule 24(b), the prosecution is allowed 6 peremptory challenges of prospective petit jurors, while the defense is allowed 10 peremptory challenges in a felony case. Section 501 of S. 3 would amend Rule 24(b) to equalize the number of peremptory challenges available to the prosecution and the defense. On November 10, 1993, we had written to Congressman Schumer and his colleagues on the House Judiciary Subcommittee on Crime and Criminal Justice on a similar provision contained in the *Sexual Assault Prevention Act of 1993* (H.R. 688).

The rules committees' study of proposed amendments to Rule 24(b) goes back to 1973, when the Advisory Committee on Criminal Rules recommended that the number of peremptory challenges be fixed at five for each side in a felony case. The proposal was submitted to Congress later in 1976 after the Judicial Conference and the Supreme Court had approved the amendments. But Congress rejected the amendments. (Pub. L. No. 95-78 (1977).) The Senate Judiciary Committee noted in its report that: "Of all the proposed amendments, it (equalization of peremptory challenges) probably drew the most vigorous criticism in the House hearing and in correspondence received by this Committee." Senate Report No. 95-354, p. 9 (July 25, 1977).

The Senate Judiciary Committee was particularly concerned with the voir dire procedures and the claimed inability of counsel to ferret out biased prospective jurors.

In March 1990, the Advisory Committee on Criminal Rules again published for public comment proposed amendments to Rule 24(b) equalizing the number of peremptory challenges. Although the comments received were essentially adverse, the advisory committee nonetheless recommended that the proposed amendments be approved for submission to the Judicial Conference. The Standing Rules Committee, however, rejected unanimously the recommendation. The following arguments in favor of retaining the present rule were considered persuasive by the Standing Rules Committee:

- The defense's additional peremptory challenges are needed to offset the availability of the government's overwhelming resources to examine prospective jurors.
- The defendant has little control over the voir dire process that is exercised often by the judge in many trials.
- The defense's greater number of peremptory challenges represents a historical right.
- The committee was mindful of the Congressional rejection of a similar proposal in 1977.
- No convincing data was provided to demonstrate that the amendment was necessary.

This background discloses that over time the rules committees' position on equalizing peremptory challenges has changed. In part, the committees' views were based on deference to the perceived will of Congress on this subject. The Advisory Committee on Criminal Rules considered but declined to act on this subject most recently in 1993; nonetheless, it has now placed the matter on the agenda for its October 1997 meeting. I respectfully request that § 501 be withdrawn pending renewed consideration by the advisory committee.

Amendments of Evidence Rule 404(a) (§ 503 of the Act)

Section 503 would amend Evidence Rule 404(a) of the Federal Rules of Evidence to provide that "if an accused offers evidence of a pertinent character trait of the victim of the crime, evidence of a pertinent character trait of the accused" may be offered by the prosecution.

Under current law, the defendant does not necessarily open the door to his own character by proffering evidence about the character of the victim. The Advisory Committee on Evidence Rules discussed the proposal at its April 1997 meeting. A majority of the committee was favorably disposed to the general concept, although several expressed concern with the details on how the provision would work. For example, would the introduction by the accused of evidence, which only slightly involved a victim's character trait, permit the wholesale introduction of the defendant's character traits? The advisory committee has placed the proposal at the top of the

agenda for its meeting in October 1997. Under these circumstances, I respectfully request that section 503 be withdrawn pending consideration by the advisory committee.

Amendments of Evidence Rule 404(b) (§ 713 of the Act)

Section 713 would amend Evidence Rule 404(b) of the Federal Rules of Evidence to include "disposition toward a particular individual" among the valid purposes for admitting evidence of a person's uncharged misconduct. The Advisory Committee on Evidence Rules considered this proposal on a preliminary basis at its April 1997 meeting. Reservations were expressed by some committee members on the advisability of amending Rule 404(b) to add another permissible purpose to a list that is universally recognized as non-exclusive. The concern was that by adding another permissible purpose to the rule, courts might get the wrong impression and exclude evidence of uncharged misconduct if offered for a purpose that does not happen to be on the list.

The advisory committee will study the matter further, and has placed the proposal on the agenda for its October 1997 meeting. In preparation for that meeting, the reporter to the advisory committee will survey the case law to determine whether evidence of "disposition toward another" has been wrongly excluded in any reported cases. I respectfully request that § 713 be withdrawn pending consideration of that proposal by the advisory committee.

Six-Person Juries in Criminal Cases (§ 502 of the Act)

Section 502 would amend Rule 23(b) of the Federal Rules of Criminal Procedure to permit a six-person jury in a criminal case on the request of the defendant and with the approval of the government and the court. The Advisory Committee on Criminal Rules was advised of the proposal in the pending legislation. Neither the advisory committee nor the Judicial Conference has taken a position on it. Several members of the advisory committee expressed concern that such a change should first be considered under the rulemaking process. The advisory committee decided to consider the proposal at its October 1997 meeting, and I request that § 713 be withdrawn pending its review.

Reduction of Sentence for Substantial Assistance (§ 821)

Section 821 would amend Rule 35(b) of the Federal Rules of Criminal Procedure to permit consideration of a defendant's "substantial assistance in an investigation *of any offense or* the prosecution of another person who has committed an offense" when reviewing a motion to reduce sentence under this rule. The Advisory Committee on Criminal Rules published in August 1996 proposed amendments clarifying Rule 35(b) that would permit a court to consider both pre-sentence and post-sentence assistance provided by the defendant in determining whether to reduce the sentence. The proposed amendments will be considered by the Standing Rules Committee at its June 19-20, 1997, meeting for submission to the Judicial Conference and later to the Supreme Court for their consideration. The committee was advised of the pending

legislation, but decided not to take any action on it. Under these circumstances, I request that legislation be stayed until the judiciary's consideration of changes to Rule 35(b) has been completed and the provision is brought before the Congress in the regular course of the rulemaking process.

Conclusion

The Judicial Conference of the United States strongly supports and promotes the integrity of the rulemaking process as prescribed by the *Rules Enabling Act*. (28 U.S.C. §§ 2071-77.) The Act establishes a partnership between the courts and Congress designed to handle the daily business of the courts, which are matters of concern to all branches of the Government. This partnership has worked well.

The general rules of practice and procedure affect the daily business of the courts. The rules have evolved over time and now form an intricate, interlocking whole. Changes in one rule can have unforeseen and unintended consequences affecting other rules. Widespread opportunity to comment by those who work daily with the rules and meticulous care in drafting by experts in the area — as envisioned under the *Rules Enabling Act* — are the hallmarks of the rulemaking process.

Both the courts and Congress have a clear duty in rulemaking. The genius of the *Rules Enabling Act* rulemaking process is that it accords to each branch of Government its proper role in this shared endeavor. I hope that the cooperation on rulemaking between the Congress and the Judiciary will continue to remain strong.

Sincerely yours,

Alicemarie H. Stotler
United States District Judge

cc: Committee on the Judiciary,
United States Senate

105TH CONGRESS
1ST SESSION

S. 3

IN THE SENATE OF THE UNITED STATES

Mr. HATCH (for himself ________ Mr. LOTT Mr. ABRAHAM Mr. ALLARD Mr. ASHCROFT Mr. CRAIG Mr. D'AMATO Mr. DeWINE Mr. DOMENICI Mr. ENZI Mr. FAIRCLOTH Mr. GORTON Mr. GRAMS Mr. GRASSLEY Mr. HAGEL Mr. HELMS Mr. HUTCHINSON Mr. KYL Mr. MURKOWSKI Mr. NICKLES Mr. ROBERTS Mr. SMITH Mr. THOMAS Mr. THURMOND Mr. WARNER Mr. COVERDELL ________) introduced the following bill; which was read twice and referred to the Committee on ________

A BILL

To provide for fair and accurate criminal trials, reduce violent juvenile crime, promote accountability by juvenile criminals, punish and deter violent gang crime, reduce the fiscal burden imposed by criminal alien prisoners, promote safe citizen self-defense, combat the importation, production, sale, and use of illegal drugs, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**
4 (a) SHORT TITLE.—This Act may be cited as the
5 "Omnibus Crime Control Act of 1997".

receives the training offered, whichever comes first.".

SEC. 424. SELF DEFENSE FOR VICTIMS OF ABUSE.

Section 922(s)(1)(B) of title 18, United States Code, is amended—

(1) by striking "the transferee has" and inserting "the transferee—

"(i) has"; and

(2) by adding at the end the following: "or

"(ii) is named as a person protected under a court order described in subsection (g)(8).".

TITLE V—CRIMINAL PROCEDURE IMPROVEMENTS

Subtitle A—Equal Protection for Victims

SEC. 501. THE RIGHT OF THE VICTIM TO AN IMPARTIAL JURY.

Rule 24(b) of the Federal Rules of Criminal Procedure is amended by striking "the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges" and inserting "each side is entitled to 10 peremptory challenges".

SEC. 502. JURY TRIAL IMPROVEMENTS.

(a) JURIES OF 6.—

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Congressional Amendment to Rule 24(b), Peremptory Challenges

DATE: April 5, 1991

At its meeting in February 1991, the Standing Committee unanimously rejected the Advisory Committee's proposed amendment to Rule 24(b) which would have equalized the number of peremptory challenges at 6 for each side in a felony case.

As the attached material indicates, Section 232 of S. 472, Women's Equal Opportunity Act of 1991, would accomplish the same result. Congress has been advised of the Standing Committee's action.

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

March 15, 1991

Honorable Strom Thurmond
Committee on the Judiciary
United States Senate
SR-217 Russell Senate Office Building
Washington, D.C. 20510-4001

Dear Senator Thurmond:

I am writing, on behalf of the Judicial Conference of the United States, to express great concern about pending legislation that would amend the Federal Rules of Evidence outside of the procedures set out in the Rules Enabling Act.

Section 231 of S. 472, the Women's Equal Opportunity Act of 1991, would add Rules 413 and 414 to the Federal Rules of Evidence to permit, in a criminal case charging sexual assault or child molestation, respectively, the introduction of evidence of commissions of similar offenses by the defendant in the past. Section 231 would also add Rule 415 to permit the introduction of evidence of sexual assaults in a civil action for sexual misconduct. The Advisory Committee on the Federal Rules of Criminal Procedure has been informed of this legislative proposal, and the congressional interest implied therein. Accordingly, the Advisory Committee will consider the proposed amendments to the Rules of Evidence at its May 1991 meeting.

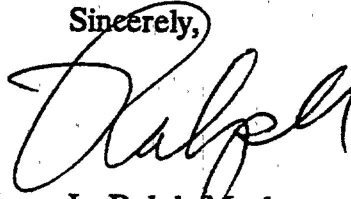
Section 232 would amend Rule 24(b) of the Federal Rules of Criminal Procedure to equalize the number of peremptory challenges in a criminal case to six for each side. The Advisory Committee on the Rules of Criminal Procedure recently considered an identical amendment. The proposal was published for public comment and, despite a great deal of negative reaction to the proposal, the Advisory Committee submitted the suggested amendment to the Committee on Rules of Practice and Procedure for its consideration at its January 1991 meeting. The Standing Committee determined that the amendment was not necessary or advisable and rejected the proposal by a unanimous vote. Given the close scrutiny this proposed change received and the generally negative reaction, we ask that the Congress respect the judgment of

the Standing Committee and the legitimacy of the Rules Enabling Act procedures and delete this provision from the bill.

Section 233 would add an appendix to title 28, United States Code, entitled, "Rules for Professional Conduct for Lawyers in Federal Practice." Although the provision would not amend the existing rules of practice and procedure, the subject matter is well within the scope of issues traditionally within the purview of rules of practice and procedure. Some provisions of the proposal are dealt with in state and local court rules of ethical conduct. All should be subject to the unique scrutiny offered by the procedures of the Rules Enabling Act. The proposal will be referred to the Standing Committee for assignment to the appropriate advisory committees.

Given the attention that these proposals have had and will receive pursuant to the Rules Enabling Act, we urge that they be determined in accordance with that process. We are aware of no reasons why the normal process of rule revision should be avoided here and ask that those sections of S. 472 that would revise the rules of practice and procedure not be included in the final version of the bill.

Sincerely,



L. Ralph Mecham
Director

cc: Honorable Robert E. Keeton
Honorable Wm. Terrell Hodges

"(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) through (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.

"(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.".

SEC. 232. RIGHT OF THE VICTIM TO AN IMPARTIAL JURY.

(a) FEDERAL RULES OF CRIMINAL PROCEDURE.—Rule 24(b) of the Federal Rules of Criminal Procedure is

1 amended by striking "the Government is entitled to 6 pe-
2 remptory challenges and the defendant or defendants jointly
3 to 10 peremptory challenges" and inserting "each side is en-
4 titled to 6 peremptory challenges".

5 (b) PROHIBITION OF DISCRIMINATION IN SELECTION
6 OF JURY.—Section 243 of title 18, United States Code, is
7 amended by designating the text of the section as subsection
8 (a) and by adding a new subsection at the end thereof as
9 follows:

10 "(b) In a proceeding in a court of the United States, an
11 attorney representing a criminal defendant shall not exercise
12 peremptory challenges to exclude any person from the jury
13 on the basis of race or color, or on the basis of any other
14 classification that could not lawfully be used by a prosecutor
15 as the basis for exercising peremptory challenges. The pros-
16 ecutor shall have the same right as the defense attorney to
17 challenge the exercise of peremptory challenges on this
18 ground. In determining whether a defense attorney has en-
19 gaged in discrimination in violation of this subsection, a court
20 shall apply the same standards that would apply in making a
21 like determination concerning the exercise of peremptory
22 challenges by a prosecutor, and shall have the authority to
23 grant the same relief that would be available in case of un-
24 lawful discrimination by a prosecutor.".

MEMO TO: Criminal Rules Committee

FROM: Dave Schlueter

RE: Comments on Proposed Amendements to Rule 24(b)

DATE: October 24, 1990

The proposed amendments to Rule 24(b), which would equalize the number of peremptory challenges and provide for six peremptory challenges in felony cases, were circulated to the public for comment. A summary of the comments along with a copy of the Rule and Committee Note are attached.

The commentators generally opposed the amendment although several indicated a support for equalization and one indicated that the rule should be amended to insure a minimum number of challenges per defendant in multiple defendant cases. Several commentators indicated that defense counsel do not exclude classes of people from juries through peremptory challenges. Yet, several recent cases indicate that defense counsel have done so and that _Batson_ will block such efforts. _See, e.g., United States v. DeGross_, ____ F.2d ____ (9th Cir. 1990)(defendant's efforts to exclude men from jury violated equal protection principles under _Batson_).

To date, Congress has not acted upon the proposal in Senate Bill 1711 which would equalize the number of peremptory challenges in felony cases at eight (8) Although Congress was apprised of the Committee's proposed amendments and the solicitation of public comments (attached), correspondance from Congress to the Administrative Office, however, indicates that they do not intend to suspend their amendment pending the outcome of the Committee's proposal.

I am also enclosing a copy of a letter from Mr. Robert K. Loesche, Deputy General Counsel of the AO to Judge H. Lee Sarokin. That letter presents a good background on the attempts by the Judicial Conference to change the number of peremptory challenges in both criminal and civil cases.

Rule 24. Trial Jurors

* * * * *

1 (b) PEREMPTORY CHALLENGES. If the offense
2 charged is punishable by death, each side is
3 entitled to 20 peremptory challenges. If the
4 offense charged is punishable by imprisonment for
5 more than one year, ~~the government~~ each side is
6 entitled to 6 peremptory challenges. ~~and the~~
7 ~~defendant or defendants jointly to 10 peremptory~~
8 ~~challenges.~~ If the offense charged is punishable
9 by imprisonment for not more than one year or by
10 fine or by both, each side is entitled to 3
11 peremptory challenges. If there is more than one
12 defendant, the court may allow each side additional
13 peremptory challenges~~.~~, provided that the
14 government shall not have more challenges than the
15 total allocated to all defendants. The court may
16 permit multiple defendants to exercise peremptory
17 challenges separately or jointly.

* * * * *

COMMITTEE NOTE

The amendment to Rule 24(b) equalizes the number of peremptory challenges normally available to the prosecution and defense in a felony case. Under the amendment the number of peremptory challenges available to the prosecution would remain the same; the number available to the defense would be reduced by four. The number of peremptory challenges available in capital and misdemeanor cases remains unchanged.

In 1976 the Supreme Court adopted and forwarded to Congress in accordance with the Rules Enabling Act amendments to Rule 24(b) which would have significantly reduced and equalized the number of peremptory challenges. Under that amendment, each side would have had 20, 5, and 2 peremptory challenges respectively in capital, felony, and misdemeanor cases. Order, Amendments to Federal Rules of Criminal Procedure, 44 U.S.L.W. 4549 (1976). The reasons for the amendments were three-fold. First, under the 1968 Jury Selection and Service Act, there were more representative panels which would reduce the need for the defense to have an advantage in the number of peremptory challenges. Second, the proposed change would make it more difficult to make systematic exclusions of a class of persons. And third, the reduction in the number of peremptory challenges would shorten the time spent on voir dire and also reduce jury costs. Congress ultimately rejected

the changes but recommended that the Judicial Conference study the matter further. The chief concern expressed by Congress was that in most federal courts, trial judges conduct the voir dire, thus making it difficult for counsel to identify biased jurors. S. Rep. 354, 95th Cong., 1st Sess. 9, reprinted in [1977] U.S. Code Cong. & Ad. News 1477, 1482-83. Congress however, has recently indicated a willingness to reconsider changes to the number of peremptory challenges. See Senate Bill No. 1711.

The Committee believes that the three reasons supporting the proposed amendments in 1976 are at least as valid today as they were then. In particular, the decision in Batson v. Kentucky, 476 U.S. 79 (1986), supports one of the reasons for the amendment, the need to reduce the opportunity for systematic exclusion of a class of persons. Although Batson addressed systematic exclusion by the prosecution, an argument could be made that under some circumstances systematic exclusion of classes of persons by the defense should also be limited. There is also growing concern about delays in disposing of cases in federal courts, and reduction of the number of peremptory challenges would be cost effective, both in terms of time and expense. On balance, the Committee believes that the reduction of the number of peremptory challenges available to a single defendant in a felony case would not unfairly deprive that defendant of a representative and unbiased jury.

The amendment expands the ability of the trial court to grant additional peremptory challenges where there are multiple defendants by permitting the court to grant additional challenges to the prosecution. Although the prosecution is potentially entitled to as many challenges as the total provided to the multiple defendants, the court is not required to equalize the number of challenges.

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

September 13, 1990

Honorable Jack Brooks
Chairman, Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Dear Mr. Chairman:

As Congress begins final consideration of criminal legislation, I wish to reiterate, on behalf of the Judicial Conference of the United States, great concern about pending legislation that would, in fact or in effect, amend the Federal Rules of Practice and Procedure outside of the procedures of the Rules Enabling Act.

Title VI, Chapter 5 of S. 1970 would add new Rule 52.1 to the Federal Rules of Criminal Procedure, new Rule 43.1 to the Federal Rules of Civil Procedure and new Rule 803.1 to the Federal Rules of Evidence. These new rules are designed to protect child victims and witnesses and to facilitate their testimony. Versions of proposed new Criminal Rule 52.1 and new Evidence Rule 803.1 have previously been before Congress (proposed Civil Rule 43.1 is similar to the proposed criminal rule). The Advisory Committee on the Criminal Rules has considered amendments involving the substance of these proposals but has tabled them because of concerns about the right of confrontation of defendants as expressed in Coy v. Iowa, 487 U.S. 1012 (1988), and the view that current Evidence Rule 803 provides sufficient flexibility to deal with hearsay statements of child witnesses.

Although some of the constitutional issues have been resolved by the Supreme Court's recent decisions in Idaho v. Wright, ___ U.S. ___ (No. 89-260, June 27, 1990), and Maryland v. Craig, ___ U.S. ___ (No. 89-478, June 27, 1990), not all of the substantive issues and, of course, none of the practical issues of concern to the Advisory Committee have been resolved.* The matter deserves the careful consideration and opportunity for input that the Rules Enabling Act provides. Accordingly, in light of these decisions, the Advisory Committee will take up the substance of these proposed rules at its next meeting in November with the end of proposing amendments to deal with the issue of child witnesses. We urge you to let the Rules Enabling Act procedures take their course regarding these complex issues.

Similarly, an amendment to H.R. 5269 offered by Mr. Levine and accepted by the House would add section 3509 to title 18, United States Code, to authorize certain practices with respect to child witnesses. Despite its placement in title 18, the amendment would effectively revise the Rules of Practice and Procedure by providing special procedures for child witnesses. These procedural and evidentiary provisions should be governed by the Rules of Practice and Procedure and should be promulgated by means of the Rules Enabling Act.

Section 2432 of S. 1970 would amend Rule 24(b) of the Federal Rules of Criminal Procedure to equalize the number of peremptory challenges available to the defense and the prosecution in a criminal case: 20 challenges in capital cases, eight in felony cases and three in misdemeanor cases.

The Advisory Committee on the Rules of Criminal Procedure had considered the issue of the number of available peremptory challenges for several years but had not acted, in part because of Congress' rejection of the amendments to Rule 24(b) adopted by the Supreme Court in 1976. When advised of this legislation, and the congressional interest implied therein, the Advisory Committee, at its November 1989 meeting, reopened its consideration of the subject and voted to propose and circulate for public comment a similar amendment.

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*For example, subsection (h) of proposed Criminal Rule 52.1 and subsection (f) of proposed Civil Rule 43.1 authorize appointments of guardians ad litem, but neither proposal provides for a means of compensating individuals appointed to serve in those capacities.

The amendment proposed by the Advisory Committee would permit 20 challenges in capital cases, six in felony cases, and three in misdemeanor cases. Like the amendment proposed in S. 1970, the court could permit additional challenges in multi-defendant cases, except that the Government would not have more challenges than those available to all of the defendants combined. The court could permit multiple defendants to exercise peremptory challenges separately or jointly.

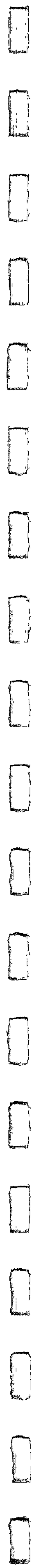
A copy of the preliminary draft of the Advisory Committee's proposed amendment of Rule 24(b), inter alia, is enclosed for your convenience. The proposed amendments were circulated in March 1990. The Advisory Committee has already received many written comments on the proposal and the comment period did not expire until August 31, 1990. At the present time, the Advisory Committee is scheduled to meet in November to consider the proposed amendments in light of the comments received.

Given the extensive scrutiny this proposal is being given pursuant to the Rules Enabling Act, the Judicial Conference urges once again that this matter be determined in accordance with that process. As with the proposed rule changes dealing with child witnesses, we are aware of no reasons why the normal process of rule revision should be avoided here and ask that those sections of S. 1970 and H.R. 5269 that would actually or effectively revise the Rules of Practice and Procedure not be included in the final version of the bill.

Sincerely,

L. Ralph Mecham
Director

Enclosure



(SAMPLE)

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

April 25, 1990

Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
Suite SD-224
Washington, D.C. 20510-6275

Re: S. 1171, With Respect to Peremptory Challenges to Prospective Jurors

Dear Mr. Chairman:

On behalf of the Judicial Conference of the United States, I am writing to express the judiciary's view that any amendment to the peremptory challenge provisions of Rule 24(b) of the Federal Rules of Criminal Procedure should be accomplished through the procedures of the Rules Enabling Act. Section 79 of S. 1171 would amend Rule 24(b) to equalize the number of peremptory challenges available to the defense and the prosecution in a criminal case: 20 challenges in capital cases, eight in felony cases, and three in misdemeanor cases.

The Advisory Committee on the Rules of Criminal Procedure had considered the issue of the number of available peremptory challenges for several years but had not acted, in part because of Congress' rejection of the amendments to Rule 24(b) adopted by the Supreme Court in 1976. When advised of this legislation, and the Congressional interest implied therein, the Advisory Committee, at its November 1989 meeting, reopened its consideration of the subject and voted to propose and circulate for public comment a similar amendment.

The amendment proposed by the Advisory Committee would permit 20 challenges in capital cases, six in felony cases, and three in misdemeanor cases. Like the amendment proposed in S. 1171, the court could permit additional challenges in multi-defendant cases, except that the government would not have more challenges than those available to all of the defendants combined. The court could permit multiple defendants to exercise peremptory challenges separately or jointly.

A copy of the preliminary draft of the Advisory Committee's proposed amendment of Rule 24(b), inter alia, is enclosed for your convenience. The proposed amendments were circulated in March 1990. Hearings are scheduled for this summer in Atlanta, Chicago and Los Angeles, and written comments are due by August 31, 1990. At the present time, the Advisory Committee is scheduled to meet in November to consider the proposed amendments in light of the comments received.

Given the extensive scrutiny this proposal is being given pursuant to the Rules Enabling Act, the Judicial Conference has urged that this matter be determined in accordance with that process. We are aware of no reasons why the normal process of rule revision should be avoided here and ask that the section of S. 1171 that would revise Rule 24(b) not be included in the final version of the bill.

Sincerely,

L. Ralph Mecham
Director

Enclosure

cc: Honorable Joseph F. Weis, Jr.
Honorable Leland Nielsen
Professor David A. Schlueter
Mr. James E. Macklin, Jr.

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

WILLIAM R. BURCHILL, JR.
GENERAL COUNSEL

January 3, 1990

Honorable H. Lee Sarokin
United States District Court
United States Post Office and
Courthouse
Post Office Box 419
Newark, New Jersey 07102

Dear Judge Sarokin:

It was a pleasure to see you at the recent meeting of the Judicial Improvements Committee. At your request, I have reviewed our files for information regarding proposals to abolish peremptory challenges. While we do not have any substantive research on this concept directly on hand, I did find several items that you and your subcommittee might find helpful.

First, there is a long history of the Judicial Conference advocating reduction--as opposed to elimination--of the number of peremptory challenges in both criminal and civil cases.

Action in the criminal area dates back to 1943, when the Conference approved a comprehensive study of the Federal jury system which concluded, inter alia:

> The number of peremptory challenges allowed to the Government and to the defendant in criminal cases should in general be the same, and the number of challenges allowed a defendant should be reduced from ten to six in all cases except trials for capital offenses.[1]

This position was next restated and refined in 1971, when the Conference specifically recommended that each side in criminal cases be limited to 12 challenges in capital cases, five challenges in other felonies, and two in misdemeanors (plus additional

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[1] Report of the Proceedings of the Judicial Conference of the United States ("Proceedings"), September 1943 at 16.

challenges granted for good cause as permitted by the court in its discretion).[2] This recommendation was embodied in a proposed amendment to F. R. Crim. P. 24(b) transmitted to Congress by the Supreme Court in April 1976.[3] Congress disapproved the proposal, not so much because of the reduced number of challenges, but because of a more general concern about judge-conducted voir dire. Suggesting that "the basic problem seems to be in the voir dire procedures," Congress invited the Judicial Conference to reconsider the proposal in light of complaints that judge-conducted voir dire makes it difficult for counsel to identify biased jurors and develop grounds to challenge for cause.[4] A subcommittee of the Jury Committee reviewed this question (and others) the following year, and to give you the full flavor of events I enclose that portion of the subcommittee's report discussing peremptory challenges. You will see that the subcommittee did not in any way retreat from its position that reduction in the number of challenges was appropriate, but concluded that the risk of heightened scrutiny of voir dire outweighed the desirability of resubmitting the peremptory challenge proposal. The Judicial Conference accepted this recommendation.[5]

The Conference has an equally long--and equally unsuccessful--history of urging a reduction in the number of strikes in civil cases. In 1971, "after extended discussion," the Conference approved in principle legislation that would both reduce the size of civil juries and, upon such reduction, diminish the number of peremptory challenges allowed.[6] These proposals were included in several jury system improvement acts introduced in Congress (with the specific proposal being to reduce peremptory strikes per side from three to two), and the Conference repeatedly expressed its support for such legislation in the ensuing years.[7] The culmination of this legislative effort was enactment of the Jury System Improvements Act of 1978,[8] but this legislation dealt primarily with juror fees and protection of jurors' employment. The proposals to

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[2]Proceedings, October 1971 at 5-6.

[3]Communication from the Chief Justice of the United States, House Document No. 94-464, 94th Cong. 2d Sess. (April 26, 1976).

[4]S. Rep. No. 95-354, 95th Cong., 1st Sess. 9 (1977).

[5]Proceedings, September 1978 at 77.

[6]Proceedings, March 1971 at 5.

[7]See Proceedings, April 1972 at 5, April 1973 at 13, September 1973 at 54-55, September 1974 at 56, and September 1976 at 45.

[8]Pub. L. No. 95-572, 95th Cong. 2d Sess., 92 Stat. 2453 (1978).

reduce jury size and peremptory challenges in civil cases had been stripped out at the committee stage, but our files do not reveal the specific reasons for their rejection.[9]

The Conference's most recent activity in this area occurred in 1985, when the former Jury Committee sua sponte revived the idea to reduce each side's peremptory challenges in civil cases from three to two. However, upon learning of the fate of the Supreme Court's earlier effort to reduce the number of challenges in criminal cases, the Committee by a very close (five to four) vote decided against pursuing the matter. My notes from that discussion reveal two interesting comments, which perhaps will be relevant to your present inquiry. Attending the meeting on another matter was Professor Richard Lempert of the University of Michigan Law School, a prominent scholar and researcher on jury administration. He suggested that the Committee might want to curb its zeal to reduce peremptories by remembering that they serve as a useful "safety valve" to make up for the lack of attorney-conducted voir dire and for inadequacies in the challenge-for-cause system. These points would appear equally relevant to proposals to eliminate peremptories. Additionally, Chief Judge John Nangle of the Eastern District of Missouri reported that his court had adopted the practice of allowing only two challenges per side in civil cases, and that, despite the apparent lack of legal authority for the practice, it was working fine and was not objected to by the bar.

Turning next to the merits of the issue of abolishing peremptories, we do not ourselves have any research collected, aside from two untitled and fairly old (I estimate from the early 1970's) documents discussing the legal nature of peremptory challenges and the history of Congress' first consideration thereof in the mid-nineteenth century. I

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[9]Even with our fairly extensive legislative history of the Jury Act and its amendments, I am unable to pin down exactly what happened to the peremptory challenge proposal. In 1978, Congress was considering two jury bills, S. 2074 and S. 2075. The bill which was finally enacted as Pub. L. No. 95-572 was labeled S. 2075, and contained portions--but only portions--of both S. 2074 and S. 2075. The previously-referenced 1978 report of the subcommittee of the Jury Committee indicates that the provisions to reduce the size of civil juries and the number of peremptory challenges in civil cases were stripped out of S. 2074 by the Senate Judiciary Committee prior to Senate passage of the bill. Unfortunately, we do not have any committee report on S. 2074 itself, and the report on S. 2075 contains no discussion of these actions. See S. Rep. No. 95-757, 95th Cong., 2d Sess. (1978). The later House report on S. 2075 is equally unhelpful. See H.R. Rep. No. 95-1652, 95th Cong., 2d Sess. (1978). We have the published transcript of a 1977 Senate Judiciary subcommittee hearing on S. 2074 and 2075 (and other bills), but that is also unenlightening.

and the history of Congress' first consideration thereof in the mid-nineteenth century. I enclose these for whatever value you find them. I also ran a quick computer search to see what else might be available, and found some promising leads.

As to cases, perhaps the best place to start is with Justice Marshall's concurrence in Batson v. Kentucky, 476 U.S. 79, 102 (1986), in which he joins the Court in condemning the prosecution's racially discriminatory use of peremptory challenges in criminal cases, but forcefully argues that the only way to entirely eliminate racial discrimination in jury selection is through total abolition of peremptories. Finding misuse of peremptory challenges to be "flagrant" and "pernicious," and noting that cases provide that the right of peremptory challenge is not of constitutional magnitude and may be withheld altogether, he advocates a complete banning. He continues to make this point today; see, e.g., Wilkerson v. Texas, 110 S. Ct. 292 (1989) (Marshall, J., dissenting from denial of certiorari).

I did not find any lower court decisions wholeheartedly endorsing Justice Marshall's position, but, as you may be aware, several courts have expanded the scope of Batson restrictions in a way that might presage the eventual abolition of peremptories. See, e.g., Edmonson v. Leesville Concrete Company, Inc., 860 F.2d 1308, rehearing en banc granted, 868 F.2d 1317 (5th Cir. 1988) (prohibiting the exercise of peremptory challenges on racial grounds by a private litigant in a civil case), and Clark v. City of Bridgeport, 645 F. Supp. 890 (D. Conn. 1986) (prohibiting state from exercising peremptories on racial grounds in a civil rights action). Judge Gee, dissenting in Edmonson, made what I found to be an insightful lament that, with Batson and the majority decision in his case, the Judiciary may "have leapt halfway across a logical chasm and come to rest in midair." He comments on Justice Marshall's Batson concurrence:

> Justice Marshall would dispense with strikes entirely, and perhaps this will be the final outcome. [Citation omitted.] In this much at least he is surely correct, that we must go on or backward; to stay here is to rest content with a strange procedural creature indeed: a challenge for semi-cause, exercisable differentially as to jurors depending on how the ethnic group to which they belong correlates with that of the striker's client--a skewed and curious device, exercisable without giving reasons in some cases but not in others, all depending on race.

860 F.2d at 1317 (Gee, J., dissenting).

As to law reviews, the computer revealed the expected abundance of literature on Batson and the future scope of peremptory challenges. Most articles did not appear to address in any depth the idea of completely abolishing peremptories, but I

did find two directly discussing--and advocating--such a position. "Batson v. Kentucky, a Half Step in the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection)," 72 Cornell L. Rev. 1026 (1987); Note, "The Case for Abolishing Peremptory Challenges in Criminal Trials," 21 Harv. C.R.-C.L. L. Rev. 227 (1986).

Finally, you asked if we have any statistics delineating between peremptory challenges and challenges for cause. Unfortunately, we do not. The jury utilization reports submitted to our Statistical Analysis and Reports Division do list the total number of jurors "challenged," but do not distinguish between the types of challenges that comprise the total figure. Division staff advised me that individual courts occasionally provide such information voluntarily, but they could cnly put their hands on reports on three individual cases (two civil, one criminal) submitted last summer by the Southern District of Ohio. I tried to think if there was any way to fairly estimate the breakdown between peremptory and cause challenges, for we do know how many jury trials are civil and how many are criminal, and we thus could estimate the number of peremptories available (excluding, of course, extra challenges granted to additional parties). Unfortunately, there would seem to be no valid basis to estimate how many of those available challenges actually were used. Illustrating the difficulty of trying to make such an estimate, the reports on the three cases received from Ohio indicate--in a way that I never would have anticipated--that all available peremptories were used in the two civil cases, but only one peremptory was used in the criminal case (there were 11 challenges for cause). Accordingly, if we want to develop accurate figures on the numbers of peremptories now being used, it appears we will have to collect that data from scratch.

I hope you find this of assistance in getting you and your subcommittee underway; please do not hesitate to contact me if there is any way in which this office can be of any further assistance.

Sincerely,

Robert K. Loesche
Deputy General Counsel

Enclosures

cc: L. Ralph Mecham
Duane R. Lee

RKLoesche/JLanier Director OGC Reading Daybook- RKL File:Peremptory Challenges and Challenges for Cause

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 24(b)

I. SUMMARY OF COMMENTS: Rule 24(b)

Twenty nine (29) individuals or organizations have filed written comments on the proposed amendments to Rule 24(b). Almost all of them are opposed to the amendment as presented although several commentators indicate approval of "equalization" of the number at eight per side in a felony case involving a single defendant. One commentator, a federal district judge, agrees with the amendment, noting that he has observed defense counsel using the peremptories to exclude classes of individuals. Those opposing the change generally cite the historical right of peremptory challenges, the overwhelming resources of the government, the lack of meaningful voir dire by the defense, the whittling away at defense rights, and the absence of any emprirical data supporting the Committee's view that reduction of the number of peremptories is warranted. One commentator, Mr. Levine, a federal public defender from Hawaii presents the most complete arguments opposing the change and a number of commentators have simply noted that they agree with his analysis. Several note that the arguments against a reduction of peremptories would be lessened if defense counsel were permitted greater leeway in voir dire.

II. LIST OF COMMENTATORS: Rule 24(b)

1. Michael L. Bender, Esq., Wash. D.C., 8-31-90
2. Robert A. Brunig, Esq., Minneapolis, Minn, 4-26-90
3. Thomas A. Campbell, Esq., Tacoma, Wash., 8-10-90

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4. Colia F. Ceisel, Esq., St. Paul, Minn., 4-20-90

5. John J. Cleary, Esq., San Diego, CA, 5-23-90

6. John P. Erickson, Esq. Minneapolis, MN, 5-14-90

7. David R. Freeman, Esq., St. Louis MO, 7-13-90

8. William J. Genego & Peter Goldberger, Wash. D.C., 8-31-90

9. Carol Grant, Esq, Minneapolis, Minn., 4-23-90

10. Bruce H. Hanley, Esq., Minneapolis, Minn., 5-9-90

11. Thomas W. Hillier, Esq., Seattle, Wash., 7-13-90

12. Fredric F. Kay, Esq., Tucson, Ariz., 5-24-90

13. Michael R. Levine, Esq., Honolulu, Haw., 5-17-90

14. David S. Marshall, Esq., Seattle, Wash., 8-8-90

15. Joe M. Quaintance, Esq., Tacoma, Wash., 8-8-90

16. Myrna S. Raeder, Prof., Los Angeles, CA., 8-29-90

17. Larry E. Reed, Esq., Minneapolis, Minn., 4-24-90

18. Ron Rosenbaum, Esq., St. Paul, Minn., 4-30-90

19. Elisabeth Semel, Esq., San Diego, CA., 8-30-90

20. Neal J. Shapiro, Esq., Minneapolis, Minn, 4-23-90

21. Thomas H. Shiah, Esq., Minneapolis, Minn., 4-25-90

22. Walter S. Smith, Judge, Waco, Tx., 4-10-90

23. Richard C. Tallman, Esq., Seattle, Wash., 8-20-90

24. Peter Thompson, Esq., Minneapolis, Minn., 4-24-90

25. Judge J.P. Vukasin, San Francisco, CA, 5-17-90

26. Alan W. Weinblatt, Esq., St. Paul, Minn., 5-9-90

27. James C. Whelpley, Esq., Roseville, Minn, 4-27-90

28. John R. Wylde, Esq., Minneapolis, Minn., 4-24-90

29. Jay P. Yunek, Esq., Fairmont, Minn., 4-20-90

III. COMMENTS: Rule 24(b)

Michael L. Bender, Esq.
Chairperson, ABA Crim. Just. Section
Washington, D.C.
August 31, 1990

Writing on behalf of the American Bar Association's Criminal Justice Section, Mr. Bender notes that the ABA has "championed the equalization of challenges for prosecutors and defense counsel" and attaches applicable ABA policy (which incidently at one point suggests five (5) challenges for each side in a felony case). Without suggesting specific numbers, Mr. Bender believes that the amendments to Rule 24(b) being considered by Congress would not only equalize the number of challenges but also maintain the total number of challenges by both sides. It would also reduce by only two the number of challenges currently available to the defense. He also suggests that working with 8 peremptory challenges for now would permit empirical studies to determine the actual impact of the amendments.

Robert A. Brunig, Esq.
Private Practice
Minneapolis, Minn.
April 26, 1990

Mr. Brunig views the proposed change to be ill-advised and unfair. He notes that there is an imbalance in the number of minority judges and in the number of minority jurors. He also notes the tendency to dismiss a juror for cause who exhibits any hostility toward the government and notes that the judge's voir dire is perfunctory and never probing; even those judges permitting defense voir dire, dramatically limit the time for doing so. He adds that jurors who have sat on a criminal case are included in the venire of consecutive criminal cases. Finally, he notes that the resources available to the governement overwhelm the resources available to the defense.

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Thomas A. Campbell, Esq.
Private Practice
Tacoma, Washington
August 10, 1990

Mr. Campbell briefly writes to indicate that he concurs with the views of Mr. Hillier, infra., in opposing the amendment to Rule 24(b).

Colia F. Ceisel, Esq.
Private Practice
Saint Paul, Minnesota
April 20, 1990

Ms. Ceisel believes that the historial distribution of peremptory challenges should be maintained and is opposed to the amendment. The current number reflects the real need for diffentiation between the prosecution and the defense; the prosecution generally does not face the same prejudices that face the defendant.

John J. Cleary, esq.
Private PracticeSan Diego, California
May 23, 1990

Mr. Cleary states that the "chutzpa" of the federal judiciary to reduce the number of challenges when most federal judges preclude attorney voir dire is startling. It would thus be both unseemly and inappropriate for the judiciary to push for further reductions in the number of challenges. The argument for protecting against racial bias is ludicrous in light of established precedent -- he cites a personal example of his attempt to ask voir dire questions concerning whether a juror would be biased against his client because of his race. He believes that greater voir dire is needed and that the Committee should take the initiative.

John P. Erickson, Esq.
Private Practice
Minneapolis, Minnesota
May 14, 1990

Mr. Erickson believes that the opportunity for a defendant to obtain a fair trial is fast becoming an extinct species in light of the many recent substantive and procedural changes. Although he understands that politically it is popular to be tough on criminals, he sees

more and more innocent people being caught up in the hysteria created by politicians. To make his point he recounts a recent experience he had defending a 70-year old man accused of shoplifting a $2.99 item. He tells this "war story" to make the point that "[i]ndividuals in authority, such as [the Committee], must now recognize that the pendulum has swung way too far and must come back in the direction of the rights of the accused." He concludes that a drop in the number of peremptory challenges is something he cannot tolerate.

David R. Freeman, Esq.
Federal Public Defender
St. Louis, Missouri
July 13, 1990

Mr. Freeman vigorously opposes the proposed amendment to Rule 24(b) because it is "ill advised...lacks a rational basis and reflects a failure to consider the history and function of the peremptory challenge." Citing historical precedent and Supreme Court language which notes the essential right of exercising a peremptory challenge, Mr. Freeman notes that when he reads the Committee's rationale for amending Rule 24(b) he is struck with the "appalling ease with which baseless assertions can be turned into facts and given the presumption of validity." He notes that there is no support for the statement that the defendant might systematically exclude a class of persons. He also indicates that the 1968 Jury Selection Act has not resulted in more representative panels. Finally, he questions whether the reduced number of challenges will actually save time and expense, given the great control exercised by federal judges over voir dire. He challenges the notion of the need for a level playing field by outlining the distinct advantages that the government has in the prosecution of a case. In short, the Committee has not offered a sufficient rationale for the amendment.

William J. Genego & Peter Goldberger
NADCL
Washington, D.C.
August 31, 1990

Mr. Genego and Mr. Goldberger, writing in their capacity as co-chairs of the NADCL Committee on Rules of Procedure, generally favor equalization of peremptory challenges but do not support the "arbitrary" number of six (6) challenges for felony cases; instead they would support an amendment to equalize the number at eight (8) in felony

cases involving single defendants. In their view there is no empirical support for the proposition that reducing the number will save time in the voir dire procedures which are already streamlined. Any any financial reasons for doing so would be outweighed by the interest in insuring that the defendant and the public perceive the process to be fair. They suggest that where there are multiple defendants, each defendant should be entitled to at least two peremptories; in a megatrial it is possible that the number of defendants would exceed the number of peremptory challenges. The defendant should not be deprived of his or her ability to challenge a juror simply because the government has decided to join a large number of defendants in a single trial.

Carol Grant, Esq.
Private Practice
Minneapolis, Minnesota
April 23, 1990

Ms. Grant opposes the amendment. The current number of challenges reflects the need of the defense to strike jurors who often possess predisposition or biases that they often do not admit. To reduce the number would be detrimental to the criminal justice system.

Bruce H. Hanley, Esq.
Private Practice
Minneapolis, Minn.
May 9, 1990

Mr. Hanley is strongly opposed to the amendment and notes that although there are still jury trials, there seems to be a concerted effort to whittle away at constitutional rights. His experience with federal juries in Minnesota is that the jurors are strongly biased in favor of the government and see themselves as an extension of the prosecution. The current number of 10 peremptories helps the defense a little in attempting to empanel a fair jury. He also points out that lack of defense voir dire hampers the defense greatly.

Advisory Committee on Criminal Rules
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Thomas W. Hillier, II, Esq.
Federal Public Defender
Seattle, Washington
July 13, 1990

Mr. Hillier fully supports the position of Mr. Michael Levine, infra, a federal public defender in Hawaii, who has submitted extensive comments on the proposed change to Rule 24(b). Mr. Hillier notes that given the potentially heavier sentences facing federal defendants, it is essential that counsel be given the opportunity to screen the jury; every reduction in the number of challenges lessens the chance for impaneling a fair jury.

Mr. Fredric F. Kay, Esq.
Federal Public Defender
Tucson, Arizona
May 24, 1990

Mr. Kay is opposed to any reduction of peremptory challenges for the defendant. In his view there is a greater need for insuring fairness for the defendant. He recognizes that concerns would not be as serious if defense counsel were given greater latitude in conducting voir dire.

Michael R. Levine, Esq.
Federal Public Defender
Honolulu, Hawaii
May 17, 1990

Mr. Levine has submitted extensive commentary opposing the amendment to Rule 24(b), which he believes is ill-advised. First, he notes that that the current number of peremptory challenges (10) has been in effect since 1865 and therefore there is a heavy burden on the proponents of the amendment. He notes that the Committee Note which suggests that Batson could be used by the defense is flawed. He believes that in an appropriate case, it would be permissible for the defense to exclude an entire class of persons, leaving aside racial classifications. It is the prosecution, not the defense, he argues that systematically exclude classes of individuals. Concerning delays in selecting jurors, he notes that Congress has expressly rejected the argument that savings of time in itself would warrant a reduction. Finally, he notes that there may be superficial appeal to the suggestion that the new numbers will level the playing field. But Congress in 1977 questioned that reasoning and in the last five years have seen an enormous increase in the government's power so that

the notion of proportionality is even less tenable. In summary, he believes that the Committee has not justified the amendment.

Mr. Levine also notes the lack of public knowledge and hostility toward the system, the increasing percentage of defendants who are being convicted, and the fact that challenges for cause are inadequate. He adds that as long as the Committee tolerates judge-alone voir dire, the arguments in support of a reduction of challenges carry little force.

David S. Marshall, Esq.
Private Practice
Seattle, Washington
August 8, 1990

Mr. Marshall briefly notes that Mr. Levine's comments, supra, express his thoughts "extremely well."

William M. Orth, Esq.
Private Practice
Bloomington, Minnesota
May 3, 1990

Mr. Orth believes that the proposed amendment is "wrong, unfair, unnecessary, and unconstitutional." Because there is no meaningful voir dire in federal courts, the additional challenges available to the defense provide the only input by the defense to trial by an impartial jury. He notes that in joint trials, the number of challenges per defendant would be reduced. He also cited an example of jurors who sat on consecutive criminal cases and who were peremptorily struck after they asked the judge if the defense could determine their home addresses.

Joe M. Quaintance, Esq.
Private Practice
Tacoma. Washington
August 3, 1990

Mr. Quaintance concurs in the comments by Mr. Levine and Mr. Hiller and strongly believes that defense peremptory challenges should not be restricted further. State courts, which provide for fewer challenges, fairly balance the process by permitting greater involvement by the parties in conducting voir dire. The federal jury selection process is already so abbreviated that reduction of the number of challenges will be unfair.

Advisory Committee on Criminal Rules
Proposed Amendments to Rule 24(b)
October 1990

Myrna S. Raeder, Professor
Southwestern Univ. School of Law
Los Angeles, California
August 29, 1990

Although she supports the equalization of peremptory challenges, she believes that fairness concerns mandate a more cautious approach by equalizing the number of challenges in a felony case at eight (8). If the drafters were starting with a clean slate, six challenges might be appropriate. But a reduction by four of the number available to the defense will appear to be "an effort to whittle away a right that the defense currently enjoys." Given the fact that voir dire is conducted by the judge, the peremptory challenge is still the best way to insure a fair jury.

Larry E. Reed, Esq.
Private Practice
Minneapolis, Minn.
April 24, 1990

He is opposed to the proposed amendment. Because there is little interaction between the defendant and the jury in voir dire, it is necessary for the defense to have extra challenges.

Ronald S. Rosenbaum, Esq.
Private Practice
St. Paul, Minn.
April 23, 1990

He is strongly opposed to the amendment to Rule 24(b). From his experience the balance against the defense has shifted dramatically. The proposed reduction would be "one more nail in the coffin." He notes the lack of defense voir dire and urges the Committee to maintain the current number of challenges.

Elisabeth Semel, President
California Attorneys for Criminal Justice
San Diego, California
August 30, 1990

Ms. Semel, writing on behalf of the 2,500 members of the CACJ, strenously objects to the reduction of peremptory challenges in Rule 24(b). She notes that there is simply no

statistical evidence of exlcusions of classes of persons by the defense and the amount of time saved, in an already abbreviated voir dire, would be minisule. The reduction of peremptories might involve more time because of the need to more carefully exercise them. Any change in the number should not be considered until federal judges permit voir dire (CACJ concurs with the position of Mr. Levine, supra).

Neal J. Shapiro, Esq.
Private Practice
Minneapolis, Minn.
April 24, 1990

He opposes the amendment, noting that the federal jury selection procedures weigh in favor of the prosecution; today when the public is fearful of crime, jurors tend to favor the government. He urges the Committee to retain the current number of challenges.

Thomas H. Shiah, Esq.
Private Practice
Minneapolis, Minn.
April 25, 1990

Mr. Shiah briefly notes that he is opposed to the proposed amendment because the deck is already "stacked" enough against the defense and the prosecution needs no additional "trump cards."

Hon. Walter S. Smith
US Dist. Judge
Waco, Texas
April 10, 1990

Judge Smith is very much in favor of the amendments. He has never understood why the defense is entitled to more strikes and believes that the amendment will result in saving a great deal of money over the years and will be more fair.

Richard C. Tallman, Esq.
Seattle, Washington
Aug. 20, 1990

Mr. Tallman is opposed to the proposed amendment. Noting the increase in minimum sentences, the pretrial restraints on assets and the risk of forfeiture, the jury

system is one of the few remaining checks on governmental abuse. It is essential that the preception of fairness and impartiality remain. Considering the limited opportunities for the defense to conduct voir dire, the proposed reduction of the number of peremptory challenges would not be sufficient to offset the damage of reducing public confidence in the judicial process.

Peter Thompson, Esq.
John W. Lundquist, Esq.
Robert D. Sicoli, Esq.
Private Practice
Minneapolis, Minn.
April 24, 1990

These three commentators (law partners who deal exclusively with federal criminal defense) are opposed to the proposed amendment. There is no meaningful voir dire in the federal system and the proposal only makes matters worse. The apparent imbalance in the current rule is really not an imbalance; first, in joint trials each defendant gets fewer challenges than the government and having four more challenges tends to result in better chances for a fair trial.

The Hon. J.P. Vukasin, Jr.
U. S. District Judge
San Franciso, California
May 17, 1990

Judge Vukasin is in favor of the amendment as written. The current number of peremptories is "unfair, unequitable, and lends itself to abuse." He indicates that he has repeatedly seen defense counsel use the extra peremptory challenges for purposes other than obtaining a fair jury and that he has seen the extra challenges used to exclude classes of persons. In his view, the jury panels today are more representative and that there is no reason to give either side an advantage in the numbers. And it is obvious to him that by reducing the number of challenges, there will be a savings of time and expense.

Alan W. Weinblatt, Esq.
Private Practice
St. Paul, Minn.
May 9, 1990

He is opposed to the amendment. He indicates that

there is no voir dire by counsel in the federal courts in Minnesota, that he has not seen systematic exclusion of classes of jurors by the defense, maintaing the current number of challenges does not cause delay or increased costs, and the current Minnesota rule governing challenges recognizes the need for additional defense challenges. Finally, he cites the maxim, "If it aint' broke, don't fix it."

James C. Whelpley, Esq.
Private Practice
Roseville, Minn.
April 27, 1990

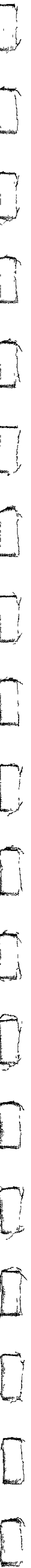
Noting the absence of voir dire by the defense, he opposes the change. If savings of time and money is important, he asks, why not simply eliminate the jury altogether. He also inquires as to what sorts of classes of persons would be excluded by the defense.

John R. Wylde, Esq.
Private Practice
Minneapolis, Minn
April 24, 1990

Mr. Wylde is "outraged" at the proposal to take away defense peremptory challenges. It is bad enough that there is no defense voir dire in federal courts.

Jay P. Yunek, Esq.
Private Practice
Fairmont, Minn.
April 20, 1990

He is outraged at the proposed change. It is "ridiculous" to believe that there is a need to create equal footing. He reminds the Committee that the defendant is stigmatized by his presence in the courtroom. Because the jurors are often of a different race or creed, reducing the number of peremptory strikes will take the defendant out of the ball game. He urges the Committee to either leave the numbers the way they are or give the defense an opportunity to conduct voir dire.



Agenda Item II E 6B

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 24. Trial Jurors: Proposal to Randomly Select Jurors and Abolish Peremptory Challenges.**

DATE: **September 7, 1997**

Judge William M. Acker, Jr. (N. Dist. Alabama) has recommended that the solution to *Batson* problems rests in first, randomly selecting both the venire and petit juries and second, abolishing the use of peremptory challenges. The attached materials include his correspondence, a newspaper article, and excerpts from several cases.

This item is on the agenda for the October meeting in California.

#2937

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
FEDERAL COURTHOUSE
BIRMINGHAM, ALABAMA 35203

CHAMBERS OF
WILLIAM M. ACKER, JR.
JUDGE

RECEIVED 5/27/97

97CV F supplement
97-CR-E supplement

May 21, 1997

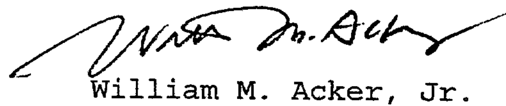
Hon. Alicemarie H. Stotler
Chair, Committee on Rules of
Practice and Procedure
Judicial Conference of the United States
Washington, DC 20544

Re: Selection of Petit Juries

Dear Judge Stotler:

Thank you for your letter of May 9, 1997. Enclosed is an article which, in my view, confirms my belief that the only solution to the Batson problem is random selection.

Respectfully yours,



William M. Acker, Jr.

WMA/mj

REGIONAL REPORTS

'Batson' Protection Extended to Jews

UNIONDALE, N.Y.—The *Batson* rule, which bars the discriminatory use of peremptory jury challenges, applies to Jews, U.S. District Judge Arthur D. Spatt ruled.

Judge Spatt, however, found that the prosecution did not discriminate against Jews in the case before him, in which the prosecution had used six of its nine peremptory challenges to excuse from jury service people with apparently Jewish surnames or close family connections to Jews.

Judge Spatt

The question of Jewish identification of jurors was important because the case, *U.S. v. Somerstein*, 96-657, involved the prosecution of a kosher food caterer for defrauding its workers of required union benefit funds.

The judge ruled that Jews are a protected group under the rule announced in the U.S. Supreme Court's 1986 ruling, *Batson v. Kentucky*, 476 U.S. 79, on two theories: The rule bars religious discrimination; and as a race or distinct ethnic group, Jews are within *Batson*'s core protection barring race discrimination.

Batson involved the prosecution's use of peremptory challenges to keep blacks off a criminal jury. The rule was broadened in *J.E.B. v. Alabama*, 511 U.S. 127, a 1994 high court decision prohibiting prosecutors from systematically excluding women. The high court, however, declined to review *Davis v. Minnesota*, 93-6577, in which a defendant sought toexpand *Batson* to religion.

The 9th U.S. Circuit Court of Appeals has rejected extending *Batson* protection to the obese. *U.S. v. Santiago-Martinez*, 94-10350 (1995). The 3d Circuit ruled that equal protection does not prohibit a trial attorney from peremptorily challenging bilingual jurors. *Pemberthy v. Beyer*, 92-5633.

Batson's ban on impermissible peremptory challenges was extended to Italian-Americans last year by New York state Supreme Court Judge Dominic R. Massaro. *People v. Rambersed*, 6000/93. [NLJ, 9-9-96.]

—DANIEL WISE

ALABAMA

Chains For Men Only, OK

BIRMINGHAM—A federal magistrate has said the state prison system does not violate the Constitution by keeping Alabama's female prisoners out of chain gangs. U.S. Magistrate T. Michael Putnam said excluding women from working while shackled with leg irons does not violate the equal protection clause of the 14th Amendment because of the low ratio of female prisoners to male prisoners within the state. Out of nearly 20,000 state prisoners, only 776 are females, Judge Putnam said in a recommendation that was released

CALIFORNIA

Media Curbs Proposed

RIVERSIDE—Newspapers or television stations would be barred from showing victims of murder and other violent crimes, under terms of new bills being introduced in the Assembly. A bill by Assemblywoman Helen Thomson, D-Davis, and a similar measure by Assemblywoman Diane Martinez, D-Monterey Park, would allow the victims' families to sue news organizations for civil damages if the restriction is violated. Ms. Thomson's bill would also apply if a newspaper or TV station publishes or broadcasts pictures of victims of rape, torture or mu-

PENNSYLVANIA

Lesbian Sues Over Epitaph

PHILADELPHIA—A lesbian woman whose partner died of cancer sued a suburban Philadelphia cemetery April 15 for refusing to include the phrase "life partner" in her epitaph. The lawsuit alleges the Har Jehuda Cemetery in Upper Darby breached a contract by overruling the legally binding wishes of Cynthia Friedman, who died in 1994, and her partner Sherry Barone. Mindy Brooks, a lawyer for the cemetery, said she had not seen the lawsuit and would not discuss the case.

TEXAS

Branch Davidians Sue Feds

WACO—Four years after the fiery end of the Branch Davidian standoff, the cult lives on, pressing a lawsuit aimed at pinning the blame for the 80 deaths on the government. The lawsuit, seeking hundreds of millions in damages, challenges the government's conclusion that the Branch Davidians themselves started the fire and that they also shot first during the federal raid on their compound 51 days earlier. The plaintiffs—about 250 surviving Davidians and the relatives of the dead—contend that, when federal agents punched through the walls and fired tear gas into the cult compound in an April 19, 1993, attempt to end the standoff, the canisters ignited, burning the building and the people inside. Joe Phillips, a Houston lawyer for the plaintiffs, acknowledged that they will be hard-pressed to make their case.

Defense Lawyers: Lab Taint Is Deep

WASHINGTON—Criminal de-

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
FEDERAL COURTHOUSE
BIRMINGHAM, ALABAMA 35203

RECEIVED 5/28/97

CHAMBERS OF
WILLIAM M. ACKER, JR.
JUDGE

May 23, 1997

97-CV-F supplement
97-CR-E supplement

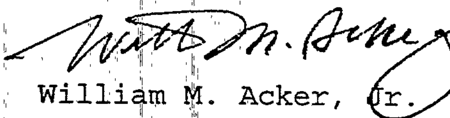
Hon. Alicemarie H. Stotler
Chair, Committee on Rules of
Practice and Procedure
Judicial Conference of the United States
Washington, DC 20544

Re: Selection of Petit Juries

Dear Judge Stotler:

I don't mean to pester, but I am enclosing a few pages from my opinion in *Morro v. City of Birmingham*, 92-AR-2339-S, in which I denied Birmingham's post-judgment motion based on a version of *Batson*. It illustrates yet another problem inherent in *Batson*.

Respectfully yours,



William M. Acker, Jr.

cc: Hon. Paul V. Niemeyer
Professor Edward H. Cooper
Mr. Peter G. McCabe
Mr. John K. Rabiej
Mr. Leonidas Ralph Mecham

The City's Attack on the Jury Venire

When the venire appeared for the selection of seven civil jurors for the trial of this case, the venire consisted of eighteen white venirepersons. Defendants complained about the absence of black venirepersons, but the court proceeded with jury selection. Defendants adequately preserved their objection to the venire.

Even before the filing of the City's current Rule 50(b) motion, the court undertook its own investigation into the matter of the venire composition. The court consulted with the jury section of the Clerk's office and with other members of the court and arrived at the same explanation for the racial makeup of this particular venire as can be deduced from the City's motion. In solving one problem *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986), created another. This venire was randomly drawn for this court's one case mid-month civil docket to start on March 18,

1996. The venire came from the "leftovers" from a much larger venire summoned for jury duty to commence at the beginning of the month on March 4, 1996, and designed to accommodate the jury needs in several criminal and civil trials before various judges.

It quickly becomes apparent that the juries actually empaneled in the Northern District of Alabama at the first of the month, by the exercise of so-called "preemptory" challenges, contain a higher percentage of black jurors than the original venire as a whole. This fact strongly suggests that *Batson* acts as a brake on the striking of black venirepersons, and has the indirect effect of leaving the remaining pool with a higher percentage of whites and a lower percentage of blacks than were in the original, total venire. In other words, by the middle of the month, the black jurors have been disproportionately "used up" as a proximate consequence of *Batson*. This court's research has not led it to a solution of this problem, if it is a problem, or to any case law which would render unconstitutional or illegal this court's present system of jury selection. It would be enormously expensive, and perhaps unconstitutional, to randomly select from 31 north Alabama counties a separate venire for each and every specific jury case. The court can conceive of no other method that would come close to assuring an apportional racial representation in every venire.

Although *Batson* itself was not invoked in this case, except perhaps in an indirect way, *Batson* and its progeny are as much

designed to protect potential jurors from disparate treatment as to guarantee litigants a racially or gender balanced jury.

#2828

RECEIVED 5/5/97

97-CV-F

97-CR-F

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

May 1, 1997

Honorable William M. Acker, Jr.
United States District Court
481 Hugo L. Black United States
Courthouse
1729 Fifth Avenue North
Birmingham, AL 35203

Dear Judge Acker:

Thank you for providing me a copy of your letter of April 14, 1997, recommending that petit juries should be randomly selected from a randomly selected venire, and that the only challenges should be challenges "for cause."

Since this issue falls within the jurisdiction of the Judicial Conference Committees on Rules of Practice and Procedure, and Court Administration and Case Management, I am providing copies of your letter to the chairs of those committees for such action as they consider appropriate.

Sincerely,

Ralph

Leonidas Ralph Mecham
Director

cc: Honorable Alicemarie H. Stotler
Honorable Ann C. Williams

bc: Mr. Peter G. McCabe
Mr. Abel Mattos
Mr. John Rabiej

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
FEDERAL COURTHOUSE
BIRMINGHAM, ALABAMA 35203

CHAMBERS OF
WILLIAM M. ACKER, JR.
JUDGE

April 14, 1997

Judiciary Committee of the U. S. Senate
Judiciary Committee of the House of Representatives
Judicial Conference of the United States
Administrative Office of the United States Courts
The American Judicature Society

Dear Entities Concerned with the Administration of Justice:

A growing number of judges, including this one, law professors and lawyers believe that petit juries should be randomly selected from a randomly selected venire, and that the only challenges should be challenges "for cause." The concept of so-called "peremptory" challenges has lost its meaning. The *Batson* idea, while understandable under the present regime, invites hypocrisy, if not outright perjury, by lawyers. Conscientious advocates regularly eliminate a prospective juror for reasons of that juror's ethnicity, but articulate a reason from a pre-programmed, ready-made list of "legitimate" reasons. It is sort of like the quarterback with a list of the plays on his wrist band. Most judges are unwilling to call an officer of the court a liar.

The time spent in jury selection, and the time spent on appeal in reviewing that process, is a ridiculous waste of judicial resources when there is no requirement in the Sixth Amendment or the Seventh Amendment, express or implied, for affording an opportunity for *voir dire ad infinitum* or for peremptory challenges. This is the only country in the world that not only guarantees trial by jury but seems to guarantee forever for jury selection full of pitfalls.

Purely random selection would not only be much quicker but much fairer, both to jurors and to litigants. What can possibly stand in the way of a new rule to accomplish this simple procedural change, unless, of course, lobbyists for the fast-growing jury selection expert industry. I can line up plenty of witnesses to support my position if anybody is interested.

I look forward to a response from someone out there.

Respectfully yours,

William M. Acker, Jr.

W.A./me

P. S. Enclosed is the recent unpublished opinion of the Eleventh Circuit that prompted this letter. See page 7.

Plaintiff-Appellant,

versus

CITY OF BIRMINGHAM, ALABAMA;
MICHELLE F. WESSON; WILLIE HARBIN;
JULIUS POWELL; DAVID DAVIS; et al.,

Defendants-Appellees.

D. C. Docket No. 93-AR-2514-S

PERTRINA TAYLOR, as next friend of
DAVID MARIO TAYLOR, a minor,

Plaintiff-Appellant,

versus

CITY OF BIRMINGHAM, ALABAMA;
MICHELLE F. WESSON; WILLIE HARBIN;
JULIUS POWELL; DAVID DAVIS; et al.,

Defendants-Appellees.

D. C. Docket No. 93-AR-2515-S

FELICIA THOMAS, as next friend of
PATRICK JERRELL THOMAS, a minor,

Plaintiff-Appellant,

versus

CITY OF BIRMINGHAM, ALABAMA;
MICHELLE F. WESSON; WILLIE HARBIN;
JULIUS POWELL; DAVID DAVIS; et al.,

Defendants-Appellees.

D. C. Docket No. 93-AR-2516-S

SHERRY MOORE, as Personal Representative
of the Estate of ROSIE MOORE, deceased,

Plaintiff-Appellant,

versus

CITY OF BIRMINGHAM, ALABAMA;
MICHELLE F. WESSON; WILLIE HARBIN;
JULIUS POWELL; DAVID DAVIS; et al.,

Defendants-Appellees.

D. C. Docket No. 93-AR-2517-S

FELICIA THOMAS,

Plaintiff-Appellant,

versus

CITY OF BIRMINGHAM, ALABAMA;
MICHELLE F. WESSON; WILLIE HARBIN;
JULIUS POWELL; DAVID DAVIS; et al.,

Defendants-Appellees.

D. C. Docket No. 93-AR-2518-S

PERTRINA TAYLOR,

Plaintiff-Appellant,

versus

CITY OF BIRMINGHAM, ALABAMA;
MICHELLE F. WESSON; WILLIE HARBIN;
JULIUS POWELL; DAVID DAVIS; et al.,

Defendants-Appellees.

D. C. Docket No. 93-AR-2519-S

FELICIA THOMAS, as next friend of
EARNEST DAVONTE WHISENANT, a minor,

Plaintiff-Appellant,

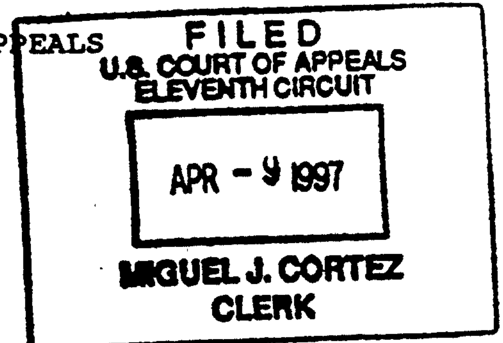
versus

CITY OF BIRMINGHAM, ALABAMA;
MICHELLE F. WESSON; WILLIE HARBIN;

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT



No. 95-6450
Non-Argument Calendar

D. C. Docket Nos. CV93-AR-2508-S
93-2512 thru CV-AR-2524-S

PERTRINA TAYLOR, as next friend of
TIMOTHY A. TAYLOR, a minor,

Plaintiff-Appellant,

versus

CITY OF BIRMINGHAM, ALABAMA;
MICHELLE F. WESSON; WILLIE HARBIN;
JULIUS POWELL; DAVID DAVIS; et al.,

Defendants-Appellees.

D. C. Docket No. 93-AR-2512-S

DOROTHY TAYLOR, as next friend of
STARPHIA SHUNTE TAYLOR, a minor,

Plaintiff-Appellant,

versus

CITY OF BIRMINGHAM, ALABAMA;
MICHELLE F. WESSON; WILLIE HARBIN;
JULIUS POWELL; DAVID DAVIS; et al.,

Defendants-Appellees.

D.C. Docket No. 93-AR-2513-S

CHERYL T. WHISENANT,

JULIUS POWELL; DAVID DAVIS; et al.,

Defendants-Appellees.

D. C. Docket No. 93-AR-2520-S

CHERYL T. WHISENANT, as next friend of
GREGORY WHISENANT, JR., a minor,

Plaintiff-Appellant,

versus

CITY OF BIRMINGHAM, ALABAMA;
MICHELLE F. WESSON; WILLIE HARBIN;
JULIUS POWELL; DAVID DAVIS; et al.,

Defendants-Appellees.

D. C. Docket No. 93-AR-2521-S

DOROTHY TAYLOR, as next friend of
SAMUEL TAYLOR, a minor,

Plaintiff-Appellant,

versus

CITY OF BIRMINGHAM, ALABAMA;
MICHELLE F. WESSON; WILLIE HARBIN;
JULIUS POWELL; DAVID DAVIS; et al.,

Defendants-Appellees.

D. C. Docket No. 93-AR-2522-S

SHERRY MOORE,

Plaintiff-Appellant,

versus

CITY OF BIRMINGHAM, ALABAMA;
MICHELLE F. WESSON; WILLIE HARBIN;
JULIUS POWELL; DAVID DAVIS; et al.,

Defendants-Appellees.

D. C. Docket No. 93-AR-2523-S

SHERRY MOORE, as next friend of
RAVEN M. MOORE, a minor,

Plaintiff-Appellant,

versus

CITY OF BIRMINGHAM, ALABAMA;
MICHELLE F. WESSON; WILLIE HARBIN;
JULIUS POWELL; DAVID DAVIS; et al.,

Defendants-Appellees.

D. C. Docket No. 93-AR-2524-S

SHERRY MOORE, as next friend of
NATHANIEL L. MOORE, a minor,

Plaintiff-Appellant,

versus

CITY OF BIRMINGHAM, ALABAMA;
MICHELLE F. WESSON; WILLIE HARBIN;
JULIUS POWELL; DAVID DAVIS; et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(Apirl 9, 1997)

Before EDMONDSON, BIRCH and CARNES, Circuit Judges.

PER CURIAM:

Plaintiff-Appellants appeal from a jury verdict for Defendants, the City of Birmingham and police officers employed by the City, on Plaintiffs' § 1983 claims. Because Plaintiffs' arguments on appeal are without merit, we affirm.

I. Facts and Background

Plaintiffs are women and children who claim to have been unlawfully searched by police officers in violation of the Fourth Amendment. Police searched the house that Plaintiffs were occupying pursuant to a premises warrant, which police obtained after observing the house for narcotics activity and after having an informant purchase drugs from an occupant of the house. When police arrived, they searched the Plaintiffs individually for

weapons and narcotics. Police found no weapons or narcotics and made no arrests.

Plaintiffs sued the City of Birmingham, Alabama and a number of police officers under 42 U.S.C. § 1983 for violation of Plaintiffs' Fourth Amendment rights against unreasonable searches. The jury returned a verdict in favor of Defendants.

II. Discussion

a. Batson Claim

Plaintiffs claim the trial judge committed reversible error by rejecting their challenge to Defendants' striking of Jurors Number 12 and 16, both females, as a violation of J.E.B. v. Alabama ex rel T.B., 114 S. Ct. 1419 (1994). We give deference to the factual determination of the district court judge that Defendants' counsel advanced a gender-neutral reason for the peremptory

strike of the two female jurors. See Wallace v. Morrison, 87 F.3d 1271, 1274 (11th Cir. 1996). We will not overturn the findings of the district court on this issue unless they are clearly erroneous. Id.

Even assuming Plaintiffs have established a prima facie case of a discriminatory use of peremptory strikes, see Batson v. Kentucky, 106 S. Ct. 1712, 1723 (1986), the district court made no clear error in finding that Defendants' counsel offered an adequate gender-neutral reason for the strikes. Defendants' proffered reason for the strikes was the following: Defendants wanted conservative jurors; federal government employees tend to be "more liberal than people in business or working in the private sector"; and Jurors Number 12 and 16 both worked for the federal government. This reason is both gender-neutral and "related to the particular case to be tried." Batson, 106 S. Ct. at 1724. See also Barfield v. Orange County, 911 F.2d 644, 648

(11th Cir. 1990) (accepting counsel's explanation for strike that juror was a school board employee and such employees "were extremely pro-labor"). Plaintiffs have produced no evidence tending to show that Defendant's proffered reason for the strike is pretextual. See, e.g., Purkett v. Elem, 115 S. Ct. 1769, 1771 (1995) (noting that "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike" and rejecting pretext argument where prosecutor's proffered reason for striking black males was that they had long, unkempt hair).

b. Jury's Request for Copy of Fourth Amendment

Plaintiffs argue that the district court judge erred by denying the jury the opportunity to view the actual language of the Fourth Amendment. Five minutes after retiring to deliberate, the jury requested a copy of the Fourth Amendment, which the judge

denied. The district court's refusal to give the jury a copy of the Fourth Amendment was not an abuse of discretion. A review of the record shows that the judge adequately instructed the jury about imposing Section 1983 liability for a Fourth Amendment violation.

c. Crack Cocaine Evidence

Plaintiffs argue that the district court erred by admitting into evidence crack cocaine that was sold by a person who was not a plaintiff in this case. Defendants argue that this evidence was "relevant to prove that the operation leading up to the search of the premises was not a capricious and arbitrary intrusion upon the residence." Plaintiffs did not object at trial to the admission of this evidence; so we review only for plain error. "Plain errors are obvious and substantial errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings."

United States v. Hope, 901 F.2d 1013, 1020 (11th Cir. 1990). Plaintiffs have shown no plain error here; so we reject this argument.

d. Jury Instructions

Plaintiffs argue that the district court erred by failing to instruct the jury that probable cause was required for the search of each Plaintiff. Specifically, Plaintiffs challenge the following portion of the instruction:

> Narcotics officers executing a search warrant for particularly described premises may search individuals present on the premises if the officers have some degree of particularized suspicion based upon the circumstances that individuals are concealing narcotics even though the individuals are not themselves named in the warrant.

Plaintiffs argue that this instruction conflicts with Ybarra v. United States, 100 S. Ct. 338 (1979). See Id. (holding person who happened to be present in bar could not be lawfully

searched pursuant to premises warrant absent "probable cause particularized with respect to that person").

Because Plaintiffs did not object to this instruction, we review only for plain error. United States v. Massey, 89 F.3d 1433, 1442 (11th Cir. 1996). Also, we review the jury instruction as a whole to determine whether it was a misstatement of the law. See Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1543 (11th Cir. 1996). In the context of all of the instructions given, we conclude that Plaintiffs have shown no plain error in the instructions in this case.

AFFIRMED.

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

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APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

May 7, 1997

Honorable William M. Acker, Jr.
United States District Court
481 Hugo L. Black United States
Courthouse
1729 Fifth Avenue North
Birmingham, Alabama 35203

Dear Judge Acker:

Director Leonidas Ralph Mecham has forwarded to me your suggestion that petit juries should be randomly selected from a randomly selected venire, and that the only challenges should be challenges "for cause." A copy of your letter will be sent to the chair and reporter of the Advisory Committee on Civil Rules for their consideration.

We welcome your suggestion and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Paul V. Niemeyer
Agenda and Policy Subcommittee
Professor Edward H. Cooper

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

RECEIVED 5/16/97

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CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

May 9, 1997

The Honorable William M. Acker, Jr.
United States District Court
481 Hugo L. Black United States
Courthouse
1729 Fifth Avenue North
Birmingham, AL 35203

Re: Selection of Petit Juries

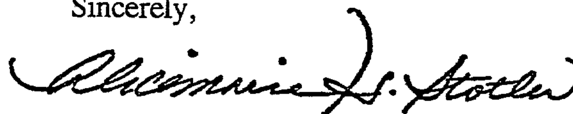
Dear Judge Acker:

I am in receipt of Director Mecham's transmittal of your letter of April 14, 1997, recommending changes regarding the selection of petit juries.

By this letter, I am forwarding your thoughtful letter and its enclosure to Circuit Judge Paul V. Niemeyer, Chair of the Advisory Committee on Civil Rules, and District Judge D. Lowell Jensen, Chair of the Advisory Committee on Criminal Rules, for consideration by those committees.

Thank you for your comments.

Sincerely,



Alicemarie H. Stotler

cc (w/enc.): John K. Rabiej, Chief,
Rules Committee Support Office

g:\docs\ahscommo\rules\juries.wma

Agenda Item II E 7

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 26. Taking of Testimony: Proposed Amendment re Remote Transmission of Testimony.**

DATE: **September 11, 1997**

At the Committee's April 1997 meeting, there was a proposal to amend Rule 26 to conform to its Civil Rules counterpart, Rule 43. That rule permits contemporaneous transmission of testimony from outside the courtroom. During the discussion, it was noted that applying that language verbatim would raise questions of a defendant's Sixth Amendment confrontation rights. The matter was deferred to the Committee's upcoming October meeting.

Judge Jensen appointed a subcommittee consisting of Judge Carnes (Chair), and Mr. Josefsberg and Mr. Pauley to study the matter and report to the Committee.

The Subcommittee's report and recommendation are attached.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Honorable Ed Carnes
United States Circuit Judge

Frank M. Johnson Jr. Federal Building
& U.S. Courthouse
15 Lee Street, Room 408
Montgomery, Alabama 36104
(334) 223-7132

TO: Members of the Criminal Rules Advisory Committee

FROM: Ed Carnes
Robert C. Josefsberg
Roger A. Pauley

RE: Proposed Rule Change to Permit Remote Transmission of Testimony

DATE: September 11, 1997

We were appointed as a subcommittee to consider and report to the Committee concerning whether the criminal rules should be amended to provide for the remote transmission of testimony during a trial. Rule 43(a) of the Civil Rules was amended in 1996 to provide:

> (a) Form. In every trial, the testimony of witnesses shall be taken in open court, unless a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. <u>The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.</u>

(emphasis added). The question is whether a similar provision should be included in the criminal rules.

PROPOSAL

Briefly stated, while none of the subcommittee members have deeply entrenched views on the subject, we do believe that the Committee should consider amending the rules to provide for remote transmission of testimony in criminal cases where compelling circumstances exist, which should at a minimum include that witness' unavailability at trial.

For purposes of discussion, we tentatively offer the following underscored language as an addition to Rule 26:

> In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence.

DISCUSSION

The proposed language down to the word "if" is identical to the last sentence of Rule 43(a) of the Rules of Civil Procedure. The last clause — the last seventeen words beginning with "if" — is lifted from the first sentence of Criminal Rule 15(e), which concerns the use of depositions as substantive evidence in criminal trials.

Our proposal's use of the controlling language already in Rule 15(e) is no accident. Permitting the use of remote transmission of testimony where, and only where, depositions already may be used at trial is a prudent and measured step. A party against whom a deposition may be introduced at trial will have no basis for complaining if remotely transmitted testimony is used instead. No basis, that is, except that live testimony may be more effective, but that is hardly a valid consideration against such a provision. When a witness is unavailable to testify — and that is a prerequisite under the proposal — the judge ought to have the discretion to permit the next closest thing to actual inside-the-courtroom live testimony. Live testimony, even if taken remotely, affords a defendant protections that are sometimes sacrificed when deposition testimony is used. See, e.g., United States v. Salim, 855 F.2d 944, 947-48 (2d Cir. 1988) (affirming conviction where deposition testimony used even though defendant and her counsel were not allowed in room with testifying witness, witness' lawyer answered some questions, lawyers were not allowed to cross-examine witness directly, and some parts of proceedings not transcribed verbatim). The judge should not be forced to choose between an unavailable witness testifying by deposition or not at all.

The proposed change does not run afoul of Supreme Court precedent and, if anything, it should be easier to defend constitutionally than the existing deposition rule. The two most pertinent decisions are Maryland v. Craig, 497 U.S. 836, 110 S. Ct. 3157 (1990), and Coy v. Iowa, 487 U.S. 1012, 108 S. Ct. 2798

(1988), both of which involve child victims of sexual assaults. In Coy, the Court vacated a conviction where during their testimony a screen in the courtroom prevented the two child victims from seeing the defendant, while allowing the defendant to see only a silhouette of the victims. The trial court in Coy had made no finding that the witness would be harmed by testifying without the screen, but had instead relied on "a legislatively imposed presumption" that such testimony would be traumatic for child victims. 487 U.S. at 1021, 108 S. Ct. at 2803. The Supreme Court concluded that use of the screen violated the defendant's confrontation rights, at least where there were no factual findings specific to that case concerning the necessity of such a procedure. A mere legislative presumption of necessity underlying a protective statute was held to be insufficient to outweigh the values the Confrontation Clause sought to protect. See, id. at 1021, 108 S. Ct. at 2803.

Two years later in Craig the Court noted that the values underlying the Confrontation Clause centered on four elements: (1) physical presence; (2) the oath; (3) cross-examination; and (4) the opportunity for the trier of fact to observe demeanor. See Craig, 497 U.S. 836, 847, 110 S. Ct. 3157, 3163 (1990). The Court rejected the notion that all four of those elements must be present in every case regardless of the circumstances. It did so in upholding a sexual assault conviction based on testimony provided by the child victim from a separate room via one-way closed circuit television. Unlike in the Coy case, the trial court in Craig had

made an explicit finding that the procedure was necessary for the child witnesses to be capable of giving effective testimony and to prevent further trauma to them. See 497 U.S. at 840-43; 110 S. Ct. at 3161-62.

In Craig, the trial court found that without the closed circuit television arrangement, the child witnesses would otherwise be psychologically "unavailable" to testify. See 497 U.S. at 852-53, 110 S. Ct. at 3167. The Supreme Court concluded that protecting child victims from additional emotional trauma was a sufficiently compelling governmental objective to "outweigh, at least in some cases, a defendant's right to face his or her accusers in court." Id. at 853, 110 S. Ct. at 3167. The Court also reasoned that any harm to the defendant resulting from the closed circuit television procedure would be relatively minor, because the defendant would still receive most of the protections contemplated by the Confrontation Clause. See id. at 851, 107 S. Ct. at 3166 (noting that the witnesses were still required to testify under oath, were subject to full cross-examination by defense counsel, and that closed-circuit television gave those in the courtroom the opportunity to observe the demeanor of the witness). A procedure allowing contemporaneous presentation of remote testimony where that testimony is otherwise unavailable would fit nicely into the Craig analysis. The same three of the four key elements of confrontation would be present, and the testimony would be otherwise unavailable.

Another decision relevant to our discussion is Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531 (1980). In that case, the Court held that introduction of preliminary hearing testimony of a witness unavailable at trial was constitutionally permissible. In the course of doing so, the Court distinguished the earlier decision in Barber v. Page, 390 U.S. 719, 88 S. Ct. 1318 (1968), which had reversed a conviction because of admission of the preliminary hearing testimony of a witness who was incarcerated at the time of trial. See Roberts, 448 U.S. at 76, 100 S. Ct. at 2544. Barber held that a defendant's rights to actual, physical confrontation could not be denied, unless the government had made a good faith effort to produce the witness in court. See, Barber. 390 U.S. at 725, 88 S. Ct. at 1322 ("The right of confrontation may not be dispensed with so lightly."). The difference is that in Roberts, the prosecution had tried repeatedly and unsuccessfully to compel the attendance of the witness who was outside of the state. See Roberts, 448 U.S. at 75, 100 S. Ct. at 2543-44.

We read the definition of "unavailability" in Evidence Rule 804(a), which is incorporated both in the deposition rule and in our proposed remote transmission rule, as consistent with the Roberts and Barber holdings. Moreover, if Criminal Rule 15(e), which permits the use of deposition testimony as substantive evidence when the witness is unavailable, is constitutional, then the language we have proposed permitting the use of remotely transmitted testimony in exactly the same circumstances is also constitutional.

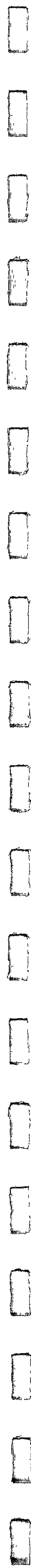
The final matter we would like to bring to the Committee's attention is that the Advisory Committee note accompanying the 1996 amendment to Civil Rule 43(a) clearly expresses a preference for deposition testimony over remotely transmitted testimony. For example, after stating that "the most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place," the note goes on to say:

> Other possible justifications for remote transmission must be approached cautiously. Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying. An unforeseen need for the testimony of a remote witness that arises during trial, however, may establish good cause and compelling circumstances. Justification is particularly likely if the need arises from the interjection of new issues during trial or from the unexpected inability to present testimony as planned from a different witness.

We are not necessarily convinced that depositions are preferable to remotely transmitted testimony in all, or even most, circumstances where the unavailability of the witness is expected. Nor are we convinced that the rule language itself supports such a preference.

In any event, if the Committee decides to propose a rule providing for remotely transmitted testimony, and especially if it adopts language similar to that used in Civil Rule 43(a), the

Committee will need to decide what action, if any, to take concerning the preference for depositions expressed in the civil rule's Advisory Committee note.



Agenda Item II E8

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 32. Sentence and Judgment: Proposal to Amend re Mental Examinations of Defendant**

DATE: **September 10, 1997**

Attached is a letter from the Department of Justice proposing that Rule 32 be amended to permit the trial court to order a mental examination of the defendant for purposes of sentencing. The letter points out that currently the Rule does not address the issue.

Please note that the letter also contains a proposal to amend Rule 12.2, also with regard to mental examinations. That proposal is addressed in a separate memo and attachments.

This item will be on the agenda for the October meeting in California.

U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

JUL 15 1997

The Honorable D. Lowell Jensen
Judge of the United States District Court
Northern District of California
1301 Clay Street, 4th Floor
Oakland, CA 94612

Dear Judge Jensen:

I am writing to request that the Advisory Committee on Criminal Rules consider amending the Rules relating to mental examinations of defendants in two respects: (1) to clarify that Rule 12.2(c) permits a court to order, on motion of the government, a mental examination of a defendant who gives notice of an intent under Rule 12.2(b) to introduce expert testimony in support of a defense of mental condition bearing on the issue of guilt; and (2) to extend the Rules to permit a court to order a government-requested mental examination of a defendant when it appears that the defendant will offer expert testimony as to mental condition at sentencing.

On the first issue, the lower courts are now in conflict. Until recently, the courts had construed Rule 12.2(c) as including not only situations in which a defendant has given notice under Rule 12.2(a) of an intent to rely on expert evidence to prove a defense of insanity, but also those in which notice was given under Rule 12.2(b). However, the law is currently in some disarray as a result of United States v. Davis, 93 F.3d 1286 (6th Cir. 1996). There the court held that, because Rule 12.2(c) only authorizes the court to order a mental examination "pursuant to 18 U.S.C. 4241 or 4242," which relates to competency and sanity examinations, and not under 18 U.S.C. 4247, the general provision regarding psychiatric and psychological examinations, the Rule does not permit a court to order a mental examination in the situation addressed by Rule 12.2(b). The court indicated in dicta, however, that a trial court nevertheless had inherent authority to order a noncustodial examination in proper circumstances, which it declined to define. See also, following Davis, United States v. Akers, 945 F. Supp. 1442 (D. Colo. 1996).

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We believe it is patently unfair, and contrary to the truth-seeking function of a criminal trial, to permit only the defendant to be able to undergo a mental examination by an expert of his or her choice and to offer such evidence on the issue of guilt, without affording the government the opportunity for an independent (and if necessary custodial) examination of the defendant by its own expert. Such a result is contrary to Section 4.05(1) of the Model Penal Code, on which the drafters of Rule 12.2(c) expressly relied in the Advisory Committee Note.

The court in Davis was troubled by what it regarded as a serious constitutional question involving self-incrimination whether a defendant could be made to undergo a government-requested mental examination in light of Estelle v. Smith, 451 U.S. 454 (1981), where the court held that the government's use at the capital sentencing phase of a doctor's testimony arising from a court-ordered competency examination violated the defendant's Fifth Amendment privilege because he was not advised of his right to remain silent and that his statements could be used against him at sentencing. But as the Advisory Committee Note to Rule 12.2(c) observes, Estelle itself intimates that a defendant can be required to submit to a mental examination when his silence may deprive the government of the only effective means it has of controverting his proof on an issue that the defendant himself interjects. See 451 U.S. at 465. Moreover, the Estelle opinion emphasized that the defendant in that case "introduced no psychiatric evidence, nor had he indicated that he might do so." 451 U.S. at 466.

Subsequent decisions, both of the Supreme Court and of the courts of appeals, have uniformly construed Estelle narrowly and have found a waiver of Fifth Amendment self-incrimination rights when the defendant has opted to introduce expert testimony at trial as to mental condition. E.g., Powell v. Texas, 492 U.S. 680, 683-4 (1989); Buchanan v. Kentucky, 483 U.S. 402, 421-4 (1987); Presnell v. Zant, 959 F.2d 1524, 1533 (11th Cir. 1992); Williams v. Lynaugh, 809 F.2d 1063, 1068 (5th Cir.), cert. denied, 481 U.S. 1008 (1987); Vardas v. Estelle, 715 F.2d 206, 209 (5th Cir. 1983), cert. denied, 465 U.S. 1104 (1984); United States v. Madrid, 673 F.2d 1114, 1119-21 (10th Cir. 1982). See also United States v. Vest, 905 F. Supp. 651, 653 (W.D. Mo. 1995)(finding waiver of Estelle at the capital penalty phase when a "defendant elects, with the advice of counsel, to put his mental status into issue"); United States v. Haworth, 942 F. Supp. 1406 (D.N.M. 1996)(same).

Rule 12.2(c), of course, only allows the introduction and use against the defendant of any statements made by the defendant during a mental examination when the defendant has introduced testimony on an issue respecting mental condition. The Rule thus embodies the triggering or waiver principle first hinted at in Estelle v. Smith and relied on in subsequent similar situations

by the cases cited above. In sum, we do not share the Davis court's belief that the constitutional issue is a serious or difficult one, and we urge that the Rule be amended to clarify the power of a trial court to do justice "in an appropriate case" by granting the government's request for an independent, and if necessary custodial, mental examination of the defendant, when the defendant gives notice of an intent to rely on expert testimony of his or her mental condition on the issue of guilt.

One relatively simple way to accomplish this, suggested by the Davis opinion itself, would be to amend the first sentence of Rule 12.2(c) to reference not only 18 U.S.C. 4241 and 4242 but also 18 U.S.C. 4247. The pertinent sentence would then read: "In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. 4241, 4242, or 4247."

A second way that we think the Rules should be amended to permit a court-ordered mental examination of a defendant involves sentencing proceedings. The Rules nowhere authorize a court-ordered mental examination of the defendant relating to sentencing. This is a gap that should be remedied.

For example, defendants in capital proceedings, in a significant percentage of federal cases, have sought mental examinations with a view toward offering expert evidence relating to mental disease or condition in mitigation at the sentencing phase. See, e.g., United States v. Vest, supra; United States v. Haworth, supra; see also, setting forth as mitigating factors, 18 U.S.C. 3592(a)(1)(impaired capacity), (a)(6)(severe mental or emotional disturbance). Likewise in noncapital sentencing proceedings, to which the sentencing guidelines apply, defendants may sometimes wish to offer expert evidence stemming from mental examinations in an effort to persuade the court to depart downward in unusual cases. See Guideline 5H1.3 (mental condition not "ordinarily" relevant); but compare Guideline 5K2.13 (diminished capacity relevant in some cases). In both instances, the government should be able to obtain a court-ordered mental examination by another expert, for the same kind of fairness reasons as undergird Rule 12.2(c).

Leaving aside the question whether defendants should be required, as in Rule 12.2(a) and (b), to give some form of timely notice of an intention to offer such expert testimony (both Vest and Haworth granted government motions to so require, apparently in the exercise of inherent authority),[1] if it appears that they

[1] In order to clarify the law and prevent future litigation, we believe the Rules should also be amended to require adequate notice of an intention to offer expert testimony at the sentencing phase.

intend to do so, the trial judge should be able to order that the defendant undergo a mental examination by another expert. See Vest, supra, 905 F. Supp. at 653: "If a defendant elects to present mitigation testimony addressing his mental status, then ... [u]nless the government is allowed to conduct its own mental health examination, it may be deprived 'of the only effective means it has of controverting ... proof on an issue that [defendant has chosen to] interject into the case.'", quoting from Estelle. In sum, in order to promote fairness and avoid future litigation, the Rules should be amended to permit court-ordered mental examinations of defendants when appropriate in sentencing proceedings, both capital and noncapital.

Your and the Committee's consideration of these matters is appreciated.

Sincerely,

(signed) John C. Keeney

John C. Keeney
Acting Assistant Attorney General

Agenda Item II E9

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor David Schlueter, Reporter**

RE: **Rules 43 & 10. Proposed Amendment to Permit Defendant to Waive Presence at Arraignment.**

DATE: **September 9, 1997**

Mr. Mario S. Cano has recommended that the Federal Rules of Criminal Procedure be changed to permit the court to excuse a represented defendant from attending his or her arraignment. Citing the Florida Rules of Criminal Procedure, Mr. Cano states that permitting a defendant to do so can save "a great deal of time, effort and expense..." Although Mr. Cano frames his proposal in the context of Rule 43, an amendment to Rule 10 would probably also be required.

Several years ago, the Committee published for comment proposed amendments to Rules 10 and 43 concerning the presence of a defendant at the arraignment. The attached pages from the minutes of three Committee meetings, from 1992 to 1994, should give some indication of the flow of those proposals. The Committee's proposed amendments to those two rules are also attached.

Although that proposal focused more on the possibility of conducting remote arraignments through teleconferencing, a great deal of the discussion focused on the underlying issue of the defendant's presence in the courtroom, before a judicial officer. As the attached materials indicate, video arraignments would have been permitted only where the defendants' consented.

The proposed amendments to Rule 10 were placed on an indefinite hold--pending the outcome of any studies or pilot programs being conducted. The proposed amendments to Rule 43, as modified, were ultimately approved.

97-CR-8D

LAW OFFICES OF

MARIO S. CANO

SUITE 1035

2121 PONCE DE LEON BOULEVARD

CORAL GABLES, FLORIDA 33134-5224

MARIO S. CANO *

* MEMBER OF FLORIDA, NEBRASKA AND NEW YORK BARS

TELEPHONES

305 / 442 - 2121

305 / 448 - 2121

TELEFAX

305 / 567 - 0423

April 1, 1997

Robert C. Josefsberg, Esquire
PODHURST, ORSECK, JOSEFSBERG, EATON,
MEADOW, OLIN & PERWIN, P.A.
Suite 800/City National Bank Building
25 West Flagler Street
Miami, Florida 33130-1780

Dear Bob:

I just received my new copy of the *Federal Rules of Criminal Procedure* and was pleased to note that you are on the Advisory Committee on Criminal Rules, as constituted on January 6, 1997.

I thus address you with respect to the current provisions and, in particular, Federal Rules of Criminal Procedure 43 which requires the presence of the Defendant at various stages, including arraignment. As you are familiar with the ***Florida Rules of Criminal Procedure*** also, you know that a Defendant's presence may be waived at arraignment, thus saving a great deal of time, effort and expense, particularly in the instances where the Defendant lives away from the charging jurisdiction.

I thus request that you propose to the committee for suggestion to the Judiciary Committee of each house of Congress an amendment to the current rule to the effect of excusing a defendant from his or her presence at arraignment, so long as they are represented by counsel, much in keeping with the *Florida Rules.*

Once again, I am most pleased to note a "hometown presence" on so important a national committee and have no doubt that our area is certainly being well represented.

Wishing you an enjoyable tenure on the committee and thanking you in advance for your attention to this point, I remain,

Very truly yours,

MARIO S. CANO
MSC/fb

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

April 25, 1997

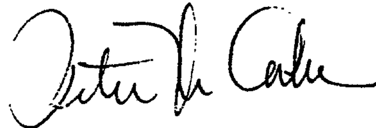
Mario S. Cano, Esquire
2121 Ponce De Leon Boulevard
Coral Gables, Florida 33134-5224

Dear Mr. Cano:

Thank you for your suggestion to Federal Rules of Criminal Procedure 43. A copy of your letter will be sent to the chair and reporter of the Advisory Committee on Criminal Rules for their consideration.

We welcome your suggestion and appreciate your interest in the rulemaking process.

Sincerely,



Peter G. McCabe
Secretary

cc: Honorable D. Lowell Jensen
Professor David A. Schlueter

authorities and nothing would happen in the case. Mr. Pauley responded that the defendant's interests would be protected by *Riverside*'s requirements of a prompt appearance before a magistrate to determine if probable cause exists for pretrial confinement.

In the ensuing discussion, the Committee noted a variety of potential problems with amending Rule 5 to meet the UFAP problem. Judge Keeton noted that it might be easier to simply amend the statute to permit federal authorities to arrest a state defendant without relying upon a separate, rarely prosecuted, substantive federal crime. Several members raised the issue of jurisdiction to arrest a UFAP defendant and the most appropriate forum for complying with Rule 5. Judge Hodges thereafter appointed a subcommittee consisting of Judge Jensen (Chair), Judge Schlesinger, Magistrate Judge Crigler, Mr. Karas, and Mr. Pauley, to consider the proposed amendment and report to the Committee at its next meeting. No vote was taken on the motion to amend.

2. Rules 10 and 43, In Absentia Arraignments.

Judge Hodges provided a brief overview of a proposal from the Federal Bureau of Prisons to provide for teleconferencing arraignments and recognized the presence of Mr. Phillip S. Wise from the Bureau who would be available to answer questions from the Committee. He noted that the gist of the proposal was to provide some contact between the defendant, counsel, and the court without the necessity of the defendant's actual appearance before the court.

Judge Jensen moved to amend Rules 10 and 43 to provide for teleconferencing of arraignments. Mr. Pauley seconded the motion.

Judge Hodges observed that the proposal had been previously considered and rejected by the Committee and Mr. Marek questioned whether the proposed amendments would be limited to arraignments. Mr. Wise answered that the Bureau's preference would be that as many pretrial proceedings as possible, e.g., pretrial detention hearings, be covered. He further explained the two-way technology used in some state courts; the defendant can see the judge and the witness box and the judge can see the defendant. The defense counsel may or may not be with the defendant. Professor Saltzburg indicated that although he favored teleconferencing for arraignment, he would be opposed to such a procedure wherever evidence would be considered.

Mr. Marek expressed concern that the amendment would lead to a slippery slope and that he opposed any

teleconferencing, even for arraignments. He noted that there was a false assumption that nothing happens at an arraignment; the defendant should see the dynamics of the situation. There are significant issues to be decided at pretrial sessions, such as setting bail and determining competency of the defendant. He noted that although the Bureau of Prisons might save money by not transporting defendants to court, the court would incur additional expenses in terms of equipment and operating costs. In his view, the proponents had not made a case for overriding the important interests associated with personal appearances.

Judge Hodges indicated that it might be beneficial to treat Rules 10 and 43 separately and raised the question of whether it would make a difference if the defendant had the option of deciding to waive a personal appearance. Mr. Marek indicated that the right should not be waivable and Mr. Karas added that if a waiver provision were added, only those who could afford counsel, would appear.

A brief discussion ensued on the problems associated with prison overcrowding and the logistical problems associated with transporting defendants to court, especially in larger metropolitan areas. Judge Jensen noted that even in such areas of congestion, there is no authority under the rules for experimenting.

On a vote to amend Rule 10 to provide for teleconferencing of arraignments, the motion was defeated by a vote if five to four with one abstention. Judge Jensen thereafter withdrew his motion concerning a similar amendment to Rule 43; Mr. Pauley consented to the withdrawal.

The Committee then engaged in a brief discussion on the possibility of providing for some experimentation with teleconferencing. Mr. Eldridge indicated that it might be difficult to devise any pilot programs but would be more than willing to work with the Committee. Following a straw poll of the Committee, Judge Hodges appointed a subcommittee consisting of Judge Keenan (Chair), Judge Crow, Mr. Doar, Mr. Marek, and Professor Saltzburg. The subcommittee was directed to study the issue of amending Rules 10 and 43 to provide for experimental teleconferencing where the defendant has consented to such.

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

Judge Hodges briefly introduced the topic of advising a defendant who is entering a guilty plea of the impact of a negotiated factual stipulation. He noted that the issue had

Mr. Pauley moved that Rule 5 be amended to provide that persons arrested for violating 18 U.S.C. § 1073 (UFAP) may be turned over to appropriate state or local authorities provided that the Government promptly moves, in the district in which the warrant was issued, to dismiss the complaint. Professor Saltzburg seconded the motion.

Judge Jensen indicated that he favored the motion but Mr. Karas spoke against the proposal noting that a person charged with UFAP might be placed in custody indefinitely without the benefit of appearing before a magistrate. Mr. Pauley expressed the view that the federal system should not provide a backstop for state criminal justice problems or procedures. And Mr. Marek responded that the federal system is involved if a UFAP charge has been filed. The Committee ultimately voted 11 to 2 to make the proposed changes and forward them to the Standing Committee with a recommendation to publish the amended rule for comment by the bench and bar.

2. Rules 10 and 43: In Absentia Appearances

Judge Hodges provided a brief background to the proposal to permit use of video technology to arraign defendants, not present in court. He noted that at the Committee's Seattle meeting he had appointed a subcommittee composed of Judge Keenan (Chair), Judge Crow, Mr. Doar, Mr. Marek, and Professor Saltzburg to study the issue and report back to the Committee. Judge Keenan indicated that the subcommittee had studied the issue and believed that the Rules should be amended. He then moved that Rules 10 and 43 be changed to permit use of teleconferencing technology where the defendant waives the right to be physically present in court. Mr. Doar seconded the motion.

Mr. McCabe of the Administrative Office, informed the Committee that at its Spring 1993 meeting, the Judicial Conference had approved a pilot teleconferencing program in the Eastern District of North Carolina for competency hearings where the defendant is not present in court. Judge Davis questioned whether a defendant would really be waiving the right to be present and Judge Keenan indicated that the waiver provision was a major compromise within the subcommittee's consideration of the issue.

Mr. Karas opposed the rule changes, stating that he viewed the amendments as one more step down the slippery slope. He noted that the waivers will come from those defendants with appointed counsel and that Arizona had scrapped a similar program of video arraignments. Mr. Marek also opposed the amendments. He was concerned that there

would be inevitable questions whether the defendant actually waived appearance in court, adding that defendants often do not fully grasp the significance of initial appearances. He joined Mr. Karas in questioning the wisdom of starting down the path of video teleconferencing.

Judge Marovich indicated that the amendment sends the message that arraignments are not that important and Mr. Wilson questioned the practical problems of defense counsel effectively communicating with a client who may not be present in court with counsel.

After some additional discussion the original motion was withdrawn and replaced with a motion to forward the proposed amendment without provision for waiver.

Mr. Marek expressed greater concern for the new proposal and Professor Saltzburg indicated that the proposal would squeeze the humanity out of the justice system. He noted that there was something fundamental about bringing defendants forward and putting them before a judge. Concerning the waiver provision, he stated that that issue could be addressed in the Committee Note. Additional comments by Judge Hodges, Mr. Marek, and Mr. Wilson focused on the problems of counsel being present with the defendant. Judge Crow commented that there might be a problem with the definition of arraignment, which is covered in Rule 10. But Rule 43 might not be as limited. Judge Marovich indicated that if teleconferencing were limited to only arraignments, it might not be as objectionable.

Judge Keenan indicated that perhaps the best way to proceed would be to treat Rule 10 separately and go forward with that rule alone. On a vote whether to amend Rule 10 without a waiver provision, the motion failed by a vote of 6 to 7. Judge Keenan thereafter moved that Rule 10 be amended to permit video teleconferencing if the defendant waived personal appearance. Professor Saltzburg seconded the motion which carried by a vote of 10 to 3.

Turning to Rule 43, Judge Jensen noted that the issue of waiver would also be a key point in any change to the rule. Mr. Marek expressed concern that any counsel who recommended that a defendant waive personal appearance might be guilty of ineffective assistance of counsel.

Judge Keenan moved that Rule 43 be amended to permit teleconferencing of pretrial sessions if the defendant waives personal appearance. Judge Crow seconded the motion which carried by a vote of 9 to 3 with one abstention.

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.

Rule 43. Presence of Defendant.

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

(b) **Continued Presence Not Required.** The further progress of the trial to and including the return of the verdict, and the imposition of sentence, will ~~shall~~ not be prevented and the defendant will ~~shall~~ be considered to have waived the right to be present whenever a defendant, initially present at trial,

(1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), ~~or~~

(2) in a noncapital case, is voluntarily absent at the imposition of sentence, or

~~(2)~~ (3) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

(c) Presence Not Required. A defendant need not be present ~~in the following situations~~:

26 (1) ~~A corporation may appear by counsel for all~~
27 ~~purposes~~ when represented by counsel and the defendant
28 is an organization, as defined in 18 U.S.C. § 18;
29 (2) ~~In prosecution for offenses~~ when the offense
30 is punishable by fine or by imprisonment for not more
31 than one year or both, the court, with the written
32 consent of the defendant, may permit arraignment, plea,
33 trial, and imposition of sentence in the defendant's
34 absence~~.~~;
35 (3) ~~At~~ when the proceeding involves only a
36 conference or ~~argument~~ hearing upon a question of law~~.~~;
37 (4) when the proceeding is a pretrial session in
38 which the defendant can participate through video
39 teleconferencing and waives the right to be present in
40 court; or
41 ~~(4)~~ (5) ~~At~~ when the proceeding involves a
42 correction reduction of sentence under Rule 35.

COMMITTEE NOTE

The revisions to Rule 43 focus on three areas and reflect in part similar changes in Rule 10, which governs arraignments. First, the amendments make clear that a defendant who, initially present at trial but who voluntarily flees before sentencing, may nonetheless be sentenced in absentia. Second, the court may use video technology to conduct pretrial sessions with the defendant absent from the courtroom, where the defendant waives the right to be present. Third, the rule is amended to extend to organizational defendants. In addition, some stylistic changes have been made.

Subdivision (a). The changes to subdivision (a) are stylistic in nature and the Committee intends no substantive change in the operation of that provision.

Subdivision (b). The changes in subdivision (b) are intended to remedy the situation where a defendant voluntarily flees before sentence is imposed. Without the amendment, it is doubtful that a court could sentence a defendant who had been present during the entire trial but flees before sentencing. Delay in conducting the sentencing hearing under such circumstances may result in difficulty later in gathering and presenting the evidence necessary to formulation of a guideline sentence.

The right to be present at court, although important, is not absolute. The caselaw, and practice in many jurisdictions, supports the proposition that the right to be present at trial may be waived through, inter alia, the act of fleeing. *See generally Crosby v. United States*, 113 S.Ct. 748, ____ U.S. ____ (1993). The amendment extends only to noncapital cases and applies only where the defendant is voluntarily absent after the trial has commenced. The Committee envisions that defense counsel will continue to represent the interests of the defendant at sentencing.

The words "at trial" have been added at the end of the first sentence to make clear that the trial of an absent defendant is possible only if the defendant was previously present at the trial. *See Crosby v. United States, supra.*

Subdivision (c). There are two changes to subdivision (c). The first is technical in nature and replaces the word "corporation" with a reference to "organization," as that term is defined in 18 U.S.C. § 18 to include entities other than corporations.

The second change to subdivision (c) is more significant. New subdivision (c)(4), which parallels a similiar amendment in Rule 10, provides that the court may use video teleconferencing technology to conduct pretrial sessions with the defendant at another location -- if the defendant waives the right to be personally present in court. The Committee balanced the concern that this might dehumanize the judicial process against the fact that some pretrial sesssions can be very brief, pro forma, proceedings. As noted above, the right to be present in court is not an absolute right, and may be voluntarily waived by the defendant. It is important to note that the amendment does not require the court to use such technology; the rule simply recognizes that the court may, under appropriate conditions, and in full respect of the defendant's rights, use such technology.

Although the Committee did not attempt to further define the term "pretrial sessions," the rule could

logically extend to sessions such as Rule 5 proceedings, arraignments (as specifically provided for in the amendment to Rule 10), preliminary examinations under Rule 5.1, competency hearings, pretrial conferences, and motions hearings not already within the purview of subdivision (c)(3). The Committee does not contemplate that the amendment would extend to guilty plea inquiries under Rule 11(c).

1 **Rule 10. Arraignment**

2 Arraignment, which must ~~shall~~ be conducted in open
3 court, ~~and~~ ~~shall~~ consists of:
4 (a) reading the indictment or information to the
5 defendant or stating to the defendant the substance of the
6 charge; and
7 (b) calling on the defendant to plead to the indictment
8 or information ~~thereto~~.
9 The defendant must ~~shall~~ be given a copy of the indictment
10 or information before being called upon to enter a plea
11 ~~plead~~. Video teleconferencing may be used to arraign a
12 defendant not physically present in court, if the defendant
13 waives the right to be arraigned in open court.

COMMITTEE NOTE

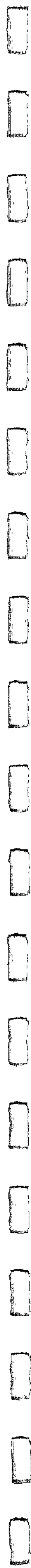
Read together, Rules 10 and 43 require the defendant to be present in court for the arraignment. *See, e.g., Valenzuela-Gonzales v. United States*, 915 F.2d 1276, 1280 (9th Cir. 1990)(Rules 10 and 43 are broader in protection than the Constitution). The amendment to Rule 10, in addition to several stylistic changes, creates an exception to that rule and provides that the court may permit arraignments through video teleconferencing if the defendant waives the right to be present in court. Similar amendments have also been made to Rule 43 to cover other pretrial sessions.

In amending the rule, and Rule 43, the Committee was very much aware of the argument that permitting video arraignments could be viewed as an erosion of an important element of the judicial process. First, it may be important for a defendant to see, and experience first-hand the formal impact of the reading of the charge. Second, it may be necessary for the court to personally see and speak with the defendant at the arraignment, especially where there is a real question whether the defendant really understands the

gravity of the proceedings. And third, there may be difficulties in providing the defendant with effective and confidential assistance of counsel if the two are in separate locations, connected only by audio and video linkages.

The Committee nonetheless believed that in appropriate circumstances the court, and the defendant, should have the option of conducting the arraignment where the defendant is in visual and aural contact with the court, but in a different location. Use of video technology might be particularly appropriate, for example, where an arraignment will be pro forma but the time and expense of transporting the defendant to the court are great. In some districts, defendants have to be transported long distances, under armed guard, to an arraignment which may take only minutes to complete.

A critical element to the amendment is that no matter how convenient or cost effective a video arraignment might be, the defendant's right be present in court stands unless he or she waives that right. As with other rules including an element of waiver, whether a defendant voluntarily waived the right to be present in court during an arraignment will be measured by the same standards. An effective means of meeting that requirement in Rule 10 would be for the court to obtain the defendant's views during the arraignment itself or require the defendant to execute the waiver in writing.



Agenda Item II E 10

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor David Schlueter, Reporter

RE: Rules Governing § 2254 Proceedings (State Custody) and Rules Governing § 2255 Proceedings (Federal Custody): Timing Requirements and Appointment of Counsel

DATE: September 10, 1997

For some time, the Criminal Rules Committee has had the responsibility of considering possible amendments to the Rules Governing § 2254 and § 2255 proceedings. For the most part the Rules have proved non-controversial and the Committee's involvement in actually amending the Rules is rarely called for. The last amendment made to the Rules as I recall was in 1993 when Rule 8 of the Rules Governing § 2255 Proceedings was amended to provide for production of witness statements.

As the attached materials indicate, two issues have been presented to the Committee. The first is in the nature of a technical amendment. Judge Dorsey has pointed out that the references in Rule 8(c) of the Rules Governing § 2255 Proceedings and Rule 8(c) of the Rules Governing § 2254 Proceedings are out-of-date. The reference to 18 U.S.C. § 3006A(g) should be changed to reflect the amendments to the statute. Subsection (a) of that provision now governs the discretionary appointment of counsel where the petitioner is seeking relief under §§ 2241, 2254, or 2255.

The second issue is more complicated. Professor Edward Cooper, Reporter of the Civil Rules Committee has forwarded materials which point out the apparent inconsistencies in the time requirements concerning a Government response or answer to a habeas petition:

- Under § 2243, the Government is required to return the habeas writ or show cause order "within three days unless for good cause additional time, not exceeding twenty days, is allowed."

- Sections 2254 and 2255 are silent regarding any time requirements for the Government's response.

- Rule of Civil Procedure 81 (a)(2) sets a maximum time limit of 20 days for § 2254 and 40 days for § 2255 proceedings.

- Rule 4 of the Rules Governing § 2255 Proceedings simply provides that if the judge does not summarily dismiss the petitioner's motion for "...the judge shall order the United States Attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate."

- Rule 4 of the Rules Governing § 2254 Proceedings bears similar language and states that "...the judge order the respondent to file an answer or other pleading within the period of time fixed by the court or take such other action as the judge deems appropriate."

Civil Rule 81 is inconsistent with Rule 4 and § 2243. But as pointed out in the attached materials there is authority for the view that § 2243 was superseded by the adoption of Civil Rule 81(a)(2) in 1971 and that both Rule 81 and § 2243 were superseded by adoption of the more flexible provisions in Rule(s) 4 in 1977.

The Civil Rules Committee is considering an amendment to Civil Rule 81 which would simply cross-reference the Rules Governing § 2254 Proceedings, and perhaps other rules or statutory provisions governing habeas actions.

That raises the issue of whether any amendment should be made to Rule 1 of the Rules Governing s 2254 Proceedings. Rule 1(a) provides that the Rules apply to cases involving state custody. And Rule 1(b) of those Rules indicates that the district court in its discretion may apply those Rules to "applications for habeas corpus in cases not covered by subdivision (a)." The Advisory Committee Note to Rule 1 states that the Committee had in mind cases such as military service issues. There is no counterpart to this provision in the Rules Governing s 2255 Proceedings.

The Committee has several options at this point. First, it could simply leave the two versions of Rule 4 as it finds them. It seems safe to assume that the more flexible language of Rule 4 governs any dispute about timing in cases brought under § 2254 or § 2255. For any other type of habeas case, apparently the courts are simply applying a more flexible standard.

However, even if it leaves the two versions of Rule 4 as they now stand, Professor Ed Cooper has raised some sound questions which probably need to be addressed. For example, it might be worthwhile to consider the question of whether the Rules ought to make mention of habeas petitions which do not fall under either § 2254 or § 2255. As noted in the attached letter from Magistrate Judge Carroll, his district experiences a large number of habeas petitions filed by federal and state prisoners under § 2241. Should the Committee propose a set of rules governing those proceedings? Or, would it be better to adopt one set of rules governing all habeas actions?

Given the intertwined issues and the fact that some additional coordination with the Civil Rules Committee is appropriate, it might be prudent to discuss this agenda item with a view toward drafting possible amendments for final consideration at the Spring 1998 meeting.

I am also attaching copies of § 2243 and Rule(s) 1 and 4 for your convenience.

97-CR-F

(no action needed)

United States District Court
District of Connecticut
141 CHURCH STREET
NEW HAVEN, CT 06510

Chambers Of
Peter C. Dorsey
Chief Judge

(203) 773-2427

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RECEIVED 8/4/97

July 9, 1997

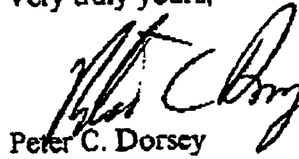
Honorable Alicemarie H. Stotler
U.S. Courthouse
751 West Santa Ana Boulevard
Santa Ana, California 92701

Dear Judge Stotler:

It has come to my attention that there is an apparent mistake in Rule 8(c) of the Federal Rules Governing § 2255 proceedings. In relevant part, Rule 8(c) states: "If an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) . . ." *See* Exh 1. The problem is that § 3006A(g), which used to address discretionary appointment of counsel in proceedings under §§ 2241, 2254, and 2255, was repealed in 1986. *See* Exh. 2 and Exh. 3. Courts still have discretion to appoint counsel in such cases, but their authority is now pursuant to subsection (a). *See* Exh. 4. The reference to subsection (g) in Rule 8(c) seemingly should be eliminated.

Rule 8(c) of the Federal Rules Governing § 2254 proceedings appears to contain the same error.

Very truly yours,



Peter C. Dorsey
Chief Judge

PCD/km

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

ALICEMARIE H. STOTLER
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D. LOWELL JENSEN
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

July 28, 1997

Honorable Peter C. Dorsey
Chief Judge
United States District Court
141 Church Street
New Haven, CT 06510

Re: Mistake in Rule 8(c) of § 2255 Rules

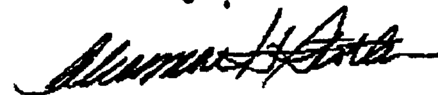
Dear Chief Judge Dorsey:

I very much appreciate the time and trouble that went into your letter of July 9. Somehow the attachments went astray, but we are tracking down the problem to find out how this got by us. As you know, the Administrative Office founded a "Rules Committee Support Office" (only in 1992) whose staff's duties include combing through recent legislation to prevent just these types of problems from occurring.

I am forwarding your letter to Judge Niemeyer, chair of the Advisory Committee on Civil Rules, Professor Ed Cooper, the Reporter, and to Mr. Rabiej who heads the Rules Committee Support Office. The Support Office maintains a docket of all correspondence received, and as soon as a plan is formulated to correct the rules defects identified in your letter, you will hear from me, perhaps Judge Niemeyer, and probably also from Peter McCabe, formal secretary to the rules committees.

Thank you again for taking the time to write, and I hope that no more rules errors ever come to your attention.

Sincerely,



Alicemarie H. Stotler

cc: Judge Paul V. Niemeyer
Professor Edward H. Cooper
John K. Rabiej, Esq.

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THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
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EDWARD H. COOPER
Thomas M. Cooley Professor of Law

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April 25. 1997

Hon. John L. Carroll
Chief United States Magistrate Judge
Middle District of Alabama
Post Office Box 430
Montgomery. Alabama 36101-0430
by FAX: 334.223.7114

Two pages this message

Re: Habeas Corpus Return Time

Dear John.

Many thanks for your letter on habeas corpus practice. This is exactly the sort of information we need to shape consideration of the proper approach to Civil Rule 81(a)(2). Encouraged by your preference for the approach taken in Rule 4 of the § 2254 Rules, let me suggest a possible "minimum changes" draft. The draft adds a reference to the § 2254 Rules as a minimum concession to the misleading statement that now seems to apply the Civil Rules unless a statute applies:

> (2) These rules are applicable to proceedings for admission to citizenship. habeas corpus. and quo warranto. to the extent that the practice in such proceedings is not set forth in statutes of the United States or the Rules Governing § 2254 cases and has heretofore conformed to the practice in civil actions. The writ of habeas corpus. or order to show cause. shall be directed to the person having custody of the person detained. It shall be returned within the period of time fixed by the court ~~within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U.S.C. § 2254 shall not exceed 40 days. and in all other cases shall not exceed 20 days~~.

This approach leads to a number of questions that I have only begun to consider — and would prefer to consider only with the help of habeas corpus experts. Like you. Section 2254 Rule 4 has abandoned the "return" concept in favor of "an answer or other pleading." Should we do the same here? And for that matter. is it time to reconsider Section 2254 Rule 1(b)? Rule 1(b) states that the § 2254 Rules can apply to any habeas corpus proceeding at the discretion of the court. Why not make them applicable across the board? And should we also have a cross-reference to the §2255 rules — Rule 12 permits application of the Civil Rules when appropriate?

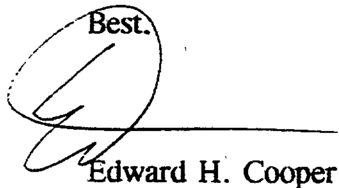
Hon. John L. Carroll
April 25, 1997
page two

Apart from the question of what to do, there is a question of relations to Congress. Rule 81(a)(2) directly and specifically supersedes an Act of Congress in establishing a 40-day extension limit, double the limit prescribed by § 2243. Section 2254 Rule 4 goes that one better. A simple rules change that adopts Rule 4 for all habeas corpus proceedings would complete the sweep of the statute. Should we think about suggesting this to Congress, or is it enough that we have got this far into the thicket and might as well carry on to an orderly conclusion?

It is clear enough that the Civil Rules Committee is responsible for Civil Rule 81. I am equally clear that we should not undertake to operate directly on the § 2254 Rules, or even to incorporate them for all habeas corpus proceedings outside of § 2254, without coordinating with the Criminal Rules Committee. And I would have guessed that if we should feel moved to operate on § 2254 Rule 1(b), so as to make the § 2254 Rules applicable to all habeas corpus proceedings and have done with it, we are moving into territory that the Criminal Rules Committee might well regard as its own.

So, as often, a simple enough inquiry leads to more complex problems. I look forward to talking with you next week.

Best,



Edward H. Cooper

EHC/lm
fc: Hon. Paul V. Niemeyer
410.962.2277

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EDWARD H. COOPER
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May 15, 1997

Professor David A. Schlueter
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, Texas 78228-8602

Re: Civil Rule 81(a)(2), § 2254 Rules 1, 4

Dear David:

I enclose a wad of papers describing a problem that was first dropped on the collective lap of the Civil Rules Committee because it is Civil Rule 81(a)(2) that obviously needs fixing. As it stands now, Rule 81(a)(2)'s statement about the time for responding to a petition for habeas corpus governed by § 2254 is flat wrong. It has been superseded by § 2254 Rule 4. It seems to be wrong in part as to all other habeas corpus petitions — § 2254 Rule 1(b) gives the court discretion to apply Rule 4, not Rule 81(a)(2) nor § 2243 time periods.

The question is how to fix this. The broadest fix would be to expand the § 2254 Rules to cover all petitions for habeas corpus. That may or not make sense. A narrower fix would be to adopt the Rule 4 time period in Rule 81(a)(2). Even that may not make sense. Something depends on the relative need for urgency in habeas petitions that fall outside § 2254. Contrary to the assumption in my initial Note to the Civil Rules Committee, I am told that there are substantial numbers of petitions by state prisoners that are not governed by § 2254; see the letter from Judge John Carroll. They may wisely fall into Rule 4. There also are petitions by people in federal custody who seek relief outside § 2255. Those petitions may present urgent needs for action that should not be governed by the discretionary approach of Rule 4.

All of this — except Rule 81(a)(2) — falls within your jurisdiction. I would think we can safely wait for the Standing Committee meeting to figure out how to go about coordinating our efforts.

Best,

Edward H. Cooper

EHC/lm
encls
cc: Hon. Paul V. Niemeyer

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

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PETER G. McCABE
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D. LOWELL JENSEN
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

August 18, 1997

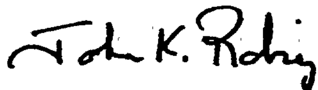
Honorable Peter C. Dorsey
Chief Judge
United States District Court
141 Church Street
New Haven, Connecticut 06510

Dear Judge Dorsey:

Thank you for your suggestion to Rule 8(c) of the Federal Rules Governing § 2255 proceedings. A copy of your letter had been sent to the chair and reporter of the Advisory Committee on Civil Rules. The issues raised by your suggestion are also relevant to review by the Advisory Committee on Criminal Rules. Accordingly, I am sending a copy of your letter to the chair and reporter of the Advisory Committee on Criminal Rules for their consideration.

We welcome your suggestion and appreciate your interest in the rulemaking process.

Sincerely,



for Peter G. McCabe
Secretary

cc: Honorable Alicemarie H. Stotler
Honorable W. Eugene Davis
Professor David A. Schlueter

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
POST OFFICE BOX 430
MONTGOMERY, ALABAMA 36101-0430

JOHN L. CARROLL
Chief United States Magistrate Judge

TELEPHONE (334) 223-7540

April 23, 1997

VIA FACSIMILE

Professor Edward M. Cooper
University of Michigan Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215

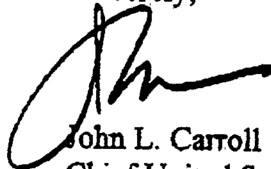
Dear Ed:

I was looking through the Agenda Book for our upcoming meeting and came across the preliminary note concerning Rule 81(a)(2). Because I do a lot of habeas corpus work, I wanted to drop you a short note concerning my view of the problem which I hope to amplify in person when I see you in Naples. As you correctly note, Rule 4 of the Habeas Rules supersedes the return time limits for cases brought under 28 U.S.C. § 2254. However, § 2254 applies only to judgments of state courts. Consequently, Rule 4 does not supersede the time limits in habeas cases brought under 28 U.S.C. § 2241. In our district, we see a fair amount of § 2241 cases. The vast majority are filed by prisoners in the state prison system attacking the constitutional validity of prison disciplinary proceedings which result in the loss of good time. The other § 2241 cases are filed by federal prisoners arguing that they are entitled to some sort of early release because of their participation in a prison program. In order to process those cases, it is necessary, at a minimum, to view the records of the disciplinary proceeding or the applicable prison program. Consequently, we routinely require a response in 20 days and do not require a showing of good cause for that extension of time. We also occasionally extend the time for a response beyond the 20 day limit if there is difficulty in obtaining records. Our practice is technically a violation of Rule 81(a)(2) but it reflects the realities of the type of § 2241 petitions which are being filed.

I think that if we were to survey other courts, we would find the results concerning § 2241 petitions to be the same. Section 2241 petitions are being utilized primarily to attack the results of prison disciplinary proceedings. It seems to me that we could provide a valuable service by making the rules reflect that reality. If we are to amend Rule 81(a)(2), I would suggest using the Rule 4 approach which allows the court complete discretion in setting response times. That would allow the court to tailor scheduling to the needs of the case and, though I hate to use the phrase, would probably conform to existing practice.

As a practicing lawyer, I spent a lot of time litigating habeas cases and I have handled hundreds of habeas cases as a judge. Habeas is a field which interests me and I am willing to help you and the committee in any way that I can.

Sincerely,



John L. Carroll
Chief United States Magistrate Judge

JLC/mdd

cc: Honorable Paul Niemeyer

Reporter's Preliminary Note

Civil Rule 81(a)(2): Habeas Corpus Return Time

This Note is cautiously captioned preliminary because your Reporter knows nothing of habeas corpus practice. The problem is presented by Magistrate Judge Mary Stanley Feinberg, whose opinion in *Wyant v. Edwards*, S.D.W.Va. No. 1:97-0023, is appended. It is another in the string of pesky Rule 81 problems that seem to arise because people seem not to bother with consulting Rule 81 when making related rules changes.

One thing that makes the problem pesky is that it is difficult to state directly. The source of the problem begins with the time limits set in 28 U.S.C. § 2243 for the return to a petition for habeas corpus. These limits have been partly superseded by Civil Rule 81(a)(2), which in turn seems to have been superseded by Rules 1(b) and 4 of the Rules Governing Section 2254 Cases. The problem is whether Rule 81(a)(2) should be amended to recognize this apparent supersession, or whether some more drastic course should be taken.

The foundation of federal habeas corpus jurisdiction is set by 28 U.S.C. § 2241. Section 2243 provides that a judge or court entertaining an application for habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted. It further provides that the writ or order to show cause "shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed."

The first supersession of the § 2243 time limits was effected by the 1971 amendment of Civil Rule 81(a)(2). Since 1971, Rule 81(a)(2) has provided:

> (2) These rules are applicable to proceedings for * * * habeas corpus * * *, to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions. The writ of habeas corpus, or order to show cause, shall be directed to the person having custody of the person detained. It shall be returned within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U.S.C. § 2254 shall not exceed 40 days, and in all other cases shall not exceed 20 days.

The Advisory Committee Note explained the reasons why additional time may be needed for state-prisoner petitions under § 2254. "The substantial increase in the number of such proceedings in recent years has placed a considerable burden on state authorities. Twenty days has proved in practice too short a time in which to prepare and file the return in many such cases. Allowance of additional time should, of course, be granted only for good cause."

The next step came with the adoption of the Rules Governing

Section 2254 Cases, effective on February 1, 1977. Rule 4 provides that the judge may order summary dismissal of a petition.

> Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

Rule 4 cuts entirely free of the 3-day, 20-day, and 40-day periods, and likewise drops the "good cause" element. The Advisory Committee Note explains that Rule 4 accords "greater flexibility than under § 2243 in determining within what time period an answer must be made." After briefly describing § 2243 and the modification made by Rule 81(a)(2), the Note says: "In view of the widespread state of work overload in prosecutors' offices * * *, additional time is granted in some jurisdictions as a matter of course. Rule 4, which contains no fixed time requirement, gives the court the discretion to take into account various factors such as the respondent's workload and the availability of transcripts before determining a time within which an answer must be made."

All of this leaves things clear for habeas corpus petitions filed by state prisoners. Rule 4 supersedes both § 2243 and Rule 81(a)(2). Rule 81(a)(2) is, to this extent, misleading. Some amendment is required.

There is no parallel problem for motions for relief by federal prisoners under § 2255. Rule 4(b) of the § 2255 rules provides that the judge "shall order the United States Attorney to file an answer or other pleading within the period of time fixed by the court * * *." The Advisory Committee Note explains that this Rule 4 "has its basis in § 2255 * * * which does not have a specific time limitation as to when the answer must be made."

The awkward problem arises from petitions for habeas corpus filed under § 2241 by people who are not in state custody — and who thus are outside § 2254 and the direct operation of the § 2254 rules — and who are not seeking relief available under § 2255. As to them, there is a compelling argument that the time limits of Civil Rule 81(a)(2) have been superseded by the § 2254 rules through Rule 1(b). Rule 1(a) states that these rules govern the procedure on applications under § 2254. Rule 1(b) states:

> **(b) Other situations.** In applications for habeas corpus in cases not covered by subdivision (a), these rules may be applied at the discretion of the United States district court.

This provision establishes discretion, not a command. Apparently it leaves a district court free to apply the § 2254 rules — including the return-time provision of Rule 4 — or not to apply the rules. The discretion to apply a discretionary time rule, however, is effectively power to supersede the Rule 81(a)(2) limit of 3 days, to be extended only for good cause and for no more than an additional 20 days.

Rule 11 of the § 2254 rules muddies the picture to some extent. It provides:

> The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.

This provision should not be read to undo the effects of § 2254 Rule 4 on Civil Rule 81(a)(2). For § 2254 petitions, it is clear that Rule 4 supersedes Rule 81(a)(2). There is no reason to ignore Rule 4 under Rule 11, which applies only "to petitions filed under these rules," when dealing with a habeas corpus petition that is not filed under § 2254 and thus is not literally "filed under these rules."

The conclusion that § 2254 Rule 4 supersedes the return-time limits of Civil Rule 81(a)(2) is supported by such scant authority as appears to exist. The history is explored in Judge Feinberg's opinion. The clear ruling was made in Kramer v. Jenkins, N.D.Ill.1985, 108 F.R.D. 429, a habeas corpus proceeding brought by a petitioner in federal custody. Judge Nordberg concluded that Rule 4 supersedes § 2243 time limits under the supersession clause of the Rules Enabling Act, 28 U.S.C. § 2072. Rule 4 likewise supersedes Civil Rule 81(a)(2) because it was adopted several years after Rule 81(a)(2) was amended. In Clutchette v. Rushen, 9th Cir.1985, 770 F.2d 1469, 1473-1475, the court, dealing with a petition under § 2254 by a state prisoner, confirmed that Rule 4 supersedes both the specific day limits and the good cause requirement of Rule 81(a)(2). (Bennett v. Collins, E.D.Tex.1993, 835 F.Supp. 930, reflects the many extensions of return time that were permitted before the respondent's persistent delays in meeting even generously extended limits drove the court to impose sanctions.)

The result seems to be clear enough. The 3-day, 20-day, and 40-day return-time limits in Rule 81(a)(2), and the good-cause limit, have been superseded by Rule 4. Supersession is direct for all cases covered by § 2254. In other cases, it requires exercise of the district court's discretion to invoke Rule 4 through Rule 1(b).

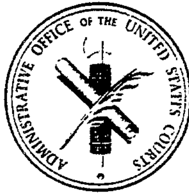
It is not clear whether this result was intended. There are seemingly persuasive reasons to embrace it nonetheless. Return time is governed by district court discretion in habeas corpus proceedings brought by state prisoners under § 2254, and also in § 2255 proceedings. Only habeas corpus petitions that fall outside these more common proceedings remain for Rule 81(a)(2). It would be convenient to have a single procedure for all of these proceedings.

The contrary argument would be that indeed different time limits are appropriate for habeas corpus proceedings brought by people in federal detention and outside of § 2255. It may be urged that these cases often present special needs for prompt action that

were responsible for the initially tight time periods set by § 2243. It also may be urged that these petitions do not present the problems confronting state officials besieged with torrents of habeas corpus petitions.

The balance of these arguments can be struck only by those familiar with the realities of practice in the habeas corpus proceedings that present the question. It would be desirable to provide a clear answer in the rules once the answer is found. The simplest solution would be to delete the time provisions from Rule 81(a)(2). It might be better to adopt the Rule 4 time provisions into Rule 81, so as to avoid the need to work through Rule 1(b) and Rule 4. But if the Rule 4 approach is not suited to non-§ 2254 habeas corpus proceedings, then a specific provision must be crafted for Rule 81(a)(2).

As a final note, there may be some advantage in combining this question with other Rule 81 questions now on the docket. The question of copyright practice has long been on the Committee's agenda. The final sentence of Rule 81(a)(1) also is on the agenda; it refers to mental health proceedings in the United States District Court for the District of Columbia, proceedings that no longer seem to exist.



LEONIDAS 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

February 5, 1997

MEMORANDUM TO PROFESSORS COOPER AND SCHLUETER

SUBJECT: *Habeas Corpus Inquiry*

I am attaching an opinion from Magistrate Judge Feinberg concerning the "inconsistent" time deadlines on the government's response to a writ of habeas corpus under § 2241. Civil Rule 81(a)(2) sets an outside deadline of 40 days to respond in cases brought under § 2254, and a deadline of 20-days for all other habeas corpus cases. Rule 4 of the Habeas Corpus Rules provides a judge with wide discretion in setting the time of response. The Note to Rule 4 recognizes the fixed deadlines in Rule 81, but concludes that more flexibility is needed in these cases. Habeas Corpus Rule 1(b) seems to apply the Habeas Corpus Rules to writs under § 2241.

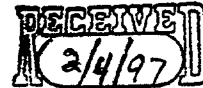
Judge Feinberg found that the Habeas Corpus Rule 4 general time requirements prevailed over the fixed time requirements of Civil Rule 81 in her case. But the interplay between the two sets of rules caused much confusion.

John K. Rabiej

Attachment

cc: Honorable Alicemarie H. Stotler
Honorable D. Lowell Jensen
Honorable Paul V. Niemeyer
Subcommittee on Agenda and Policy
Professor Daniel R. Coquillette

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
ELIZABETH KEE FEDERAL BUILDING
601 FEDERAL STREET, ROOM 1013
BLUEFIELD, WEST VIRGINIA 24701



MARY S. FEINBERG
UNITED STATES MAGISTRATE JUDGE

304/327-0376
FAX 304/325-7662

January 28, 1997

John K. Rabiej, Chief
Rules Committee Support Office
Administrative Office of the
U.S. Courts
Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Rule 1(b), Habeas Corpus Rules

Dear Mr. Rabiej:

Thank you for your assistance in providing materials concerning the adoption of Rule 1(b) of the Habeas Corpus Rules. I have enclosed a copy of the Memorandum Order which I entered on the issue. Perhaps I used a sledge hammer to swat a fly, but the time limits in § 2243 and Rule 81(a)(2) have been troublesome. I am submitting the Memorandum Order to West for publication.

Very truly yours,

Mary S. Feinberg

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

BLUEFIELD

THELMA WYANT,

Petitioner,

v. CIVIL ACTION NO. 1:97-0023

DAN EDWARDS, Acting Warden,
Federal Prison Camp
Alderson, West Virginia, and
BUREAU OF PRISONS, an agency of
the United States,

Respondents.

MEMORANDUM ORDER

This is a habeas corpus case filed by a federal prisoner pursuant to the provisions of 28 U.S.C. § 2241, challenging the decision by the Bureau of Prisons to deny Petitioner eligibility for early release pursuant to 18 U.S.C. § 3621(e)(2)(B).

Pending before the Court is Respondents' Motion to Reconsider Time Frame Order, which seeks additional time in which to file a Response to the Order to Show Cause entered January 13, 1997. Respondents previously filed a Motion to Extend Time, which was granted in part and denied in part, and a Response was ordered to be filed by February 5, 1997.

In the Order disposing of the Motion to Extend Time, the Court applied the provisions of 28 U.S.C. § 2243, and of Rule 81(a)(2), Fed. R. Civ. Pro., which Rule provides that a writ of habeas corpus "shall be returned within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U.S.C. § 2254 shall not exceed 40 days, and in all other cases shall not

exceed 20 days." [Emphasis added.]

Respondents' pending Motion to Reconsider points out that Kramer v. Jenkins, 108 F.R.D. 429, 432 (N.D. Ill. 1985), addresses Rule 81(a)(2), and holds that "the Supreme Court intended to allow district courts to bypass the time limits of Rule 81(a)(2) when it promulgated Rule 4 of the 2254 Rules." (Motion, at 2.) According to Shepard's, Kramer has not been cited by any other published case. Petitioner did not object to the previous Motion to Extend Time.

The Kramer case reasons that Rule 1(b) of the § 2254 Rules states as follows: "In applications for habeas corpus in cases not covered by subdivision (a), habeas rules may be applied at the discretion of the United States district court." Therefore, the case asserts, a § 2241 habeas corpus case is one not covered by Rule 1(a) of the § 2254 Rules, and is one covered by Rule 1(b). In particular, the Kramer case holds that the district court may apply, in its discretion, Rule 4 of the § 2254 Rules, which states, in pertinent part, that "the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate." 108 F.R.D. at 431. Kramer then asserts that the enabling statute for promulgation of rules, 28 U.S.C. § 2072, provides that "all laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Therefore, Rule 4 of the § 2254 Rules prevails over 28 U.S.C. § 2243. Id. Kramer holds that Rule 4 of the § 2254 Rules also

prevails over Rule 81(a)(2), Fed. R. Civ. Pro. because Rule 81 was promulgated in 1971, and Rule 4 in 1976. Id. at 432.

The Court recognizes that 28 U.S.C. § 2243 and Rule 81(a)(2) set time limits that may be unrealistic, given the volume of prisoner habeas corpus litigation (and the inexpensive filing fee of $5.00). However, habeas corpus is intended to provide "a swift and imperative remedy in all cases of illegal restraint or confinement." Fay v. Noia, 372 U.S. 391, 400 (1963). Habeas corpus claims should receive "a swift, flexible, and summary determination." Preiser v. Rodriguez, 411 U.S. 475, 495 (1973).

Given this background and policy, the Court has engaged in considerable research, with the invaluable assistance of the Librarian of the U.S. Court of Appeals for the Fourth Circuit and the Rules Committee Support Office of the Administrative Office of the U.S. Courts, attempting to learn the origin and meaning of Rule 1(b) of the 2254 Rules. That research has yielded some information, but not a definitive answer.

The Supreme Court suggested that procedural rules for habeas corpus be promulgated in Harris v. Nelson, 394 U.S. 286, 300 n.7 (1969) ("the rule-making machinery should be invoked to formulate rules of practice with respect to federal habeas corpus and § 2255 proceedings, on a comprehensive basis and not merely one confined to discovery"). It appears that the original version of Rule 1, proposed September 23, 1971, addressed only "persons in custody pursuant to the judgment of a state court, or subject to such custody in the future." On September 6, 1973, Professor Paul M.

Bator of the Law School of Harvard University wrote to Professor Frank J. Remington of the University of Wisconsin Law School and other members of the committee which proposed the 2254 Rules, and pointed out that the Rules did not address Section 2241 petitions. Professor Bator wrote, "the Rules should at least explicitly tell us why they do not cover these cases, and what procedure is contemplated for them."

When a Preliminary Draft of the proposed 2254 Rules was published, Rule 1 continued to address "persons in custody pursuant to the judgment of a state court" and "persons in custody pursuant to the judgment of a state or federal court for a determination that custody to which they may be subject in the future under another judgment of a state court," but did not address § 2241 petitions. The Advisory Committee Note stated that "[b]asic scope of habeas is prescribed by 28 U.S.C. § 2241(c) and 28 U.S.C. § 2254." The rest of the Note on proposed Rule 1 concerned the issue of "custody."

When Proposed Habeas Corpus Rules were again published, this time on June 3, 1974, Rule 1 retained the language of the Preliminary Draft. On August 14, 1974, two alternative provisions for Rule 1 were proposed. Alternative No. 1 defined "custody pursuant to a judgment of a state court" in subsection (b), and then added subsection (c), as follows:

> (b) "Custody Pursuant to a Judgment of a State Court" Defined. For purposes of these rules, a person is in custody pursuant to a judgment of a state court if he is in custody pursuant to a judgment of either a state or a federal court and makes application for a determination that custody to which he may be subject in the future

> under a judgment of a state court will be in violation of the Constitution.
>
> (c) Other Situations. In applications for habeas corpus in other cases not covered by subdivision (a) or (b), these rules may be applied at the discretion of the United States District Court.

Alternative No. 2 omitted the definition of "custody pursuant to a judgment of a state court," and retained the "Other Situations" language.

In the Minutes of the Meeting of the Advisory Committee on the Federal Criminal Rules of August 28, 1975, at page 25, Professor Remington (the recipient of Professor Bator's 1973 letter) remarked, "As now cast, Rule 1 would permit use of the rules under a habeas corpus action brought pursuant to § 2241, when § 2255 was otherwise inappropriate."

In the Advisory Committee Notes (1976 Adoption) to Rule 1, no specific reference is made that the 2254 Rules may apply to § 2241 petitions for writs of habeas corpus. The Notes simply state, "[w]hether the rules ought to apply to other situations is left to the discretion of the court." Examples of "other situations" include a person in active military service, or a reservist called to active duty, but who has not reported. The Notes then address the "unclear" boundaries of the custody requirement of the habeas statutes.

When the 2254 Rules were sent to Congress pursuant to 28 U.S.C. § 2072, Congress undertook to amend some of the Rules, but not Rule 1. The Court has reviewed the legislative history concerning adoption of the 2254 Rules (Pub. L. No. 94-426, House

Report No. 94-1471, Senate Report No. 1797, and the Congressional Record for September 14, 1976 (House), and September 16, 1976 (Senate)). There was no discussion concerning the scope of the 2254 Rules and their applicability to § 2241 petitions.

The Court has carefully considered Rules 1, 4 and 11 of the 2254 Rules, Rule 81 of the Federal Rules of Civil Procedure, the Advisory Committee Notes for all those Rules, and 28 U.S.C. §§ 2241 et seq. The 1971 Amendment to Rule 81(a)(2) increased to forty days the additional time that the district court may allow in habeas corpus proceedings involving persons in custody pursuant to a judgment of a state court. The amendment explicitly excluded habeas corpus cases like that of Petitioner, and left the additional time period at 20 days. The 1976 Adoption of the 2254 Rules, which became effective February 1, 1977, permits the district court, in Rule 4, to fix the time within which the respondent shall file an answer or other pleading. In the Fifth and Eleventh Circuits, the practice, even in § 2254 cases, is to order the respondent to file an answer "within the period of time fixed by the court," which is "3 days unless for good cause shown additional time is allowed which . . . shall not exceed 40 days . . .." Bagwell, David A., "Procedural Aspects of Prisoner § 1983 and § 2254 Cases in the Fifth and Eleventh Circuits," 95 F.R.D. 435, 461 (1982).

The Court has also reviewed the following cases: Kramer v. Jenkins, 108 F.R.D. 429 (N.D. Ill. 1985); Bennett v. Collins, 835 F. Supp. 930 (E.D. Tex. 1993); Clutchette v. Rushen, 770 F.2d 1469

(9th Cir. 1985); Bermudez v. Reid, 570 F. Supp. 290 (S.D.N.Y. 1983), stay granted, 720 F.2d 748 (2d Cir. 1983), rev'd, 733 F.2d 18 (2d Cir. 1984); Mattox v. Scott, 507 F.2d 919 (7th Cir. 1974); Troglin v. Clanon, 378 F. Supp. 273 (N.D. Cal. 1974). Bennett applies Rule 81(a)(2) to §§ 2241 and 2254 cases, and notes that "[t]he emphasis on a timely response makes sense in so far as the purpose of the writ is to allow a person in custody to challenge a wrongful, perhaps unconstitutional, imprisonment." 835 F. Supp. at 934-35. When confronted with repeated and extraordinary delay by respondent in answering, the Bennett court held that respondent had waived the procedural default defense to the petition.

In Clutchette v. Rushen, 770 F.2d 1469, 1475 (9th Cir. 1985), the Ninth Circuit held that in a § 2254 case, the district court had discretion to grant respondent an extension of time which exceeded the 40-day limit of Rule 81(a)(2).

The Second Circuit held, in Bermudez v. Reid, 733 F.2d 18 (2d Cir. 1984), that even in the face of inexcusable disregard by respondent of a district court order to respond to a petition, default judgment should not be granted, and the district court should reach the merits of the petitioner's claim.

Mattox v. Scott, 507 F.2d 919 (7th Cir. 1975), and Troglin v. Clanon, 378 F. Supp. 273 (N.D. Cal. 1974), were both decided before the § 2254 Rules were promulgated. Nonetheless, both cases are of interest because they recognize Congress' strong interest in prompt responses being filed to habeas corpus petitions, the problem of a respondent who is slow to answer, and the necessity for flexibility

by the district court in considering late returns.

The Court recognizes that it is not unusual for the Fourth Circuit to look favorably upon precedents and practices from the Fifth (and Eleventh) Circuits. However, given the historical information concerning the promulgation of Rule 1(b) of the § 2254 Rules, the nature of habeas corpus, and the difficulties of imposing strict sanctions on a respondent custodian who is slow to answer, the Court has concluded that the § 2254 Rules were intended to apply to § 2241 cases, and that Rule 4's allowance for discretion prevails over Rule 81(a)(2)'s strict time limits.

Accordingly, it is hereby **ORDERED** that the Motion to Reconsider Time Frame Order is granted, and Respondents shall file their answer to the Order to Show Cause on or before **February 17, 1997**.

The Clerk is directed to mail copies of this Order to counsel of record, including the Alderson Legal Assistance Program at Washington & Lee University School of Law.

ENTER: January 28, 1997

Mary Stanley Feinberg
United States Magistrate Judge

petitioner is making application to the chief judge because the district court failed to permit him to amend the application the court dismissed. Stidham v. Swope, D.C.Cal.1949, 83 F.Supp. 370.

40. Evidentiary material

A petition for habeas corpus in federal court, whether filed before or after effective date of new rules, should allege facts supporting grounds for relief; it need not contain evidentiary material. U.S. ex rel. Bonner v. Warden, Stateville Correctional Center, D.C.Ill.1976, 422 F.Supp. 11, affirmed 553 F.2d 1091, certiorari denied 97 S.Ct. 2662, 431 U.S. 943, 53 L.Ed.2d 263.

41. Remand

Whether the respondent, who had custody of habeas corpus petitioner from Monday to Thursday of each week while petitioner was working on railroad project in the Eastern District of Texas, had authority to produce petitioner in court or to release him should the United States District Court for the Eastern District of Texas so order was uncertain on the record, under which the relationship between respondent and the Thursday-Sunday custodian of petitioner could not be determined; accordingly, the case had to be remanded for an investigation of the facts pertaining to habeas jurisdiction. Mounce v. Knighten, C.A.5 (Tex.) 1974, 503 F.2d 967.

42. Miscellaneous applications sufficient

Prisoner's petition for habeas corpus to review conviction in state court on ground that his wife had not testified at his trial because of threats of prosecution against her, sufficiently complied with this section prescribing requirements of petition. Loper v. Ellis, C.A.Tex.1955, 224 F.2d 901.

§ 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

(June 25, 1948, c. 646, 62 Stat. 965.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on Title 28, U.S.C., 1940 ed., §§ 455, 456, 457, 458, 459, 460, and 461 (R.S. §§ 755 to 761).

Section consolidates sections 455–461 of Title 28, U.S.C., 1940 ed.

The requirement for return within 3 days "unless for good cause additional time, not exceeding 20 days, is allowed" in the second paragraph, was substituted for the provision of such section 455 which allowed 3 days for return if within 20 miles, 10 days if more than 20 but not more than 100 miles, and 20 days if more than 100 miles distant.

Words "unless for good cause additional time is allowed" in the fourth paragraph, were substituted for words "unless the party petitioning requests a longer time" in section 459 of Title 28, U.S.C., 1940 ed.

The fifth paragraph providing for production of the body of the detained person at the hearing is in conformity with *Walker v. Johnston*, 1941, 61 S.Ct. 574, 312 U.S. 275, 85 L.Ed. 830.

Changes were made in phraseology. 80th Congress House Report No. 308.

CROSS REFERENCES

Administrative Procedure Act, issuance of writ to obtain judicial review, see 5 USCA § 703.
Application to extent that practice in habeas corpus is not set forth in federal statutes, see Fed.Rules Civ.Proc. Rule 81, 28 USCA.
Certified copies of indictment, plea and judgment; duty of respondent to file, see 28 USCA § 2249.
Exhaustion of state remedy prior to application for habeas corpus, see 28 USCA § 2254.
Filing fees, see 28 USCA § 1914.
Notice to state attorney general or other appropriate officer, see 28 USCA § 2252.
Removal of cause, issuance of writ to take custody of defendant in district court, see 28 USCA § 1446.
Return or answer; conclusiveness, see 28 USCA § 2248.
Stay of state court proceedings by federal justice or judge, see 28 USCA § 2251.
Suspension of habeas corpus, see USCA Const. Art. 1, § 9, cl. 2.
Transcripts, fees of district court reporter, see 28 USCA § 753.

LIBRARY REFERENCES

Administrative Law

Adjudicatory proceedings, see West's Federal Practice Manual § 6850.

American Digest System

Habeas corpus; hearing and rehearing, see Habeas Corpus ⇐827.
Habeas corpus; hearing in general, see Habeas Corpus ⇐741 et seq.
Habeas corpus; proceedings in general, see Habeas Corpus ⇐661 et seq.

Encyclopedias

Habeas corpus; hearing and determination, see C.J.S. Habeas Corpus § 207 et seq.
Habeas corpus; proceedings and relief in general, see C.J.S. Habeas Corpus § 158 et seq.
Habeas corpus; rehearing, see C.J.S. Habeas Corpus § 237.

Law Reviews

New Habeas. Kathleen Patchel, 42 Hastings L.J. 939 (1991).

Rule 1. Scope of Rules

(a) Applicable to cases involving custody pursuant to a judgment of a state court. These rules govern the procedure in the United States district courts on applications under 28 U.S.C. § 2254:

(1) by a person in custody pursuant to a judgment of a state court, for a determination that such custody is in violation of the Constitution, laws, or treaties of the United States; and

(2) by a person in custody pursuant to a judgment of either a state or a federal court, who makes application for a determination that custody to which he may be subject in the future under a judgment of a state court will be in violation of the Constitution, laws, or treaties of the United States.

(b) Other situations. In applications for habeas corpus in cases not covered by subdivision (a), these rules may be applied at the discretion of the United States district court.

ADVISORY COMMITTEE NOTES

Rule 1 provides that the habeas corpus rules are applicable to petitions by persons in custody pursuant to a judgment of a state court. See *Preiser v. Rodriguez,* 411 U.S. 475, 484 (1973). Whether the rules ought to apply to other situations (*e.g.,* person in active military service, *Glazier v. Hackel,* 440 F.2d 592 (9th Cir. 1971); or a reservist called to active duty but not reported, *Hammond v. Lenfest,* 398 F.2d 705 (2d Cir. 1968)) is left to the discretion of the court.

The basic scope of habeas corpus is prescribed by statute. 28 U.S.C. § 2241(c) provides that the "writ of habeas corpus shall not extend to a prisoner unless * * * (h)e is *in custody* in violation of the Constitution." 28 U.S.C. § 2254 deals specifically with state custody, providing that habeas corpus shall apply only "in behalf of a person in custody pursuant to a judgment of a state court * * *."

In *Preiser v. Rodriguez, supra,* the court said: "It is clear . . . that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody." 411 U.S. at 484.

Initially the Supreme Court held that habeas corpus was appropriate only in those situations in which petitioner's claim would, if upheld, result in an immediate release from a present custody. *McNally v. Hill,* 293 U.S. 131 (1934). This was changed in *Peyton v. Rowe,* 391 U.S. 54 (1968), in which the court held that habeas corpus was a proper way to attack a consecutive sentence to be served in the future, expressing the view that consecutive sentences resulted in present custody under both judgments, not merely the one imposing the first sentence. This view was expanded in *Carafas v. LaVallee,* 391 U.S. 234 (1968), to recognize the propriety of habeas corpus in a case in which petitioner was in custody when the petition had been originally filed but had since been unconditionally released from custody.

See also *Preiser v. Rodriguez,* 411 U.S. at 486 et seq.

Since *Carafas,* custody has been construed more liberally by the courts so as to make a § 2255 motion or habeas corpus petition proper in more situations. "In custody" now includes a person who is: on parole, *Jones v. Cunningham,* 371 U.S. 236 (1963); at large on his own recognizance but subject to several conditions pending execution of his sentence, *Hensley v. Municipal Court,* 411 U.S. 345 (1973); or released on bail after conviction pending final disposition of his case, *Lefkowitz v. Newsome,* 95 S.Ct. 886 (1975). See also *United States v. Re* 372 F.2d 641 (2d Cir.), cert. denied, 388 U.S. 912 (1967) (on probation); *Walker v. North Carolina,* 262 F.Supp. 102

Rule 4. Preliminary Consideration by Judge

The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general of the state involved.

ADVISORY COMMITTEE NOTES

Rule 4 outlines the options available to the court after the petition is properly filed. The petition must be promptly presented to and examined by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits attached thereto that the petitioner is not entitled to relief in the district court, the judge must enter an order summarily dismissing the petition and cause the petitioner to be notified. If summary dismissal is not ordered, the judge must order the respondent to file an answer or to otherwise plead to the petition within a time period to be fixed in the order.

28 U.S.C. § 2243 requires that the writ shall be awarded, or an order to show cause issued, "unless it appears from the application that the applicant or person detained is not entitled thereto." Such consideration may properly encompass any exhibits attached to the petition, including, but not limited to, transcripts, sentencing records, and copies of state court opinions. The judge may order any of these items for his consideration if they are not yet included with the petition. See 28 U.S.C. § 753(f) which authorizes payment for transcripts in habeas corpus cases.

It has been suggested that an answer should be required in every habeas proceeding, taking into account the usual petitioner's lack of legal expertise and the important functions served by the return. See Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1178 (1970). However, under § 2243 it is the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer. *Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970). In addition, "notice" pleading is not sufficient, for the petition is expected to state facts that point to a "real possibility of constitutional error." See *Aubut v. State of Maine*, 431 F.2d 688, 689 (1st Cir. 1970).

In the event an answer is ordered under rule 4, the court is accorded greater flexibility than under § 2243 in determining within what time period an answer must be made. Under § 2243, the respondent must make a return within three days after being so ordered, with additional time of up to forty days allowed under the Federal Rules of Civil Procedure, Rule 81(a)(2), for good cause. In view of the widespread state of work overload in prosecutors' offices (see, e.g., *Allen*, 424 F.2d at 141), additional time is granted in some jurisdictions as a matter of course. Rule 4, which contains no fixed time requirement, gives the court the discretion to take into account various factors such as the respondent's workload and the availability of transcripts before determining a time within which an answer must be made.

Rule 4 authorizes the judge to "take such other action as the judge deems appropriate." This is designed to afford the judge flexibility in a case where either dismissal or an order to answer may be inappropriate. For example, the judge

Rule 1. Scope of Rules

These rules govern the procedure in the district court on a motion under 28 U.S.C. § 2255:

(1) by a person in custody pursuant to a judgment of that court for a determination that the judgment was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack; and

(2) by a person in custody pursuant to a judgment of a state or other federal court and subject to future custody under a judgment of the district court for a determination that such future custody will be in violation of the Constitution or laws of the United States, or that the district court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.

ADVISORY COMMITTEE NOTES

The basic scope of this postconviction remedy is prescribed by 28 U.S.C. § 2255. Under these rules the person seeking relief from federal custody files a motion to vacate, set aside, or correct sentence, rather than a petition for habeas corpus. This is consistent with the terminology used in section 2255 and indicates the difference between this remedy and federal habeas for a state prisoner. Also, habeas corpus is available to the person in federal custody if his "remedy by motion is inadequate or ineffective to test the legality of his detention."

Whereas sections 2241–2254 (dealing with federal habeas corpus for those in state custody) speak of the district court judge "issuing the writ" as the operative remedy, section 2255 provides that, if the judge finds the movant's assertions to be meritorious, he "shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." This is possible because a motion under § 2255 is a further step in the movant's criminal case and not a separate civil action, as appears from the legislative history of section 2 of S. 20, 80th Congress, the provisions of which were incorporated by the same Congress in title 28 U.S.C. as § 2255. In reporting S. 20 favorably the Senate Judiciary Committee said (Sen.Rep. 1526, 80th Cong.2d Sess., p. 2):

The two main advantages of such motion remedy over the present habeas corpus are as follows:

First, habeas corpus is a separate civil action and not a further step in the criminal case in which petitioner is sentenced (Ex parte *Tom Tong*, 108 U.S. 556, 559 (1883)). It is not a determination of guilt or innocence of the charge upon which petitioner was sentenced. Where a prisoner sustains his right to discharge in habeas corpus, it is usually because some right—such as lack of counsel—has been denied which reflects no determination of his guilt or innocence but affects solely the fairness of his earlier criminal trial. Even under the broad power in the statute "to dispose of the party as law and justice require" (28 U.S.C.A., sec. 461), the court or judge is by no means in the same advantageous position in habeas corpus to do justice as would be so if the matter were determined in the criminal proceeding (see *Medley*, petitioner, 134 U.S. 160, 174 (1890)). For instance, the judge (by habeas corpus) cannot grant a new trial in the criminal case. Since the motion remedy is in the criminal proceeding, this section 2 affords the opportunity and expressly gives the broad powers to set aside the judgment and to "dis-

States, 273 F.2d 775 (10th Cir.1960), cert. denied, 365 U.S. 853 (1961), holding that the reduced fee was exclusive to habeas petitions.

Counsel for Martin insists that, if a docket fee must be paid, the amount is $5 rather than $15 and bases his contention on the exception contained in 28 U.S.C. § 1914 that in habeas corpus the fee is $5. This reads into § 1914 language which is not there. While an application under § 2255 may afford the same relief as that previously obtainable by habeas corpus, it is not a petition for a writ of habeas corpus. A change in § 1914 must come from Congress.

273 F.2d at 778

Although for most situations § 2255 is intended to provide to the federal prisoner a remedy equivalent to habeas corpus as used by state prisoners, there is a major distinction between the two. Calling a § 2255 request for relief a motion rather than a petition militates toward charging no new filing fee, not an increased one. In the absence of convincing evidence to the contrary, there is no reason to suppose that Congress did not mean what it said in making a § 2255 action a motion. Therefore, as in other motions filed in a criminal action, there is no requirement of a filing fee. It is appropriate that the present situation of docketing a § 2255 motion as a new action and charging a $15 filing fee be remedied by rule when the whole question of § 2255 motions is thoroughly thought through and organized.

Even though there is no need to have a forma pauperis affidavit to proceed with the action since there is no requirement of a fee for filing the motion the affidavit remains attached to the form to be supplied potential movants. Most such movants are indigent, and this is a convenient way of getting this into the official record so that the judge may appoint counsel, order the government to pay witness fees, allow docketing of an appeal, and grant any other rights to which an indigent is entitled in the course of a § 2255 motion, when appropriate to the particular situation, without the need for an indigency petition and adjudication at such later point in the proceeding. This should result in a streamlining of the process to allow quicker disposition of these motions.

For further discussion of this rule, see the advisory committee note to Rule 3 of the § 2254 rules.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

Rule 4. Preliminary Consideration by Judge

(a) Reference to judge; dismissal or order to answer. The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge of the district in accordance with the procedure of the court for the assignment of its business.

(b) Initial consideration by judge. The motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall

make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the United States Attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

ADVISORY COMMITTEE NOTES

Rule 4 outlines the procedure for assigning the motion to a specific judge of the district court and the options available to the judge and the government after the motion is properly filed.

The long-standing majority practice in assigning motions made pursuant to § 2255 has been for the trial judge to determine the merits of the motion. In cases where the § 2255 motion is directed against the sentence, the merits have traditionally been decided by the judge who imposed sentence. The reasoning for this was first noted in *Carvell v. United States*, 173 F.2d 348, 348–349 (4th Cir.1949):

> Complaint is made that the judge who tried the case passed upon the motion. Not only was there no impropriety in this, but it is highly desirable in such cases that the motions be passed on by the judge who is familiar with the facts and circumstances surrounding the trial, and is consequently not likely to be misled by false allegations as to what occurred.

This case, and its reasoning, has been almost unanimously endorsed by other courts dealing with the issue.

Commentators have been critical of having the motion decided by the trial judge. See Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1206–1208 (1970).

> [T]he trial judge may have become so involved with the decision that it will be difficult for him to review it objectively. Nothing in the legislative history suggests that "court" refers to a specific judge, and the procedural advantages of section 2255 are available whether or not the trial judge presides at the hearing.
>
> The theory that Congress intended the trial judge to preside at a section 2255 hearing apparently originated in *Carvell v. United States*, 173 F.2d 348 (4th Cir.1949) (per curiam), where the panel of judges included Chief Judge Parker of the Fourth Circuit, chairman of the Judicial Conference committee which drafted section 2255. But the legislative history does not indicate that Congress wanted the trial judge to preside. Indeed the advantages of section 2255 can all be achieved if the case is heard in the sentencing district, regardless of which judge hears it. According to the Senate committee report the purpose of the bill was to make the proceeding a part of the criminal action so the court could resentence the applicant, or grant him a new trial. (A judge presiding over a habeas corpus action does not have these powers.) In addition, Congress did not want the cases heard in the district of confinement because that tended to concentrate the burden on a few districts, and made it difficult for witnesses and records to be produced.

83 Harv.L.Rev. at 1207–1208

The Court of Appeals for the First Circuit has held that a judge other than the trial judge should rule on the 2255 motion. See *Halliday v. United States*, 380 F.2d 270 (1st Cir.1967).

There is a procedure by which the movant can have a judge other than the trial judge decide his motion in courts adhering to the majority rule. He can file an affidavit alleging bias in order to disqualify the trial judge. And there are circumstances in which the trial judge will, on his own, disqualify himself. See, *e.g.*, *Webster v. United States*, 330 F.Supp. 1080 (1972). However, there has been some questioning of the effectiveness of this procedure. See Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1200–1207 (1970).

Subdivision (a) adopts the majority rule and provides that the trial judge, or sentencing judge if different and appropriate for the particular motion, will decide the motion made pursuant to these rules, recognizing that, under some circumstances, he may want to disqualify

Agenda Item II F 1-4

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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EVIDENCE RULES

September 16, 1997

MEMORANDUM TO THE CHAIRMAN AND MEMBERS OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

SUBJECT: Status Report on Electronic Filing in the Federal Courts

Attached for your consideration is a brief report on the status on electronic filing in the federal courts and the potential issues for the rules committees arising from the judiciary's efforts to develop and implement electronic case file systems. You will receive updated reports on this topic periodically and as developments warrant.

Peter G. McCabe
Secretary to the Committee on Rules
of Practice and Procedure

Attachment

September 1997

Electronic Filing: A Status Report for the Rules Committees

I. Introduction

Recent amendments to the federal rules authorize courts to accept papers in electronic form.[1] The rules now provide that "[a] court may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules."[2]

Several courts now are working to identify and acquire appropriate technology to accept and maintain court records in digitized form. At the national level, work is proceeding on a "core" electronic filing system that interested courts could adapt to fit local needs. And the Judicial Conference's Committee on Automation and Technology has made Electronic Case Files ("ECF") one of its priority initiatives.

Moving towards an electronic case file ("ECF") system will require the federal judiciary to resolve numerous legal and policy questions—including several that may implicate the federal rules. A recent report by the Administrative Office, *Electronic Case Files in the Federal Courts: A Preliminary Examination of Goals, Issues, and the Road Ahead*, outlines a vision for how the courts might implement ECF systems. The report identifies some of these questions that should be resolved and suggests possible approaches for resolving them.

As outlined in the report, a fully developed ECF system would capture documents electronically at the earliest possible point, ideally from the person who creates the document. The system would not only contain everything presently included in a paper case file, but could also accommodate the court's internal case-related documents. Working on the assumption that the transition towards ECF should promote savings for the courts, an electronic case file system is expected eventually to provide at least the following:

- electronic submission of documents to, from, and within the court
- electronic service and noticing
- appropriate management of electronic documents, including storage and security

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[1] Fed. R. Civ. P. 5(e); Fed. R. Bank. P. 5005; Fed. R. App. P. 25(a)(2)(D) (all effective Dec. 1, 1996). Fed. R. Crim. P. 49(d) provides that papers in criminal actions be filed in the manner provided in civil actions.

[2] Fed. R. Civ. P. 5(e). The language of the companion bankruptcy and appellate rules is essentially the same.

- docket entries automatically through information provided in electronic form by the filing party
- case management reports based upon the electronic documents and docket entries
- quick retrieval of documents and case files, including public and remote access.

Nationally developed ECF systems delivered through the initiative will be made available to all courts, will incorporate new capabilities (such as creation of docket entries by the filing attorneys), and will replace the current case management systems used in the courts. The decision to use the systems, however, will be left to individual courts, and the assessment and utilization of the new capabilities will be left to those courts. The Administrative Office, with assistance from the courts, is about to begin the process of defining the functional requirements that ECF systems will be expected to satisfy. That process should be completed by mid-1998, after which the alternatives for meeting those requirements will be considered.

Two federal courts are already operating "prototype" ECF systems developed by staff in the Administrative Office. The Northern District of Ohio, which was the first prototype court, began receiving electronic filings in maritime asbestos cases through the Internet in January 1996. This system, developed by the Administrative Office, has managed over 9,000 such cases and handled over 125,000 docket entries (involving some 20,000 documents). Nearly 50 attorneys from around the country have not only submitted those documents in electronic form, but also simultaneously and automatically created the court's official docket entries. The bankruptcy court in the Southern District of New York has more recently begun testing in Chapter 11 cases a prototype ECF system based on the same model. At this time, filings in approximately 70 cases are being handled electronically in that court.

Beginning in the fall of 1997, the list of courts testing the AO-developed prototype systems will be expanded to include the district courts of the Western District of Missouri, the Eastern District of New York, and the District of Oregon, and the bankruptcy courts of the Southern District of California, the Northern District of Georgia, the District of Arizona, and the Eastern District of Virginia (Alexandria Division). Each of the prototype courts is being asked to test ECF functionality in handling certain types of civil actions (e.g., non-prisoner civil rights and Title VII actions, intellectual property disputes, cases involving federal, state and local governments or large national firms) and the various kinds of bankruptcy cases (Chapter 7, Chapter 11, Chapter 13). A similar Internet-based system has recently been established in the District of New Mexico, and several courts have begun constructing their own electronic case files by having court staff scan paper documents into their systems.

The 1996 rules amendments enable individual courts to authorize electronic filing by local rule, subject to any technical standards that may be adopted by the Judicial Conference. The Committee on Automation and Technology ("CAT Committee") recently approved a set of

"Interim Technical Guidelines for Filing by Electronic Means." The committee has chosen not to seek Judicial Conference approval of the standards at this time, but it will urge courts choosing to implement electronic filing to use them as guidance for their efforts. The proposed guidelines do not establish mandatory standards, but rather provide recommended approaches for experimental use subject to further evaluation by the CAT Committee and the Conference. They focus primarily on ensuring the "integrity of the record," providing an electronic filing capability that is at least as reliable as existing paper-based systems, and promoting nationwide uniformity in electronic filing procedures. The guidelines are based on proposed technical standards and guidelines that were circulated for comment among the judiciary and the interested public in late December 1996.

II. Potential Rules Issues Relating to ECF

Potential rules issues have already surfaced in the ongoing court experiments with electronic case filing. The following is a preliminary list of such issues:

- authorizing electronic filing (or certain requirements for electronic filing) by a court's standing order or case-by-case order, rather than by local rule
- allowing electronic means of service, as only mail and various methods of personal service are now authorized nationally
- adequacy of electronic filing and service of the initial case pleadings, raising filing fee and jurisdictional issues
- responsibility for, and proof of, service of pleadings
- providing notice of court orders and opinions electronically to the parties
- timeliness of filings and the possibility of computing action dates differently when filing and service are accomplished electronically by some or all parties
- verification of signatures and Rule 11 requirements
- verification of signatures on documents not signed by the attorney (e.g., bankruptcy schedule of assets)
- document format questions, including:
  - — problems with documents received in an incompatible format, including potential problems affecting timeliness and service of papers
  - — incompatible software among electronic filers.

III. Conclusion

An ongoing part of the "ECF" initiative will be the identification and collection of additional rules-related issues, particularly as encountered in the various prototyping efforts. The Office of Judges Programs staff assigned to the project will continue to monitor developments in prototype courts and forward relevant information to the Rules Committee Support Office for circulation to the rules committees' technology subcommittees.